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IN THE COMPETITION
APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

5 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 8)

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

APPEARANCES

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

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

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

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

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

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

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1 Wednesday, 5 October 2011
 2 (10.00 am)
 3 Further opening submissions by MR HOWARD
 4 **THE CHAIRMAN:** Yes, good morning.
 5 **MR HOWARD:** Good morning.
 6 I am now going to open the ITL appeal in relation to
 7 Shell, and in opening that case, it's necessary, as it
 8 is at every stage in these proceedings, to remind
 9 ourselves of the issues and what it is that one is
 10 actually looking for in the material, and remind you of
 11 the summary of the position, which is set forward in the
 12 OFT's skeleton argument at paragraph 12, which is their
 13 central assertion is that if one manufacturer knows its
 14 rival manufacturer's retail price will always be the
 15 same relative to its own retail price, then it can never
 16 win/lose customers from or to its rival. If it can
 17 never win customers there is no point lowering the price
 18 of its product as it will not profit.
 19 However, both it and its rival can profit from
 20 raising their prices given they will not lose customers,
 21 so their conclusion, they say, is both logical and
 22 simple: prices will increase and this will lead to
 23 greater profits for everyone which can be divided
 24 between them. So it's very important that one
 25 recognises that what they are saying is, and you might

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1 think already, having seen the evidence, that this is
 2 slightly odd, that this is an arena in which price
 3 competition doesn't take place, notwithstanding that you
 4 have seen an enormous amount of evidence of course
 5 relating to the price war and the tactical bonuses and
 6 so on.

7 But similarly, Professor Shaffer's central tenet is
 8 that a rival manufacturer will be unable to shift
 9 relative prices in its favour. That's paragraph 17 of
 10 his 2010 report, core 6, tab 65, page 31. {C6/65/31}

11 So what you are looking for -- and one mustn't be
 12 distracted from this -- is whether there is in fact
 13 a restriction on the retailers which meant that the
 14 rival manufacturer was unable to shift relative retail
 15 prices in its favour.

16 Yes.

17 **DR SCOTT:** Sorry. The way you phrased that, "which meant
 18 that", strikes me as an effects argument rather than
 19 an objects argument. "Supposed to mean" might be
 20 an object.

21 **MR HOWARD:** Okay. Was there in fact a restriction in the
 22 agreement or the arrangements or the practices.

23 Mr Lasok seems to think that we are saying that one is
 24 only looking at matters as a matter of contract. We
 25 recognise that it's not simply a matter of contract, but

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1 of course the OFT's case is there was a contract which
 2 so provided. So one has to look at their case on the
 3 contract, then, if the contract doesn't provide, when
 4 you look at it in its true factual context, and you have
 5 to take account of objectively everything the parties
 6 understood, and so -- and we have been told by
 7 Lord Hoffmann how we should approach these things, and
 8 essentially -- and I will address that in due course --
 9 but we say when you properly construed these contracts
 10 against their appropriate factual matrix including the
 11 parties' understanding in the market, it's self-evident
 12 they didn't operate in the way that the OFT would say.
 13 So you consider that.

14 Then I accept you have to look and see, well,
 15 notwithstanding that, was there some practice between
 16 the parties, even if it wasn't strictly contractually
 17 binding, where they were in a concerted way acting in
 18 a particular way. You still have to decide, what is the
 19 particular way, so you still have to find the
 20 restriction. One can't get away from this. That is the
 21 OFT's case, that the retailers were restricted, and then
 22 you have to see what it is, how that restriction is
 23 supposed to feed into a theory of harm, and the theory
 24 of harm -- I have said this before but I don't shrink
 25 from saying it again -- is by reference to the position

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1 of the manufacturers and their competing on price, that
 2 they say the manufacturers, as a result -- and this is
 3 what's very important, it has to be as a result of these
 4 P&D requirements -- of that, they have certainty or
 5 a significant enhanced degree of certainty, that they
 6 can put up their prices and the other prices will follow
 7 up, or that they can put down their prices and the other
 8 prices will come down, so that it's either actually
 9 lock-step as a matter of obligation or lock-step through
 10 the practice.

11 But the important thing to distinguish is
 12 competition in practice whereby one manufacturer chases
 13 the other one because he's trying to get his prices to
 14 be competitive, or a situation where one manufacturer
 15 uses the fact that his rival has put up the prices as
 16 an opportunity to put up his prices. But the question
 17 is: is any of this actually the result of the P&D
 18 arrangements, or is it simply the result of competition
 19 in practice?

20 If we focus in on this case, what we have to ask
 21 ourselves, we say, are the three areas that you should
 22 be looking at in the evidence in relation to Shell.

23 The first is: what was Shell's role in relation to
 24 pricing in the outlets with which we are concerned? My
 25 friend Ms Rose has addressed you on that, which is that

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1 they were not in fact under the RBA arrangements setting
 2 the prices or even able to. So in that regard, Shell's
 3 position is different to the other retailers in that
 4 essentially Shell is saying "I am not actually for these
 5 purposes the retailer, the maximum I could do was set
 6 a maximum price, that's all I could control, but
 7 I couldn't do anything other than that".

8 Now, the second point is, in any event, Shell had
 9 an independent, and in this sense it is similar to other
 10 retailers, it had its own independent strategy which it
 11 sought to follow.

12 The third is, which is a key point which you need to
 13 consider: were there any restrictions or requirements,
 14 as alleged by the OFT, in relation to Shell?

15 Just taking in fact the second point first, which is
 16 Shell's approach to matters, Shell's actual independent
 17 position of taking its own strategy is evidenced by the
 18 slides which we looked at yesterday, rather oddly, at
 19 19/54(a). {D19/54(a)} I say oddly; the witness, I think
 20 it was Mr Batty, was taken by Mr Lasok to them, and then
 21 Mr Lasok appeared to shy away from actually asking any
 22 questions about them. Be that as it may, they are at
 23 54(a) in volume 19. You will need to turn the file
 24 around, because they are slides.

25 The point I wish to draw out of these slides is that

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1 what you can see from them is that Shell had its own
 2 independent view of life in relation to trying to (a)
 3 gain market share in tobacco, and (b) look after price.

4 Firstly you can see it's Shell, drafted by Mr Barry,
 5 who we are going to hear from.

6 If you go to page 100 at the top of the page here,
 7 it's the left-hand corner, you can see that their
 8 objectives were at this stage to increase their market
 9 share to 10 per cent, and you can see that interestingly
 10 what they were trying to do is increase category sales
 11 in various areas of the trade. But the interesting
 12 thing is those areas, low margin, standard margin and
 13 high margin, those don't coincide with anything that you
 14 see in Imperial's documents. In other words, they are
 15 Shell's own segregation of how it saw things, and you
 16 will see that when Imperial was noting what it
 17 understood to be Shell's policy, it understood something
 18 similar to this as to how they were going to price,
 19 which is that they had an RRP plus policy as Imperial
 20 understood it by reference to these different
 21 categories.

22 It's turned out, or at least we will have to see how
 23 the evidence comes out, that Imperial's understanding of
 24 what Shell was doing was probably wrong, but Imperial
 25 did have an understanding.

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1 Then if you go to page 104, you can see that they --

2 **THE CHAIRMAN:** Where it refers to a market share of
 3 10 per cent, what's that referring to?

4 **MR HOWARD:** I can't tell you, I'll tell you what I think it
 5 does, it can't mean 10 per cent of the UK market, it
 6 obviously can't.

7 **THE CHAIRMAN:** No.

8 **MR HOWARD:** I think it must mean, if you go to page 116, you
 9 see that they compare themselves with other people in
 10 the market. Two things to note about this: one, they
 11 are doing particularly badly against the people they
 12 compare themselves with, if you see, I think they do the
 13 worst except for the independent oil companies. But
 14 what they appear there to be comparing themselves with
 15 are the cut price market, the RRP convenience, and then
 16 what looks like other oil stations or petrol stations
 17 I should say in this country.

18 I don't know, but it obviously can't be the whole of
 19 the UK market, because not least we know -- for instance
 20 I think we know that Imperial at around this time
 21 I think were selling about £50 million worth of tobacco
 22 via these outlets. I think it's in Mr Culham's
 23 statement. And let's infer that with the other
 24 manufacturers, it's a similar amount with Gallaher and
 25 some with BAT and some with Philip Morris. Let's say

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1 you even take it up to 150 million, that's a small
 2 fraction of the total sales of tobacco in the country,
 3 so he must be talking about a sector of the market.
 4 Whether it's petrol stations or petrol stations plus
 5 something else, I don't know.

6 The point is what they were trying to do is increase
 7 their market share, so that's the point you want to bear
 8 in mind, they had an independent strategy to try and
 9 increase their share, and as part of that independent
 10 strategy, you can see at page 108 -- to those no doubt
 11 who are used to setting strategies for selling retail
 12 products, there is nothing, this is pretty bog standard
 13 stuff, but the point is they did have a strategy.

14 So the second bullet point down, get the basics
 15 right first, right products, right place, right price,
 16 right promotion, and have the best selling items
 17 available all the time.

18 Then at 109 they are trying to increase their market
 19 share, and price again at 114. This is important, again
 20 it shows that they have a strategy, they are going to
 21 test competitive pricing strategy on selected sites in
 22 conjunction with supplier support with stock to support
 23 the retailer during the trial, implement timely budget
 24 and manufacturer price increases to reflect category
 25 margin and objectives.

8

1 So in other words, they have their own margin
 2 objectives, and they also are deciding which type of
 3 cigarettes they are going to sell, and you can see that
 4 they are interested in the particular types, because if
 5 you go to 100, they look at shopper segmentation, and at
 6 111 what they are really analysing by reference to
 7 postcodes -- so that look at all postcodes and then
 8 I think TW10 is in Twickenham, and it looks as if they
 9 are saying, well, Twickenham is a particularly -- I was
 10 going to say high class area but it's an area with
 11 a higher proportion I think of ABCs in the terminology,
 12 and so you get a higher proportion of people buying
 13 upmarket -- if there is such a thing, I suppose there
 14 is -- cigarettes. I shouldn't say that, Imperial are my
 15 client. Marlboro Lights and Silk Cut are
 16 a preponderance being sold in TW10, whereas in other
 17 postcodes you can see it's different.
 18 The point is you can see that people are here
 19 thinking about their own strategy, about what brands we
 20 want in particular areas, because it depends upon where
 21 you are, and our own margin requirements.
 22 **THE CHAIRMAN:** Although this was in October 2002, which of
 23 course is long after the RBA agreements had all come
 24 into effect.
 25 **MR HOWARD:** Yes.

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1 **THE CHAIRMAN:** Petrol stations were now contractors.
 2 **MR HOWARD:** Shell still have an interest in what's going on
 3 under the RBA arrangements, it's not that they become
 4 divorced from any interest in -- they want them to
 5 succeed, because they make money out of success. It's
 6 basically, though, a strategy where if you allow the
 7 agents themselves a much greater interest, and they are
 8 allowed to price the products, you are incentivising
 9 them so that both the agents make a lot of money and
 10 Shell make a lot of money.
 11 But the point about this, at 117, is that
 12 ultimately -- and obviously you will have to hear the
 13 evidence as to whether this was some change, but if you
 14 go to "right price" at 117, you see that Shell are
 15 advising the RRP's -- and of course that's the Shell --
 16 we know this is the Shell Select RRP's, they are all the
 17 SSSPs, just to make life complicated for us and they do
 18 that after careful consideration of all factors relating
 19 to competitive market forces.
 20 In other words, this isn't a situation, at least in
 21 their internal strategy papers, where they appear to be
 22 just being dictated to by the manufacturers.
 23 Now, if you then -- that's Shell's actual -- of
 24 course ITL didn't see that document at the time, we have
 25 seen it for the purposes of these proceedings.

10

1 ITL's understanding of the position was a slightly
 2 different one in that -- it's different in the sense
 3 that ITL thought that the strategy was rather
 4 a simplistic strategy, and you see that if you go back
 5 in this bundle to -- it starts at tab 5, which is
 6 Mr Culham's and Breda Canavan's, I am not sure who the
 7 author is but it doesn't matter for present purposes.
 8 This is a national accounts brief and if you look in the
 9 column four down of "Price and Availability Survey", the
 10 current shelf pricing policy is as follows:
 11 "Premium sector, ie Embassy and Regal, is RRP plus
 12 9. Mid-price sector: Superkings, RRP plus 10. Economy
 13 sector: JPS, L&B, RRP plus 11."
 14 In other words, that was the understanding, and we
 15 don't need to turn it up, and I'll give you the
 16 reference, there are similar documents at tabs 6, 7, 8,
 17 11, 12, 15 and 16. You will see sometimes the additions
 18 change. But Imperial's understanding of the position
 19 was that what Shell was intending to do was something
 20 rather simplistic, which is you just take the
 21 manufacturer's RRP and add these sums onto it, depending
 22 on whether you categorise the cigarettes as premium,
 23 mid-sector or cheap. One of the things is they were not
 24 particularly interested in the cheap sector, that's why
 25 you find them adding more on there, and that's partly

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1 because they saw themselves as premium pricing.
 2 Now, the reason I draw this to your attention, you
 3 will see in some of the documents where Breda Canavan
 4 was commenting on the Shell price file, that what she
 5 says at one point is "What I have done is I have gone
 6 through it and I have added on" -- I can't remember what
 7 it was, I think at that stage 12p and 20p, because she
 8 thought that's just how it worked, apparently.
 9 We will hear from the Shell witnesses, they said
 10 "Actually we had a much more sophisticated process than
 11 that" and that's part of the explanation for why, when
 12 you look at what actually happened, that a lot of the
 13 recommendations that Breda makes don't find their way
 14 ultimately into Shell's recommendation, because there is
 15 a mismatch between what Imperial actually think Shell
 16 want to do and what they themselves are doing.
 17 **DR SCOTT:** We found Mr Batty's summary of some of this in
 18 5.22, in core bundle 3/33 {C3/33}. It's very helpful in
 19 this regard because he does starkly bring out contrasts
 20 between Shell's approach and the ITL approach.
 21 **MR HOWARD:** 5.22?
 22 **DR SCOTT:** 5.22. I am not reading it out because some of it
 23 is bracketed.
 24 **MR HOWARD:** Is it? 5.22?
 25 **DR SCOTT:** It starts:

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1 "Finally it is noted", but most of it in my copy is
 2 bracketed as confidential.
 3 **MR HOWARD:** None of it is bracketed in mine, that's why
 4 I was slightly puzzled, but none the worse for that.
 5 Yes. What I think you will find -- and that's
 6 helpful, thank you for referring to that -- when we hear
 7 the evidence is that there in fact appears to have been
 8 some confusion and tension between Imperial's position,
 9 a confusion in Imperial as to what they actually
 10 understood Shell was doing, and some tension between the
 11 two situations.
 12 Now, those are two general points. The other point
 13 is that Shell's position generally was that it, because
 14 it was a premium pricer, was on the whole -- this is
 15 again in the evidence -- ITL found them reluctant to
 16 accept price promotions, but there are price promotions,
 17 so you see in relation to the Richmond story that they
 18 did accept a promotion on that. But they,
 19 interestingly, you will remember the story, we have been
 20 through it a lot, of the time that Imperial, having
 21 launched Richmond, then decide to try and reduce the
 22 price further to compete aggressively with Dorchester
 23 and they have this 10p reduction.
 24 **THE CHAIRMAN:** Is that the same as the time that they were
 25 reducing that to make a window for the Superkings to be

1 introduced, or is that a different --
 2 **MR HOWARD:** Yes, sorry, you are right, but I think it's the
 3 Superkings, but it's all part of the strategy where they
 4 moved away from benchmarking Mayfair to the battle with
 5 Dorchester. It was repositioning, basically. Standing
 6 back from it, you can see what happened, that Gallaher
 7 have their Mayfair brand, which is one of the things
 8 that starts out this ultra low price, then they have
 9 also got Dorchester, Imperial decide to come in, and
 10 they go against Mayfair, and then they realise actually
 11 there is somebody beneath, which is Dorchester, so we
 12 have to try and get market share from them. Which they
 13 did, to a very great degree.
 14 But the point is, and we will look at the documents
 15 in a moment, you will see that Shell took -- the price
 16 gets cut, but Shell don't feed it all through in the
 17 prices at that stage where they were actually
 18 controlling stores, so it's another one of these
 19 examples of the retailer doing what I yesterday
 20 described as trousering the money.
 21 Now, the next heading, but I can pass over this very
 22 quickly, because we have been through it, is the RBAs
 23 and what was going on in the RBAs. It is in fact clear
 24 that, under the terms of the RBA, the contractors had
 25 freedom to set their prices at any levels up to and

1 including the maximum price stipulated by Shell. That's
 2 clause 5.6.
 3 One point I draw out is that, from ITL -- ITL was
 4 aware of that, of the change, and the result of the
 5 change is that then the price files were performing
 6 a different function, and the obvious function was that
 7 they were then simply the recommendations subject to
 8 setting the ceiling.
 9 So as Ms Rose put it, what one had in the trading
 10 agreements here was an attempt to influence Shell, who
 11 were themselves an influencer, subject to the fact they
 12 could set a ceiling.
 13 Mr Lasok, in his opening, said that -- it's Day 5,
 14 page 82, lines 1 to 9 -- when you look at the Shell
 15 evidence, the commonsense conclusion is that Shell
 16 agreed or concerted with each of the manufacturers
 17 pricing at shelf level by reference to the
 18 manufacturers' P&D requirements, and that was done --
 19 and this is the important part -- on the basis that
 20 Shell was going to take steps to secure compliance by
 21 the independent contractors with the P&D requirements.
 22 What he said was that in support of this, ITL and
 23 Gallaher believed -- although for present purposes I am
 24 only concerned with ITL -- that Shell had control and
 25 influence over the contractors and that the recommended

1 price was understood by all parties to be a minimum
 2 price.
 3 Now, he referred to, in support of this, two
 4 documents which are said to support the case, in
 5 volume 19, I should be saying an SO decision, annex 19,
 6 and they are tabs 60 and 61. {D19/60} I don't think
 7 I need to read them out, the letter of 15 July.
 8 **THE CHAIRMAN:** No. It does concern me as to why you are
 9 taking me to these, when presumably they are going to be
 10 put to the witness.
 11 **MR HOWARD:** Yes.
 12 **THE CHAIRMAN:** And we need to hear what the witness says
 13 about them, and I am not sure whether those witnesses
 14 are in court at the moment, and therefore whether it's
 15 helpful for you to take me to them.
 16 **MR HOWARD:** Okay. Well, for present purposes I'll leave it
 17 on this basis --
 18 **THE CHAIRMAN:** You don't accept that they have the meaning
 19 that Mr Lasok says?
 20 **MR HOWARD:** Well, the question is, when you just look at the
 21 letters, and in relation to what the OFT is saying, it
 22 is common ground, if one just stands back, that Shell
 23 had the ability to control the maximum price. So the
 24 question you have to consider, the fact that Imperial is
 25 telling Shell that "We have looked around the stores, or

1 petrol filling stations", I suppose the shops in the
 2 petrol filling stations, "and we have discovered that in
 3 a number of cases people are pricing above the maximum
 4 price"; what does that tell you? It tells you that
 5 Imperial considered that Shell was able to tell them
 6 they shouldn't be pricing above the maximum. But that's
 7 all it tells you. It doesn't tell you what Mr Lasok is
 8 seeking to draw from it. That's the simple point.
 9 We can move from that to the trading agreements.
 10 There are two trading agreements. One is at tab 27, and
 11 the other is at tab 40. It's perhaps just worth turning
 12 them up very, very briefly, and again we will be looking
 13 at them. It's a very short agreement at tab 27.
 14 {D19/27}. This agreement provided for various things.
 15 The major payment is under "Range", a payment which was
 16 one fifth of what was to be in range, and by any view of
 17 the matter, a tiny sum of money, for Shell setting
 18 sell-out prices no worse than the relative RRP.
 19 In other words, it was explicitly designed to be by
 20 reference to RRP, and the schedule that is on the second
 21 page is in fact, I think, to be found just a reflection
 22 of the RRP differentials. Now, on its face, there is no
 23 question that this is providing for maxima.
 24 The second agreement, which is at tab 40, {D19/40}
 25 is in similar terms. We have discussed previously the

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1 effect of this being an incentive and not an obligation,
 2 but that issue fits into the analysis insofar as it's
 3 being said there was a contractual obligation to do
 4 something. In fact, what one sees is it's if you do it
 5 you can get paid this small sum of money.
 6 But perhaps more important than that debate, in
 7 relation to all of these agreements but it's worth
 8 making this point, you have to ask yourself, when you
 9 look at this agreement: was there anything to stop Shell
 10 entering into a more favourable arrangement to it with
 11 Gallaher, BAT or Philip Morris? The answer to that is
 12 plainly not, because we know -- that's the whole point
 13 about all the tactical bonuses -- that happened day in,
 14 day out, which is that retailers generally took -- Shell
 15 were less involved than of course the multiples, but
 16 were taking the bonuses from Gallaher to reduce the
 17 price of Gallaher's products.
 18 The second point, which you can see, is that the RMS
 19 payments were small. The relevance of that is that they
 20 did not create any -- and nobody could sensibly suggest
 21 that this payment to Shell could have created some sort
 22 of economic restriction on Shell so that it had no
 23 choice other -- or was being paid a sum of money to
 24 behave in a way which might otherwise seem rather odd.
 25 I will not go back into all of that at the moment

18

1 but you will hear from the experts in due course about
 2 how, on the OFT's case, it would not make any sense for
 3 people to be entering into agreements of the type that
 4 are sought.
 5 The third point I've already made in passing in
 6 part, which is that the agreements in terms are for
 7 maxima, not fixed differentials. That is inescapable.
 8 Now, the OFT accepts that's what the trading
 9 agreements say, but they say they were in fact
 10 implemented as fixed, as parity or fixed requirements.
 11 We don't need to turn it up, but I refer you to table 8
 12 in the ITL/Shell appeal which you will find in core 1,
 13 tab 9 at page 720, {C1/9/720} which does an analysis of
 14 the extent to which the differentials were in fact
 15 implemented as fixed, and you will see that they were
 16 not.
 17 Mr Ridyard's analysis is that, if you look at
 18 adherence to fixed requirements, in other words if you
 19 accept the OFT's point that this was in fact fixed,
 20 there was only 41 per cent adherence; whereas if they
 21 were maxima, as the agreement says, the adherence level
 22 was 82 per cent. That's table 5 of his second report,
 23 core 3, tab 26, page 145, {C3/26/145} as revised in his
 24 second report in core 3, tab 26, page 168. {C3/26/168}
 25 **THE CHAIRMAN:** Just remind me, was he looking there at the

19

1 recommended prices or the actual shelf prices?
 2 **MR HOWARD:** He is looking at, I think, the shelf prices.
 3 No, actually I don't think so. Can I come back to you
 4 on that? Somebody else will look it up.
 5 The point that I wanted to just say something about
 6 at this stage is: Mr Lasok says -- and this is a false
 7 point but it's important because of the documents that
 8 he refers to -- adherence is of limited probative value.
 9 He says you can have non-adherence that does not detract
 10 from an agreement. But just stop for a moment. The
 11 agreement that we have in the papers is on its face for
 12 maxima. It's the OFT's case that, no, although that's
 13 what the agreement says, in practice it was operated on
 14 a fixed basis. Well, if that's right, how are you
 15 establishing that? You surely have to look at the
 16 material to see what happened in practice. In practice
 17 it wasn't operated on a fixed basis. So to say this
 18 data is of no relevance at all, it's of direct probative
 19 value to the case the OFT wants to run, which is: ignore
 20 the agreements, let's look at what happened in practice
 21 because something in practice is different to what the
 22 parties agree.
 23 What was referred to in this regard was document 29,
 24 because this is -- yes. Now, you will -- I won't at
 25 this stage go through the sequence of documents that

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1 this relates to, but you need to note that there is
 2 a line of communication here, which is documents 19, 22,
 3 24, 26, and this one, 29. In essence, what is happening
 4 here, and it's something that you will be familiar --
 5 but you can see it in this case, they have paid a bonus.
 6 What they did was in fact they reduced the price by 10p,
 7 subject to the selling price not being above £3.55.
 8 What they found was that the selling price was in
 9 43 per cent of the agent and managed sites, still above
 10 the agreed price. In other words, I've paid you 10p per
 11 pack to bring the price down, and 43 per cent of the
 12 time that's not happening, what am I paying my money
 13 for? That has nothing to do with the so-called fixed
 14 requirements, it's a tactical bonus or a price reduction
 15 which is linked to saying "I want you to reduce the
 16 price that you are charging to this level, which is to
 17 make it competitive". Nothing to stop you going below.
 18 The complaint is that the price is too high.
 19 The other documents that are referred to, in fact
 20 the next one is in the next tab, and Mr Lasok refers to
 21 the fact that at tab 30 there is a reference to target
 22 differentials, it's in the bit that's not in the box,
 23 target differentials are achieved on all products most
 24 of the time. So he says there you are, what's the
 25 relevance of adherence analyses in fact at the time

21

1 contemporaneously ITL thought that target differentials
 2 were being achieved? But of course the question is,
 3 what is it they thought was being achieved? So you have
 4 to ask yourself: how does this make sense? Does it
 5 correspond with the reality? Well, it does correspond
 6 with Mr Ridyard's analysis on the basis that the
 7 differentials are the maxima, because 82 per cent of the
 8 time they were adhering, that corresponds. Mr Ridyard's
 9 analysis that if it's fixed its 41 per cent, that
 10 doesn't correspond. What Mr Lasok wants to do is ignore
 11 that and say: well, because I say it's fixed, this must
 12 be evidence that Imperial thought it was fixed and they
 13 were saying there is adherence. Whereas of course if
 14 you start from a false premise, then you end up with
 15 a false conclusion.

16 Now, there are two other points but I don't think
 17 I need to address them further at this stage. Well,
 18 there is the opportunity to respond clause, which one
 19 finds explicitly set out in the first agreement, is not
 20 explicitly set out in the second agreement, we say for
 21 reasons I've previously explained that doesn't make any
 22 difference. But it is worth noting this: the OFT points
 23 to document 49 in the bundle -- this is actually a sort
 24 of very interesting document. This is a letter on
 25 9 July, and in the third paragraph what you can see is

22

1 that they are reducing the price of Drum, which we are
 2 all now becoming familiar -- perhaps you need to start
 3 at the beginning.

4 They say:

5 "In line with the continuing Amber Leaf £2.09 price
 6 marked pack currently on sale, Imperial would like to
 7 take this opportunity as part of the business agreement
 8 allowance to respond to the price offer with a Drum
 9 £2.09 price marked pack."

10 Then in the third paragraph:

11 "In order to maintain your current margins, Imperial
 12 will pay an additional bonus", and so on.

13 So what they are doing, they produce their own price
 14 marked pack, £2.09, which is designed to prevent them
 15 being in an uncompetitive position vis-a-vis Amber Leaf.

16 Now, this, one would have thought, is just
 17 absolutely normal competition in practice with one
 18 manufacturer finding himself disadvantaged, then taking
 19 steps to improve his competitive position and paying for
 20 it. This is relied on by the OFT as somehow being part
 21 of something that's uncompetitive. But the important
 22 thing to see here is that there is no -- firstly, Shell
 23 were not in any way inhibited from --

24 **THE CHAIRMAN:** Well, we are going to hear from Mr Barry, are
 25 we, presumably?

23

1 **MR HOWARD:** Yes.

2 **THE CHAIRMAN:** As I said before, I am concerned that, with
 3 the witnesses here, shortly to give evidence, that it's
 4 not really appropriate for you to go through what you
 5 hope to get from these documents.

6 **MR HOWARD:** Okay. Can I then move on? I don't think I need
 7 to say anything more about the independence of the
 8 contractors, just then to consider the issues that you
 9 need to consider on the evidence.

10 Now, where there was an Imperial price increase,
 11 which is, you will remember, that is what's been
 12 described as the central plank of the OFT's case: where
 13 Imperial put up the price of its products, was there
 14 a requirement of Shell to increase the retail price of
 15 a Gallaher brand?

16 In answering that, in considering that, for instance
 17 you will need to consider tabs -- as examples -- 28, 29
 18 and 31, as to what was -- I'll just leave it on this
 19 basis -- the need for that correspondence. I think
 20 the Tribunal is well aware of the point.

21 You need to consider, if there was some pre-existing
 22 obligation on Shell's part or requirement or
 23 expectation, however Mr Lasok tries to put it, what was
 24 the point in this? Essentially you have to consider,
 25 firstly did the arrangements automatically provide for

24

1 retailers to increase the price of the Gallaher product?
 2 Secondly, did they in fact operate in any way to
 3 restrict or impose any requirement or obligation on the
 4 retailers where there was an Imperial price increase?
 5 I've already reminded you of how the theory of harm is
 6 based upon this premise of being able to increase your
 7 prices without fear, is really what it amounts to, and
 8 you will have to consider whether that is in any way
 9 borne out by the evidence in relation to Imperial price
 10 increases.
 11 Where there is a Gallaher price increase, you then
 12 have to consider: was there any requirement imposed by
 13 Imperial that the retailer should increase the price of
 14 Imperial's brands in response to a wholesale price
 15 increase? Again, you need to distinguish two
 16 situations: one is the situation where retailers -- here
 17 it would be Shell -- do the normal thing, which is one
 18 manufacturer's put up the price and they use that as
 19 an opportunity to, pejoratively to steal -- it's not
 20 stealing, but they have a profit motive and incentive,
 21 so they are trying to increase their profits behind one
 22 manufacturer's price increase -- they try and increase
 23 prices across the board.
 24 The retailers might do that, that's what they are
 25 allowed to do, subject to their own competitive

1 situation. What you have to consider is: was that
 2 something that Imperial was requiring of them to do? We
 3 say there is no evidence that that was the case, indeed
 4 the evidence is to the opposite effect.
 5 Then you have to consider the situation where
 6 Gallaher put its price down, and we know that's
 7 essentially the way this operates in the market, you can
 8 actually directly put down your wholesale price, but
 9 more usually it's done by special promotions because you
 10 can put them on for a period and then decide to withdraw
 11 them. You have to decide: was Shell in any way
 12 restricted from accepting those promotions? If it did
 13 accept them, did it impose any obligation on Shell to
 14 reduce the price of Imperial? We say, again, it's
 15 absolutely clear what the answer to that is.
 16 And of course you have the position that you then
 17 have to consider Imperial price decreases, and
 18 essentially that's the position, and again the answer is
 19 so obvious it's actually in a way sort of slightly
 20 embarrassing to keep making the point. Imperial spends
 21 money on a tactical promotion, is it seriously being
 22 suggested that Imperial had a requirement that it funded
 23 a promotion, cut the price of Richmond, that it's
 24 expecting the retailer independently to cut the price of
 25 Dorchester? It's just so far-fetched it's actually

1 quite difficult to really respond to it.
 2 Now, you are going to hear, and I am not going to
 3 trespass on it because we are going to go into it,
 4 evidence about the Shell price files and what was
 5 happening in these various communications. What you
 6 will hear from, but obviously the witnesses will tell
 7 you what the position is, but the position on Imperial's
 8 side is, as a matter of analysis, what we say is clear
 9 is that in fact the suggestions that Imperial were
 10 putting forward were largely not followed by Shell.
 11 That is borne out by an analysis of the materials.
 12 Madam, just to pick up on the point you were asking
 13 me about Mr Ridyard's analysis. It was based on Shell
 14 prices observed in the Shell outlets, and you can see
 15 that apparently from his addendum in core 3, tab 26 at
 16 page 168(a). {C3/26/168(a)}.
 17 **DR SCOTT:** Sorry, Mr Howard, you were just saying that the
 18 suggestions made were largely not followed by Shell.
 19 You referred to an analysis. Is there a reference to
 20 the analysis?
 21 **MR HOWARD:** Yes, I am sorry, I got distracted. I'm mindful
 22 that I do not want to trespass into evidence, there is
 23 a lot of evidence about it, but the analysis that I was
 24 intending to refer you to as an example is in the
 25 ITL/Shell appeal at table 6 which is in core 1, tab 9,

1 page 718. {C1/9/718}. Perhaps we could just turn up
 2 that, because there are a couple of tables I would quite
 3 like to show you. Core 1, tab 9 should be the ITL/Shell
 4 discrete document. If you turn in the bundle to
 5 page 718, that's a table which compares Shell's
 6 recommended and maximum prices in its SSSP list for
 7 January 2002 with what ITL recommended in its email of
 8 13 December. That is document 39 in bundle 19.
 9 {D19/39}. You can see that the first is the recommended
 10 RRP, and then Shell's actual RRP, and you can see in
 11 their five out of seven cases there is a difference and
 12 then in the recommended maximums again in four of seven
 13 cases there was a difference.
 14 If you would then turn to page 720, again you will
 15 see -- so there are two things that one is looking at.
 16 One is to what extent did Shell actually observe, in
 17 this case, what ITL was recommending? Then if you look
 18 at the tables 7 and 8, it's a comparison between Shell's
 19 RRP's and the -- in 7 is the Gallaher RMSs as we now know
 20 them to have been, and ITL's RMSs. Again you can see
 21 that -- we are particularly concerned with ITL, but in
 22 the case of Gallaher there was a 12.5 per cent
 23 adherence, and in the case of ITL, there was
 24 a 25 per cent adherence.
 25 In other words, the real point is: Shell got in the

1 views of the manufacturers and then they did their own
 2 thing. What table 8 also shows is that the
 3 differentials were not fixed, and one also sees that in,
 4 for instance, the case of Golden Virginia, that Shell
 5 decided to price Old Holborn at a price which was from
 6 ITL's point of view competitively disadvantageous. In
 7 other words, they wanted them to be at least equal and
 8 actually Old Holborn was cheaper. So Shell rowed their
 9 own boat, which they were entitled to do.
 10 **DR SCOTT:** Or Gallaher's boat.
 11 **MR HOWARD:** Well, it's their own boat, in the sense that
 12 what you have actually got -- that's what one has to
 13 remember in any situation where you have got
 14 manufacturers trying to get an advantage, that the
 15 retailers in the middle need to decide what suits it.
 16 What suits it may sometimes coincide with one, may
 17 sometimes coincide with another, and may sometimes leave
 18 them both in tears. That's life, and that's how markets
 19 work.
 20 The real point is that -- you will have to determine
 21 once you have heard the evidence, but we suggest that
 22 once you have heard it, what you will see is that it's
 23 a picture of Shell ultimately retaining its independence
 24 to decide what it recommends, and the agents'
 25 independence to decide what they want to do, subject to

1 the ceiling. That's, I think, all for the moment on
 2 price files.
 3 Two other points before I sit down, both of which
 4 I am going to deal with very briefly, you will be
 5 pleased to know. The first is just to remind you about
 6 the important evidence about the variability data. You
 7 will remember just again how that fits in in relation to
 8 Shell. The differentials in prices set by Shell for
 9 Imperial and Gallaher brands were more volatile during
 10 the alleged infringement period than after. That's
 11 again, you need to look at Mr Ridyard's report, and the
 12 relevant references are core 3, tab 26, page 150, and
 13 page 168(c). {C3/26/150}
 14 It's set out there, I don't think I need to expand
 15 on it at the moment.
 16 Briefly, and in conclusion, parallel and symmetrical
 17 as a couple of preliminary points. The first is that
 18 the mere fact that ITL and Gallaher and indeed -- there
 19 is a big danger in this case that we just talk about ITL
 20 and Gallaher and we ignore the fact that British
 21 American Tobacco, BAT and Philip Morris are also
 22 manufacturers, BAT particularly is a significant player,
 23 I think one of their brands is Rothmans, which we will
 24 all be familiar with and so on. The fact that they may
 25 have similar relative pricing aspirations for certain of

1 their brands doesn't tell you anything (a) because you
 2 will find in any market there will be obvious brands
 3 where the manufacturers are looking at what is the
 4 obvious competing brand. No doubt if you looked at
 5 Heinz tomato soup, you would find that they are looking
 6 at Crosse & Blackwell's tomato soup, or whoever it is,
 7 that's how markets work.
 8 But your ability to do that in this market to do
 9 that, the fact that they are doing it, is made clear by
 10 their legal obligation to publish recommended retail
 11 prices for all their brands. So they can each see what
 12 the RRP is for a particular brand, and then they can
 13 individually decide what their strategy is and how they
 14 are going to seek to pitch against particular brands.
 15 That's the first point. The second point is: we
 16 have to be careful not to get distracted by the
 17 allegations, because it is the OFT's case that the
 18 relevance of their allegation of parallel and
 19 symmetrical is that it affects only -- these are
 20 Mr Lasok's words -- the magnitude of the anticompetitive
 21 harm. In other words, they correctly recognise they
 22 have to establish first that Imperial had an agreement
 23 or practice with a retailer which was itself
 24 anticompetitive by object. It's only once they have got
 25 over that hurdle that this becomes relevant in that they

1 say it's aggravated by (a) there being a parallel and
 2 symmetrical arrangement and (b) your having knowledge of
 3 it.
 4 **THE CHAIRMAN:** Well, my understanding was that the parallel
 5 and symmetrical point was used in two ways: a narrow
 6 way, if I can describe it like that, which is that the
 7 different requirements, or the different differentials
 8 set by the two manufacturers have the effect, in
 9 relation to particular brands of making the parities
 10 fixed, because in order to comply with both obligations
 11 the retailer has in fact to set them at the same price
 12 or at a fixed differential, even though if you looked at
 13 the two agreements independently, they would appear to
 14 be maxima. So that's the narrow point about parallel
 15 and symmetrical.
 16 Then there is a wider point, which is a sort of
 17 network effect point that one is familiar with in
 18 vertical restraints cases, where one says: well, this
 19 particular public house tied beer arrangement might not
 20 in itself be so anticompetitive that you have to look at
 21 the fact that a lot of the market is taken up with these
 22 kinds of arrangements, not because of any collusive
 23 thing but because that's how the market operates, and
 24 here there is a network, albeit there is only two
 25 manufacturers, so it's a network of two, and that then

1 increases the anticompetitive effect of the agreements.
 2
 3 **MR HOWARD:** Yes.
 4 **THE CHAIRMAN:** So that was my understanding of kind of
 5 a narrow and a broad relevance of parallel and
 6 symmetrical.
 7 **MR HOWARD:** You have to remember, though, on the narrow
 8 approach, you have to then note the shift in the case in
 9 the defence whereby they are now -- their case is
 10 similar, an awareness in general terms.
 11 **THE CHAIRMAN:** Yes, and there is an issue as to whether that
 12 really knocks out the whole point or whether there is
 13 something of the point that still remains.
 14 **MR HOWARD:** Precisely. But then in relation to both the
 15 points that you have made -- I say you have made, but
 16 the summary of what you understand the OFT to be making,
 17 one mustn't lose sight of the fact that this is
 18 a so-called object case. I am sure you will very much
 19 have that in mind. That's why Mr Lasok actually
 20 correctly observes, he has to prove the agreement or
 21 practice to which Imperial is party, because if you
 22 don't prove that that by its object is anticompetitive,
 23 once you say, well, if you were to say you had this
 24 agreement, he has that agreement, the combined effect is
 25 anticompetitive, one immediately says yes, but that's

1 an effects case and that needs an effects analysis.
 2 It's much more difficult to say that by object your
 3 agreement is anticompetitive, because it's not on its
 4 own, but when I combine it with something else. That's
 5 why Mr Lasok says, essentially his case is, as
 6 I understand it the way he has put it is he says it's
 7 an aggravating factor that in trying to describe what is
 8 the agreement, if you like, or the practice, he I think,
 9 on what you have described as the narrow basis may seek
 10 to refer to the other arrangements to say, well,
 11 actually, part of the arrangement is your knowledge of
 12 what's going on elsewhere.
 13 We say that is, before we come to the evidence,
 14 really alleging something quite different, and it's
 15 alleging collusion between the manufacturers, that isn't
 16 part of the case, or an ABC infringement, that isn't
 17 part of the case. It's all been dropped.
 18 I think it is very important, about all of this, and
 19 the OFT's cross-examination of witnesses, to always ask:
 20 what is the point that is sought to be being made? I am
 21 not obviously going to stand up and object all the time,
 22 that's not helpful, but we would suggest that -- we have
 23 heard cross-examination so far of a couple of
 24 witnesses -- simply trying to sort of suggest that this
 25 is evidence, for instance, or conduct which might

1 resonate to, say, an ABC relationship, it's not
 2 something in my submission that the OFT should be doing
 3 because it's not part of their case, and therefore
 4 actually it's really going to sort of prejudice where --
 5 and I would describe it as willing to wound but afraid
 6 to strike, in those well known words of Alexander Pope,
 7 and it's quite wrong for the OFT to be doing that.
 8 Anyway, you will hear the evidence but you always
 9 have to decide. In relation to this point, you are
 10 already aware of the retreat in the defence, and I won't
 11 go back over that. But the Shell case in the decision
 12 is, as it were, the high point of the parallel and
 13 symmetrical allegation. You will remember that they
 14 have developed in the defence an analysis where they say
 15 there is a more general parallel and symmetrical point,
 16 although it's put not as exactly parallel and
 17 symmetrical. I've already told you that we object to
 18 that embroidering, but that's a point you will have to
 19 consider in due course.
 20 If we just focus on the Shell point for a moment and
 21 just make this headline point: in the case of Shell
 22 there were 27 brands that were specified in both
 23 Imperial's and Gallaher's trading agreements, in other
 24 words there is a total number of brands between those
 25 two agreements. The two agreements are in SO annex 9,

1 document 7, {D9/7} and SO annex 19, document 27.
 2 {D19/27}. The first is obviously the Gallaher one. In
 3 fact, out of those 27 brand pairs, only nine were paired
 4 by both manufacturers.
 5 The point about that is, it's really: Imperial's
 6 evidence will be -- and you are obviously going to hear
 7 it -- they did not actually know what Gallaher's
 8 strategy was, and you have heard that clearly from
 9 a couple of witnesses already. The importance of that
 10 is it's not particularly -- I think Mr Lasok says that's
 11 incredible, but of course in any market you can try and
 12 guess what is going on of your competitor, and of course
 13 the RRP's may allow you to guess what you think is going
 14 on, but actually when you see the schedules, what you
 15 can see is actually they are not the same, they are
 16 quite different, and each can pursue his own strategy,
 17 and whether they do it by RMSs or something else, that
 18 you don't know. Anyway, you will have to hear the
 19 evidence on that.
 20 I won't go into some of the other material on this,
 21 because again this is likely to be gone into in
 22 evidence.
 23 I will conclude at this stage by saying: when you
 24 hear the evidence, at each stage we would respectfully
 25 suggest you need to consider how, if at all, the case

1 being put fits into the OFT's allegations which they
 2 need to make in order to substantiate their decision and
 3 their theory of harm.
 4 That's all I wanted to say at the moment.
 5 **THE CHAIRMAN:** Thank you very much. Yes, Ms Rose.
 6 Further opening submissions by MS ROSE
 7 **MS ROSE:** Madam, having heard that, there are just a couple
 8 of points that I would like to make before Shell calls
 9 its witnesses.
 10 The first point is to underline something that was
 11 just said by Mr Howard, which is of course well-known to
 12 everybody here, that this is an object infringement case
 13 and from the perspective of Shell the question is: what
 14 was the object to which Shell was a party? What was the
 15 conduct on the market which Shell was intending to
 16 pursue? I showed you the case in opening in relation to
 17 that. So the question always from the perspective of
 18 Shell's witnesses was: what was Shell intending to do?
 19 The OFT's answer to that, in its decision, which is
 20 the only place that matters, is that Shell was a party
 21 to conduct that was intended to fix the retail prices at
 22 fixed parities and differentials, as between the
 23 manufacturers, and that's what, as we saw in my original
 24 opening, the OFT found against Shell.
 25 Now, the reason I emphasise this now is that in his

1 opening in relation to Shell, and it was striking that
 2 Mr Lasok said almost nothing about Shell in his opening,
 3 and indeed I think he said twice that he was going to
 4 take it very quickly in an opening that in respect of
 5 the other retailers with respect was somewhat more fully
 6 developed. That tells its own story about the way that
 7 the OFT feels about the presence of Shell in this
 8 appeal.
 9 The point that he did make was that he said that the
 10 recommended retail price ought to be construed as
 11 a minimum retail price, and he referred in particular to
 12 the document at tab 61, Breda Hughes' document, tab 61
 13 of annex 19. {D19/61}.
 14 The first point that I want to make is that if that
 15 is the case that the OFT is now running, this appeal
 16 must succeed, because it is inconsistent with the
 17 finding made by the OFT against Shell to suggest that
 18 Shell was a party to conduct intending to fix a range of
 19 prices between a minimum price and a maximum price,
 20 because -- as I pointed out in opening -- you cannot
 21 implement fixed parities and differentials if you are
 22 giving to your retailers two prices and they can price
 23 between the range.
 24 Now, of course Shell's case is that the recommended
 25 retail price wasn't a minimum, it was what it says it

1 was, it was a recommended retail price. But the case
 2 that was opened by Mr Lasok is inconsistent with the
 3 finding of the OFT and is inconsistent with any finding
 4 of infringement against Shell. That's the reason why
 5 I intervened when he was on his feet, because I was
 6 startled to hear that being positively developed.
 7 The second point to make on this point is that
 8 Mr Lasok relied in support of that submission on the
 9 document at tab 61. That's the email from Breda Hughes
 10 to Daryl Barry dated 13 August 2003, in which she refers
 11 to the Shell price file stating a minimum price.
 12 {D19/61}.
 13 **THE CHAIRMAN:** Again, I say to you what I said to --
 14 **MS ROSE:** Breda Hughes is not going to be giving evidence,
 15 as I understand it.
 16 **THE CHAIRMAN:** No, but --
 17 **MS ROSE:** Can I just make a simple point about this, because
 18 this is about Breda Hughes' understanding, and he made
 19 the submission based on this: Breda Hughes must have
 20 understood the RRP to be a minimum.
 21 Now, the difficulty with that submission is that
 22 Breda Hughes was also the author of the document at
 23 tab 57. {D19/57}. You can see her signature on that
 24 document, dated February 2003. So that is several
 25 months earlier than the document at tab 61 upon which

1 Mr Lasok relied. We looked at this in my opening, at
 2 page 219 there is the passage where she states that:
 3 "Agents own all shop stock but are given guidance by
 4 Shell with regard to range, merchandising, pricing and
 5 source of supply. Ultimately, the final decision is
 6 that of the agent."
 7 Then over to page 4 of this document on the internal
 8 numbering:
 9 "Shell recommends a pricing policy to all Select
 10 sites. The price file consists of a Shell recommended
 11 price and a maximum price for each product. A copy of
 12 the price file is provided to ITL. Under the previous
 13 category manager [that's Annie Parker] the price file
 14 was in a state of disrepair with many differentials out
 15 of line."
 16 And then:
 17 "Under the new category manager and [with] the aid
 18 of both Gallaher and ITL this has been resolved and in
 19 the main differentials between manufacturers' comparable
 20 brands are now maintained."
 21 We submit it's absolutely clear from that document,
 22 which is a considered written business plan, that
 23 Breda Hughes knew perfectly well first of all that the
 24 decision on pricing was down to the agents subject to
 25 guidance from Shell and that the Shell price file

1 contained a recommended and a maximum retail price. We
 2 submit it's simply impossible in the light of that
 3 document from Breda Hughes in February to construe her
 4 very brief email at tab 61 in August saying "minimum" as
 5 indicating that she thought that was a minimum and not
 6 a recommended price. Even if he is right, though, as
 7 I've already said, his case must fail. That's one
 8 reason why we are still puzzled as to why we are in the
 9 headmaster's office.

10 The other point I wanted to make briefly was that in
 11 his opening Mr Howard referred you to page 720 at tab 9
 12 of core bundle 1, tables 7 and 8 on that page,
 13 {C1/9/720} which show divergences between the
 14 recommended prices on Shell's price file and the
 15 differentials and parities being put forward by both
 16 Gallaher and ITL. He made the point that in relation to
 17 Golden Virginia the ITL policy was that that should be
 18 at parity with Old Holborn, but that it was actually
 19 being priced at a penny more expensive, and he said
 20 well, Shell is there rowing its own boat, and Dr Scott
 21 intervened, "Or Gallaher's boat", but of course the
 22 answer is "not Gallaher's boat", because you can see the
 23 Gallaher policy at table 7 and the Gallaher policy is
 24 also same price between Old Holborn and Golden Virginia.

25 So this is simply one of many examples where Shell

1 listens politely to what is said by these manufacturers
 2 with these enormous financial riches that they are being
 3 offered and then says "Thank you very much, we will
 4 price these brands at what we think is right for us and
 5 right for our own margins", so it's not rowing anybody's
 6 boat but Shell's as you would expect, given the size of
 7 the financial incentives that were on offer.

8 The final point I want to make is just to flag up
 9 the point that Mr Barry is not attending to give
 10 evidence. Madam, you may recall that in March of this
 11 year a Civil Evidence Act notice was served by Shell
 12 because Mr Barry no longer works for Shell --

13 **THE CHAIRMAN:** He is in Australia.

14 **MS ROSE:** He is in Australia, yes, madam, and in fact at the
 15 case management conference in April of this year, my
 16 learned junior Mr Kennelly drew this to the attention of
 17 the Tribunal and he said that:

18 "Mr Barry will not be attending. He is not being
 19 called. We served a Civil Evidence Act notice when we
 20 served his statement, he lives in Australia and it was
 21 considered disproportionate to ask him to attend to be
 22 cross-examined. The OFT have not responded to that,
 23 they have not dealt with Mr Barry's attendance and that
 24 may be something they want to address the Tribunal on
 25 today."

1 Now, the OFT did not address the Tribunal on that
 2 point at that time, and in fact Mr Kennelly asked the
 3 OFT's junior counsel whether the OFT did wish Mr Barry
 4 to attend to be cross-examined, and was given a response
 5 along the lines of "We will get back to you on that".

6 We heard nothing further from the OFT. On
 7 12 September you will recall that the OFT served its
 8 time estimates, and Mr Barry appeared on that in italics
 9 with the words "to be confirmed" and in square brackets,
 10 suggesting that they still hadn't decided whether they
 11 wished to cross-examine him.

12 Somewhat to our surprise, therefore, we received
 13 a letter on Thursday afternoon last week, only four days
 14 before our case is due to be heard, announcing that they
 15 did wish him to attend from Australia, that it wasn't
 16 disproportionate and that we should have arranged for
 17 video conferencing facilities.

18 Can I just hand up a copy of that letter. (Handed).
 19 This is a letter of 29 September. If we can hand up
 20 that and our response as well.

21 If we look at this letter, it's a remarkable
 22 document. The OFT asserts that it's made clear in its
 23 letters of 25 March and 25 September that it will wish
 24 to cross-examine Mr Barry. Now, just pausing, it's
 25 right that in the letter of 25 March he appeared on the

1 schedule of witnesses, but Mr Kennelly then expressly
 2 sought clarification at the case management conference
 3 in April, drawing attention to the fact that Mr Barry
 4 was in Australia. We heard nothing at all from the OFT
 5 then until 12 September, when the letter they sent did
 6 not confirm that they wished to cross-examine Mr Barry,
 7 but on the contrary had him in square brackets saying
 8 "to be confirmed". So that's simply untrue.

9 Then they say:

10 "The OFT does not consider these valid reasons for
 11 him not to submit to cross-examination. It is
 12 commonplace for witnesses to be cross-examined by
 13 videolink."

14 But with respect it's not commonplace for this to be
 15 suggested for the first time on the Thursday before the
 16 witness, who is in Australia in a somewhat radically
 17 different timezone and who doesn't work for us, is
 18 expected to be called.

19 We replied on the following day, making the points
 20 about the difficulties in which this placed us, and
 21 Mr Barry is not attending, hardly surprisingly in the
 22 circumstances. We submit it's wholly unreasonable for
 23 the OFT to have conducted itself in this way.

24 Mr Kennelly expressly asked them in April what their
 25 position was. For them then to leave the matter for six

1 months and raise it like this is wholly unreasonable and
 2 as a public authority they really ought to behave more
 3 proportionately, given that they are in the position of
 4 a prosecutor in this case.
 5 So I just wanted to put our position on the record
 6 there, madam. It might perhaps be appropriate for us to
 7 take a short break now before I call our first witness.
 8 **THE CHAIRMAN:** Yes. Thank you. We will come back then at
 9 25 to 12.
 10 (11.25 am)
 11 (A short break)
 12 (11.35 am)
 13 **MR LASOK:** Madam, the before the witness is called, it may
 14 be appropriate if I make some brief submissions about
 15 the position concerning Mr Barry.
 16 **THE CHAIRMAN:** Well, I would rather get on with the witness,
 17 if that's all right with you, Mr Lasok.
 18 **MR LASOK:** That's fine.
 19 **MS ROSE:** Our first witness is Mr David Moss.
 20 MR DAVID MOSS (sworn)
 21 Examination-in-chief by MS ROSE
 22 **MS ROSE:** Mr Moss, if you would like to take a seat. Can
 23 I ask for core bundle 11 to be provided to Mr Moss,
 24 please. Mr Moss, can you turn to tab 117 in that
 25 bundle. (Pause). Tab 117. {C11/117}. We see

1 a statement there with your name on it. This version is
 2 not signed, but for the Tribunal's note, if you look at
 3 annex F --
 4 **THE CHAIRMAN:** We have a signed back page.
 5 **MS ROSE:** Good, I am delighted to hear that. It's simply my
 6 copy then.
 7 **THE CHAIRMAN:** Page 158, in fact on the back of 157.
 8 **MS ROSE:** Is this your witness statement?
 9 **A.** Yes, it is.
 10 **Q.** Are the contents of it true?
 11 **A.** Yes, they are.
 12 **MS ROSE:** If you would just wait there, please.
 13 Cross-examination by MR LASOK
 14 **MR LASOK:** Mr Moss, could you turn to paragraph 29 of your
 15 witness statement, please. If you look at the bottom of
 16 the page, you say:
 17 "I was emphatically not aware in my time as UK
 18 retail sales and operations manager, though, of Shell
 19 agreeing to set prices in line with manufacturers'
 20 requirements in exchange for payment."
 21 Can I just confirm that the time you are referring
 22 to is December 1999 to January 2003?
 23 **A.** Yes, that is correct.
 24 **Q.** It therefore follows, I take it, that you were not aware
 25 of what Mr Conrad and Ms Parker are now saying about the

1 arrangements with the manufacturers?
 2 **A.** Yes, that's correct. At the time obviously I was not
 3 aware, now through proceedings I am aware.
 4 **Q.** Now, if we move back to paragraph 25, the sequence from
 5 paragraphs 24 to 27 of your witness statement are
 6 concerned with this software that was in place. Am
 7 I right in thinking that you don't have direct knowledge
 8 of the software, you obtained knowledge from other
 9 people, whom you mention in those paragraphs?
 10 **A.** Yes, that's correct.
 11 **Q.** Could you confirm that the software alerted the
 12 contractors when the price was below the Shell
 13 recommended price?
 14 **A.** The software concerned, it was actually a disk that
 15 would have to be placed into the individual systems at
 16 each service station, would do a number of things, one
 17 of which is the matter you refer.
 18 **Q.** Thank you. If you move back to paragraph 20, and go to
 19 the last few sentences, it's the bit referring to the
 20 commission that the contractor paid to Shell. You say
 21 that, in the penultimate sentence:
 22 "The commission was calculated as a percentage of
 23 convenience sales."
 24 Am I correct in thinking that it was calculated by
 25 reference to whichever of the Shell recommended retail

1 price or the Shell maximum was the price being used by
 2 the contractor?
 3 **A.** The way it worked, for every category, of which tobacco
 4 was a category, there was a category margin, and in
 5 across a convenience stores, some of those category
 6 margins would be low, and some would be high, depending
 7 on the difference between the cost price and the selling
 8 price of the contractor.
 9 So in the case of tobacco, the category was quite
 10 a low category margin, and it would be based on the
 11 average margin between the average cost of the products
 12 and the average Shell recommended retail price of those
 13 products.
 14 **Q.** Okay. In paragraph 22 you refer to the, in the middle
 15 of the paragraph, recommended retail price and the
 16 maximum price. Am I right in thinking that what you had
 17 were two pricing tiers? There was the Shell recommended
 18 price and the Shell maximum price?
 19 **A.** I am not too sure I would categorise them as tiers.
 20 I think, if I recall correctly, there was Shell's
 21 recommended retail price, but then there was also
 22 a price that we would stipulate, it was a maximum price,
 23 that was really set as a ceiling, the reason being very
 24 straightforward, we didn't want the Shell brand to be
 25 affected by what one could call insult pricing. So I am

1 not too sure I would call them tiers. I think I would
 2 say there was a Shell recommended price and a Shell
 3 maximum price.
 4 **Q.** Now, the recommended price was effectively a minimum
 5 price, wasn't it?
 6 **A.** No, that's categorically not the case. It was as it
 7 was, Shell's recommended price.
 8 **Q.** Can you say that categorically by reference to how the
 9 pricing affected tobacco products?
 10 **A.** I think I can say categorically across all products in
 11 the Shell Select store.
 12 **Q.** I wonder whether you could look at annex 9, please. If
 13 you could turn to tab 15, {D9/15} you should have
 14 an email string with, at the top, the first line should
 15 be "from Bernie Streeter", and the second line should
 16 have a date, 9 January 2002. Do you have that?
 17 **A.** Yes, I do.
 18 **Q.** I wanted to refer you to the first email in the string,
 19 which is on the second page. It's the one which starts,
 20 in my copy at the first holepunch, from Annie Parker,
 21 sent on 13 December 2001. Could you read that email to
 22 yourself, please? (Pause). Right?
 23 **A.** Yes.
 24 **Q.** Now, can you explain why -- I know this is not your
 25 document, but I have to put it to you, that if you look

1 at the paragraph beginning "if poss", do you have that?
 2 **A.** Yes.
 3 **Q.** In the second line, Ms Parker refers to "min and max
 4 retails". Doesn't that suggest that the recommended
 5 price was the minimum price?
 6 **A.** So this is the first time I've seen this email, and the
 7 physical words written here say "min and max retails".
 8 That is absolutely not my understanding of Shell's
 9 recommended retail pricing or Shell's maximum price.
 10 I stand by what I said previously.
 11 **Q.** How close were you to what was actually happening on the
 12 ground?
 13 **A.** From a service station operation standpoint, I would say
 14 I was reasonably close. From a category management
 15 standpoint, I would say I was reasonably distant.
 16 **Q.** Could you look at -- put that one away, please --
 17 annex 19, please. Turn to tab 32. {D19/32}.
 18 **THE CHAIRMAN:** You need speak up a little bit, Mr Moss, to
 19 be sure that the transcript writers can hear you.
 20 **A.** Certainly.
 21 **MR LASOK:** It's two emails, they are not emails that were
 22 sent to you, but you were copied in on. If you look at
 23 the email in the second half of the page, it's an email
 24 from Mr Conrad, who at the time was the person dealing
 25 with tobacco products with Shell, and he is sending

1 prices, retail prices, to Mr Culham of Imperial.
 2 Mr Culham, in his email at the top of the page, is
 3 forwarding this to Amanda Eager, who is also an Imperial
 4 person, I believe, and he is getting her to check the
 5 differentials. If you look at the third paragraph of
 6 Mr Culham's email, he says:
 7 "There is now two prices to show, the Shell retail
 8 price plus the maximum allowed at the sites. Most
 9 should be at the Shell retail price, but there will be
 10 some at the maximum level."
 11 I put it to you that that indicates that, at least
 12 so far as Mr Culham is concerned --
 13 **MS ROSE:** I object to this question. This is an internal
 14 ITL document on which this witness is not in a position
 15 to give any evidence. Mr Culham is going to give
 16 evidence and can be asked what he meant.
 17 **THE CHAIRMAN:** Well, I think as with a lot of these, when
 18 the witness makes a statement as to his belief in his
 19 witness statement, which is of a general nature, then
 20 I think Mr Lasok is entitled to put to him documents on
 21 which he is going to wish to rely to submit to
 22 the Tribunal that Mr Moss' evidence shouldn't be
 23 accepted, and to see if that makes Mr Moss change his
 24 mind. It may well not do, but I am sure that Mr Lasok
 25 is concerned that if he doesn't put this to Mr Moss and

1 then in his submissions asks us to take this into
 2 account as being contrary to what Mr Moss says, he
 3 doesn't want to be met with an objection "Oh, well, you
 4 never put that document to Mr Moss", and I understand
 5 it's on that basis that it's being put.
 6 **MS ROSE:** I do understand that point, but this document of
 7 course is not relevant to the question of what Shell
 8 believed.
 9 **THE CHAIRMAN:** Well, nonetheless, for the reason that I've
 10 outlined, I think it's best if Mr Lasok can put to the
 11 witnesses any document that he's in future going to wish
 12 to rely on as casting doubt on the statement that was
 13 made in the witness statement. But, Mr Moss, if you
 14 don't want to comment on documents which are not either
 15 written by you or received by you, then you must say if
 16 you don't feel able to comment on them.
 17 **MR LASOK:** Just to reassure you, Mr Moss, if you look at the
 18 second page, you will see a list of prices, and you will
 19 see in every single case there is a Shell retail price
 20 and a Shell maximum retail price. So I fully accept
 21 that we will get information from Mr Culham about this,
 22 but it's fair to point out that, on the face of it,
 23 Mr Culham is indicating, when he says that there are two
 24 prices to show, and he says that most should be at the
 25 Shell retail price and some at the maximum level, he is

1 referring there to the sites, at most of the sites, the
 2 price would be at the Shell retail price and some would
 3 be at the maximum level.
 4 The question I can put to you is: is that, to your
 5 knowledge, an accurate reflection of what was happening
 6 at the time?
 7 **A.** So obviously I haven't seen this before, but to my
 8 knowledge, I don't believe that is an accurate
 9 reflection at the time, and the way I read this,
 10 Mr Culham has chosen his words to show two prices, and
 11 on this spreadsheet there are two prices. To me in no
 12 way does that suggest that those are the only two prices
 13 that one would see at a Shell service station. I would
 14 suggest there would be a range, of which some products
 15 would be at this price and some products would not.
 16 **Q.** Right. If you would turn to tab 33, we have a letter
 17 here to Ms Parker from ITL, {D19/33}, and again
 18 I appreciate that as far as one can see, you are not
 19 copied in on this. I take it that you weren't?
 20 **A.** I was not.
 21 **Q.** No. If you turn to the second page, there is a heading
 22 "Richmond Kingsize", and if you could read that
 23 paragraph to yourself, please. (Pause).
 24 **A.** Yes.
 25 **Q.** Again, in that paragraph, it refers to two prices for

1 Richmond Kingsize. I can shed light on the fact that,
 2 in the second line, the two prices which I think are not
 3 confidential but are 3.70 and 3.71, are the Shell
 4 recommended price and the maximum price respectively.
 5 We can get that from the next tab, at page 5, but
 6 I think that that is a detail for cross-referencing,
 7 I am not going to ask you a question about that.
 8 So at any rate the agreement was that Richmond
 9 Kingsize would move from 3.64 and 3.65 to 3.70 and 3.71.
 10 **MS ROSE:** I am terribly sorry, that's not correct. That
 11 price, 3.70 and 3.71, was a proposal which ITL was
 12 making to Shell, and the document that my learned
 13 friend's just referred to, as you will see, is headed
 14 "Breda's reply to Annie's price file with
 15 recommendations", but in fact the Shell price files show
 16 that this recommendation was not implemented. I am
 17 sorry, but my learned friend --
 18 **THE CHAIRMAN:** What is it that you are saying that that was,
 19 the 3.70 and the 3.71 was what?
 20 **MS ROSE:** It was not the Shell price, these were prices that
 21 ITL was recommending to Shell as its recommended and
 22 maximum price, but in fact, if you look at the Shell
 23 price files, they were not implemented, the
 24 recommendations were not implemented. You know, my
 25 learned friend is now putting to the witness material

1 not only that's not within his knowledge but not, with
 2 respect, on an accurate basis.
 3 **MR LASOK:** Well, I fear that we are at cross-purposes about
 4 this, because I was asking the witness about this
 5 paragraph in the letter. I am not asking him about the
 6 words "it was agreed". He has to read those words.
 7 There is a dispute between my learned friend and I as to
 8 whether or not it was agreed, because she says that it
 9 was recommended by ITL, but it wasn't implemented by
 10 Shell. Now, that's another debate. The reason for
 11 referring to tab 34, page 5, for the second line, is
 12 that it explains what the figures 3.70 and 3.71 are.
 13 Because they are the figures that ITL had inserted in
 14 the price file as being the Shell recommended price and
 15 the Shell maximum price respectively.
 16 So all that I've tried to do was to explain, by
 17 a cross-reference to another document emanating from the
 18 writer of this letter, what is the significance of those
 19 two numbers.
 20 **THE CHAIRMAN:** So there is a 1p difference between the
 21 recommended --
 22 **MR LASOK:** The Shell recommended and the Shell maximum at
 23 that point.
 24 **THE CHAIRMAN:** Well, the suggested --
 25 **MS ROSE:** There wasn't, there was actually a much greater

1 difference.
 2 **THE CHAIRMAN:** If these are, whether they are suggested or
 3 actual or agreed or whatever, the point is that the 3.70
 4 was supposed to be, if I can put it neutrally like that,
 5 the recommended, and the 3.71 the maximum.
 6 **MS ROSE:** ITL was proposing that, but that proposal was not
 7 adopted and the actual Shell recommended and maximum
 8 show a significantly larger margin.
 9 **THE CHAIRMAN:** A larger margin.
 10 **MR LASOK:** That of course is --
 11 **THE CHAIRMAN:** Perhaps if you ask your question again of the
 12 witness.
 13 **MR LASOK:** Actually, I had not even got to the question yet.
 14 **THE CHAIRMAN:** Well, ask it for the first time then.
 15 **MR LASOK:** We have two prices in the second line, we have
 16 two prices in the first line and when you get to the
 17 third line there is a reference to a move to a greater
 18 minimum and maximum differential. So again we have two
 19 prices, a minimum and a maximum.
 20 I want to ask you again, you have stated that there
 21 was no minimum, and I am putting to you that in the
 22 conversations that were taking place between ITL and
 23 Shell, this is the second occasion on which we see
 24 a mention of a minimum price. So do you still hold to
 25 the reply that you gave the first time around?

1 A. Yes, I do, for exactly the same reason I gave the first
 2 time. I cannot deny that this letter -- which was the
 3 first time I've seen it -- uses the words "minimum and
 4 maximum", it clearly states that, but that is absolutely
 5 not my understanding and it's certainly not my
 6 experience of what was happening in the market.

7 Q. If you could turn to tab 35, {D19/35}, this is a letter
 8 to Ms Parker dated 4 October 2001 from Breda Canavan.
 9 I would just ask you to look at the second page, down at
 10 the bottom, and if you could just read that last
 11 paragraph under the heading "Richmond Kingsize".

12 (Pause)

13 So she is again referring to two prices, there is
 14 the carry-on from the previous correspondence, and I put
 15 it to you again there is a reference to a minimum price
 16 and a maximum price?

17 A. To be honest with you I can't tell from this letter
 18 whether that is what it's referring to, because it
 19 doesn't state minimum and maximum, but clearly the 3.70
 20 and then 3.70 are the same. I just wonder whether it's
 21 not just emphasis of the previous point. So I still
 22 stand exactly by what I've said.

23 Q. Could you turn to tab 61, please, {D19/61}, this should
 24 be an email from Breda Hughes -- this is also
 25 Breda Canavan -- dated 13 August 2003 to Mr Barry.

1 Could you read the email to yourself, please.
 2 (Pause)

3 A. Yes.

4 Q. I put it to you again that that shows that the common
 5 understanding between ITL and Shell was that there were
 6 two prices in the Shell price file, there was a minimum
 7 price and a maximum price?

8 A. So as I read this email, again for the first time, it
 9 says to me that the Shell price file states a minimum
 10 price and a maximum price. If the document I saw
 11 earlier was the price file, I think that says
 12 recommended price.

13 Q. That's quite right. The question I am putting to you
 14 is, or rather I am putting to you a proposition more
 15 than a question, and that is that the common
 16 understanding of Shell and Imperial at this time was
 17 that the Shell recommended price mentioned in the price
 18 file was a minimum price.

19 A. So as far as I am concerned, my experience and what was
 20 actually happening, Shell could recommend a retail price
 21 and we did recommend retail prices, for which our
 22 contractors either chose or did not choose to follow.
 23 Sometimes they may be below, sometimes they may be
 24 above. The time that I, if you like, would get
 25 concerned is if they were above our maximum price, to

1 the point I mentioned earlier.

2 So I am not aware, at all -- other than these three
 3 documents that use the word "minimum price", I am not of
 4 any understanding that Shell's recommended price was
 5 indeed a minimum price. I cannot dispute that this says
 6 that, but that is contrary to my understanding.

7 DR SCOTT: Mr Moss, thinking about the wider question of the
 8 RBAs, as we understand it, there was a royalty,
 9 a commission, as you call it in your evidence, which was
 10 being paid, but what you are suggesting to us is that
 11 that was related to the recommended retail prices in the
 12 Shell price list, rather than the actual price at which
 13 goods were sold; is that correct?

14 A. Correct, so Shell's margin for a category I recall was
 15 based on Shell's recommended retail price.

16 DR SCOTT: Now, you were also concerned, as I understand it,
 17 about the margin being made by your new contractors, and
 18 as I recall the RBA, there was a margin either side of
 19 the expectation so that you would offer support if they
 20 made less than 70 per cent of that, but take the cream
 21 if they made more than 140 per cent of that. So you
 22 were concerned, as I understand it, from that, not
 23 simply about insult pricing but about sufficient margin
 24 being made by the contractors; is that correct?

25 A. Yes, I think I should help clarify, if I may.

1 DR SCOTT: Yes.

2 A. What we called the floor and the ceiling, the
 3 70 per cent and 140 per cent, were based around the
 4 estimated earnings that the retailer would make in
 5 total, a contributory factor of that could be the margin
 6 that he or she would have made in their convenience
 7 store, but there are understandably several other
 8 factors that would come into that. The reason why Shell
 9 and therefore I was so concerned about the floor and the
 10 ceiling was were there factors beyond the contractor's
 11 control or within the contractor's control to influence
 12 their earnings?

13 Let me give you a very simple example. A service
 14 station, being on the side of the road, could have some
 15 roadworks outside and could drastically affect the sales
 16 of the station and therefore the income of the retailer.
 17 If that were the case, it is unfair for Shell to take
 18 the normal estimated earning calculation and therefore
 19 we would bring it up to the floor so they could make
 20 a reasonable living.

21 The reverse is also true. If a nearby road was
 22 closed and double the traffic was coming past the Shell
 23 service station, that was where the 140 per cent would
 24 kick in. So it was in a much broader context that we
 25 have the floor and the ceiling in the RBA as against

1 just the margin of shop products, if that helps.
 2 **DR SCOTT:** Thank you.
 3 **MR LASOK:** Mr Moss, I think you have already explained
 4 candidly that you didn't know what was going on in terms
 5 of the trading agreements between ITL and Gallaher on
 6 the one hand and Shell on the other.

7 In your witness statement, paragraph 28, you
 8 candidly state that you can't speak about tobacco
 9 specifically. There is a point I am going to put to
 10 you: in practice on the ground, and at least in relation
 11 to tobacco products, the understanding -- I am not
 12 talking about your understanding, I am talking about the
 13 understanding at a lower level -- is exemplified in the
 14 correspondence that I've taken you to, and that is that
 15 the way it worked in practice was that, in the Shell
 16 recommended price file, we had two prices, a minimum
 17 price and a maximum price.

18 Firstly, do you accept that that is so?
 19 **MR HOWARD:** Could I just ask that we should have
 20 clarification as to whether the understanding is of the
 21 petrol station agents that is being referred to or
 22 somebody else's understanding? It's quite important
 23 whose understanding we are talking about.

24 **THE CHAIRMAN:** Yes, whose understanding?

25 **MR LASOK:** At the level of Mr Conrad, Ms Parker, Mr Barry

1 and below.
 2 **A.** I have to say I am a little bit confused now. Could
 3 I ask you to repeat the question, please?
 4 **Q.** Certainly. At the level of Mr Conrad, Ms Parker,
 5 Mr Barry and at the level of the petrol stations, the
 6 practical understanding of how things worked was that in
 7 the price file Shell would set out the minimum price and
 8 a maximum price?

9 **A.** Okay, so a couple of points, I think, we should clarify
 10 or I should clarify. I do not accept, for reasons
 11 I have already stated, that Shell had a minimum price,
 12 period. We had a maximum price, which I fully accept.
 13 I also have a view, a belief, a fact that the prices
 14 that our independent contractors charged customers was
 15 a range of prices. Let me give you some reasons why
 16 I say this. The whole principle behind the RBA, the
 17 retailer business agreement, is so that we have
 18 individual entrepreneurs running our service stations.
 19 We used to do this ourselves and we weren't successful.
 20 So one of the streams to turn around our business, one
 21 of the seven streams, was to introduce this operating
 22 model.

23 In searching for a local entrepreneur we were
 24 looking for a number of things, clearly somebody that
 25 would see Shell's values through of safety and brand,

1 but also had an understanding in his or her local
 2 trading area, but the products that he or she was
 3 selling outside of the core range and the prices that he
 4 or she was setting for his or her customers were
 5 relevant to that market, and so therefore, for Shell to
 6 set a minimum price would go totally against the spirit
 7 of our agreement, and factually I don't believe we could
 8 have done it, but it did go against the spirit of our
 9 agreement. I would expect retailers to consider Shell's
 10 recommendation but to make their own decision, and
 11 invariably that would lead to a range of prices that may
 12 well meet up to the category margin so that the retailer
 13 or the contractor would feel they wouldn't lose. But
 14 I just simply do not accept that Shell set minimum
 15 prices; we did not. We set recommended prices, of which
 16 some contractors would follow and some would not.

17 **Q.** Is that a conclusion that you draw from your knowledge
 18 at a relatively high level, or do you have any knowledge
 19 as to what was actually going on on the ground?

20 **A.** As part of my role, as sales and operations manager,
 21 I would have to be out in the field, I wouldn't be doing
 22 my job properly if I was stuck in the office all day.
 23 So I would spend a number of days a week touring the
 24 network around the UK with either area managers or
 25 regional managers or sometimes on an unannounced basis,

1 I would just turn up and see the stations myself, and
 2 I would have first-hand experience of seeing prices,
 3 obviously, but also if our contractors had concerns
 4 about those things. So I genuinely believe on the
 5 ground I would have that experience. I have to also
 6 state that I would not have the experience in the
 7 category management area. I could only talk about the
 8 result.

9 **Q.** And you would only obtain knowledge, as I understand it,
 10 if somebody made a complaint to you?

11 **A.** Obviously if someone had complained I would have that
 12 knowledge, but also as I mentioned through my own store
 13 visits, either accompaniment or non-accompaniment,
 14 I would interact and I would see. As well, to be
 15 honest, I am a customer of Shell as well and I would buy
 16 products.

17 **MR LASOK:** I have no further questions.

18 Questioned by THE TRIBUNAL

19 **THE CHAIRMAN:** Just one question, I don't know whether this
 20 scenario is at all factually likely, and perhaps you can
 21 help me with that, but you have over the period that we
 22 are concerned with people managing these shops who start
 23 out managing them with Shell effectively running that
 24 business and they are just agents, and at that stage
 25 Shell may well direct them, instruct them, as to what

1 prices they should charge for all manner of products
 2 that they have in the shop.
 3 You then change over to the RBA and then, instead of
 4 sending them the price at which they must sell it, you
 5 are sending them the recommended price and the maximum
 6 price.

7 Was there a danger, do you think, of them not
 8 appreciating that things had changed or saying to
 9 themselves, "Well, I know it has to be called
 10 a recommended price now, but in fact it's business as
 11 usual, we will still charge the price that they are
 12 telling us"?

13 **A.** Yes, I think there is a risk, I am not too sure I would
 14 say it was a danger, and let me explain why. When we
 15 went through the -- I call it the reorganisation, from
 16 a direct managed operation to a contractor operation, we
 17 went through quite a stringent selection process, so
 18 much so, there was a lot of negative publicity about it,
 19 actually, but I won't go into that. And through that
 20 process obviously we selected -- I want to say new to
 21 industry people, but also selected some existing store
 22 managers. Why did we select those existing store
 23 managers? It was because they demonstrated through the
 24 interview process that they had independence and
 25 entrepreneurial flair. Yes, of course I think there was

1 a risk that somebody that used to run a direct managed
 2 store and then ran it as a contractor simply followed
 3 Shell's wishes or recommendations, I think I would be
 4 wrong to say otherwise. Was it prevalent? I don't
 5 think so. I don't think so.

6 **THE CHAIRMAN:** A second question, in relation to this
 7 complaints point: did you ever, in your time in this
 8 role, experience a contractor saying to you "We are
 9 being told what prices to charge but I thought we were
 10 supposed to choose our own prices", or conversely did
 11 any of the category managers ever say to you "Some of
 12 the contractors are not charging the prices we want them
 13 to charge"? Were there those sort of discussions taking
 14 place that you were party to?

15 **A.** I really can't recall any discussions like that at all.
 16 The only -- very open about it -- retailers would
 17 complain to me about the price of our fuel, but of
 18 course that was our fuel and obviously the higher the
 19 price, arguably the less busy the station, but not about
 20 their own products, no.

21 **THE CHAIRMAN:** Thank you.
 22 **DR SCOTT:** Mr Moss, we understand from your witness
 23 statement that this was a successful venture, and that
 24 Shell went from being, I think, third to be equal top in
 25 this period, as you introduced the RBAs. That was on

1 the fuel side, as I understand it. Can you tell us
 2 a bit about what happened to the non-fuel sales in
 3 general and to tobacco sales in particular during this
 4 period?

5 **A.** Yes, so typically when we talk about market share in
 6 Shell, you are correct, we are talking about the fuel
 7 sales. I cannot tell you categorically what happened to
 8 the convenience store sales over that period, but
 9 I think it stands to reason that if the service stations
 10 become busier in the forecourt that they also become
 11 busier in the store. I think it also is evident that
 12 when -- I should just re-emphasise that the turnaround
 13 from third to equal first was not purely because of the
 14 retailer business agreement, it was because of the other
 15 six additional workstreams as well, so collectively the
 16 strategy was successful.

17 I think when you are in position 3, you probably
 18 attract a candidate for a service station that may be of
 19 a different calibre to one when you are in position 1.
 20 So I want to explain the point that really success
 21 breeds success, and therefore when we became equal
 22 number 1, we were attracting a better calibre of
 23 retailer, and we were also consolidating as well, we
 24 gave more service stations to successful candidates as
 25 others may have been less successful. And that's where

1 I would therefore expect growth.

2 I think that's the most I can say, really.

3 **DR SCOTT:** That's helpful, thank you.

4 **THE CHAIRMAN:** Just one other question that occurs to me: as
 5 far as the setting of the recommended price and the
 6 maximum price, were you involved in that setting or was
 7 that something that was organised and decided upon by
 8 the category managers?

9 **A.** So within our organisation there were several
 10 structures, if you like, and I was responsible for what
 11 were called sales and operations, and my colleague
 12 Jim Rand was then marketing and trading manager. It was
 13 in Jim Rand's area that the category management would
 14 think where those decisions were made. So I can say
 15 I did not have any influence at all.

16 **MR SUMMERS:** Just looking again at the duration of the use
 17 of the term "minimum and maximum" in these various
 18 documents, there is one document dated 3 September, the
 19 year isn't actually mentioned, I think it was 2001, at
 20 tab 33. I don't know if we can actually establish the
 21 full date of the letter.

22 **MR LASOK:** In the index it has a date of 3 September 2001.

23 **MR SUMMERS:** 2001, yes, thank you. Then again we also
 24 looked at another document at tab 61, which was dated
 25 13 August 2003. So that's virtually two years during

1 which these terms appear to have been used as a matter
 2 of currency. I'm wondering whether actually, if other
 3 people who must have been aware of the currency of the
 4 term clearly, this wasn't just an isolated incident,
 5 whether they would have felt it necessary to correct the
 6 use of the term, and say in effect "Look, you are
 7 misunderstanding or misusing this term, this is actually
 8 a recommended price?"
 9 **A.** Yes.
 10 **MR SUMMERS:** Did you have any knowledge of that sort of
 11 training action being taken?
 12 **A.** No, I didn't, but I do agree with you, I would certainly
 13 have expected people in Shell to have corrected that
 14 position to reflect the nature of our retailer business
 15 agreement and what we could and could not do. So I have
 16 to say I am surprised to see words like this. I don't
 17 know whether Shell staff wrote to the tobacco companies
 18 to state minimum and maximum, I see these examples where
 19 I think it's the lady, Breda Hughes, looks like she
 20 worked for Imperial Tobacco, wrote to us. So it seems
 21 that perhaps Shell should have corrected that position.
 22 I am still stuck on the point that, irrespective of
 23 what is in this email -- which I obviously can't deny,
 24 it's written there -- we didn't set minimum prices on
 25 the files for service stations, we set maximum prices

1 and we recommended, and as I said earlier, there was
 2 a range. So there is a difference there between what
 3 this states and what actually happened.
 4 **MR SUMMERS:** Thank you.
 5 **THE CHAIRMAN:** Any re-examination?
 6 Re-examination by MS ROSE
 7 **MS ROSE:** Mr Moss, you have explained that the amount of the
 8 royalty that was paid to Shell was based on the average
 9 margin looking at the recommended retail price over
 10 a category, so that would be the whole of the tobacco
 11 category, would it?
 12 **A.** Yes, that's correct, I think -- sorry.
 13 **Q.** So can you explain, what are the circumstances in which
 14 a retailer in that situation would price particular
 15 products below the recommended price?
 16 **A.** Oh, I think there were several situations in which
 17 a retailer, a true retailer, would do that. In a local
 18 trading area there could be a competitor that's
 19 introducing a product, and it could be a soft drink,
 20 could be a soft toy, could be a tobacco product, and
 21 they want to compete on price. And this is part of this
 22 entrepreneurial flair that I was talking about earlier.
 23 So it could be to compete locally in the marketplace.
 24 It could be because the products are coming to an end of
 25 life and they want to sell them off cheaply. It could

1 also be that they wanted to clear the shelf of one
 2 product so they could get more of another product on it.
 3 I think there is a whole host of reasons why a real
 4 retailer, the type we were looking for, would sell
 5 below, at Shell's recommendation, in the knowledge that
 6 there is a risk they could be charged a higher margin in
 7 their royalty for that, so one would also expect counter
 8 behaviour. So if they are lowering a product price in
 9 a category, I would expect -- and obviously I have been
 10 a retailer in my time -- to increase the product price
 11 in another part of the shop so that I am not losing out.
 12 So primarily --
 13 **Q.** So it's overall rather than each individual product
 14 rigidly priced at RRP?
 15 **A.** Absolutely. It is from each individual product,
 16 obviously, that you go up to category, you go up to
 17 store, you go up to network, where you are making your
 18 money. But every decision is on an individual product,
 19 and many reasons why.
 20 **Q.** Do you have any knowledge of any incident when any
 21 category manager, in relation to the tobacco category,
 22 ever sought to instruct the contractors in the stores to
 23 price at RRP or at MRP?
 24 **A.** No, I am not aware at all. I am also not aware, it
 25 could have happened, that category managers necessarily

1 had a direct contact with the retailers, because it
 2 would typically go through my -- my, Shell's field
 3 force, the contact with or the relationship with the
 4 retailer would be via me, through my regional managers
 5 and my district or area managers as I called them at the
 6 time. They would hold the relationship and the
 7 discussions. So it could have happened, obviously, if
 8 a category manager has a local station that they are
 9 familiar with, but no, I'm not aware of that.
 10 **Q.** Had there been any practice of seeking to dictate the
 11 retail prices to your newly appointed contractors, would
 12 you have expected any reaction to you?
 13 **A.** Yes, I think just so we are clear, had that practice
 14 happened and had I been informed about it, I would have
 15 expected appropriate action to be taken on that
 16 individual.
 17 **Q.** Meaning what?
 18 **A.** Disciplinary action. I mean, just so we are clear, the
 19 reputation of Shell is not only about its service
 20 stations and how they are operated, but I think it is
 21 how Shell behave in supporting that operation.
 22 So if the member of staff were behaving in such
 23 a way that was contrary to any contract or agreement we
 24 had, then as and when I would know about it, I would
 25 have expected to take action, either I or the relevant

1 line manager, correct, that was the ethics we had.
 2 **Q.** Can I finally show to the Tribunal the document in
 3 relation to Richmond, there was a little spat between
 4 Mr Lasok and myself about it. If we take up notice of
 5 appeal volume 2, this is the Shell notice of appeal,
 6 volume 2. There is a multiplicity of tabs in this
 7 bundle which are rather confusing, so I am going to give
 8 you a page number which I think is a bit easier to
 9 follow. If you go to page 521, do you have a document
 10 that says "Exhibit JAP 12"?
 11 **A.** Yes, I do.
 12 **Q.** If you turn the page, you see a document that says
 13 "Shell product master file list for RBA sites,
 14 1 October 2001". Do you see that?
 15 **A.** Yes.
 16 **Q.** If you go over to page 524, you have to crane your neck
 17 the other way, unfortunately, the third line from the
 18 bottom, do you see "Richmond Kingsize 20s"? This is
 19 page 524.
 20 **A.** Yes.
 21 **Q.** If you follow it along, we see that the recommended
 22 retail price is £3.65, and the maximum price is £3.79.
 23 So obviously not the £3.70 and £3.71 that we saw in the
 24 emails we were looking at. We can compare that with
 25 Dorchester, if you go back to 523, third line from the

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1 bottom "Dorchester Kingsize 20", the recommended retail
 2 price is £3.71, and the maximum is £3.91. Just for
 3 the Tribunal's note, that remains the case in November
 4 of 2001.
 5 **THE CHAIRMAN:** Do we know why there are two entries for ...
 6 **MS ROSE:** I don't know, madam, but they do give identical
 7 prices. It may just be a double entry.
 8 **A.** I think it's because the barcode is different. That's
 9 the only difference.
 10 **MS ROSE:** Ah, different barcode, thank you very much.
 11 **THE CHAIRMAN:** Yes.
 12 **MS ROSE:** I have no further questions.
 13 **THE CHAIRMAN:** Thank you.
 14 Further questioned by the TRIBUNAL
 15 **DR SCOTT:** I have one further question. It is this: you
 16 said just now that you would expect disciplinary action
 17 if a sales staff member behaved contrary to a contract.
 18 If -- and I realise you are not aware of the trading
 19 agreements -- Shell were to have entered into a trading
 20 agreement with a tobacco manufacturer, would your
 21 stricture on disciplinary action on Shell staff members
 22 abiding by a contract into which they had entered apply
 23 to such a trading agreement as well as to the RBA?
 24 **A.** Yes, I think the answer would be yes, but I think we
 25 would also, within Shell, obviously check with our own

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1 legal department whether a contract was legal or not.
 2 So if the employee had not done that, then that's twice
 3 as bad, if you like. Had they done that, and they have
 4 approval to do that, then they wouldn't be disciplined.
 5 **DR SCOTT:** Thank you.
 6 **THE CHAIRMAN:** Yes, thank you very much, Mr Moss, I can
 7 release you now from the witness box. That's your role
 8 finished.
 9 (The witness withdrew)
 10 **MS ROSE:** Madam, I would now like to call Ms Parker.
 11 **THE CHAIRMAN:** Yes.
 12 MS JUDITH ANN PARKER (affirmed)
 13 Examination-in-chief by MS ROSE
 14 **MS ROSE:** Thank you. If you would like to take a seat. Can
 15 I ask for core bundle 11, please.
 16 Ms Parker, if you could turn to tab 118, {C11/118},
 17 and that's headed "First Witness Statement of
 18 Judith Ann Parker". Is that your witness statement?
 19 **A.** Yes, it is.
 20 **Q.** Are the contents of that statement true?
 21 **A.** Yes, they are.
 22 **Q.** If you would turn over to the next tab, 119, is that
 23 your second witness statement?
 24 **A.** Yes, it is.
 25 **Q.** Are the contents of that statement true?

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1 **A.** Yes, they are.
 2 **MS ROSE:** If you would wait there, please.
 3 **A.** Thank you.
 4 Cross-examination by MR LASOK
 5 **MR LASOK:** Ms Parker, am I right in thinking that, so far as
 6 the matters at issue in this case are concerned, you
 7 came on the scene in September 2001?
 8 **A.** I was actually employed by Shell from 1999 within the
 9 category team, but I managed other categories prior to
 10 tobacco, and I picked up tobacco in September 2001.
 11 **Q.** Do you happen to remember approximately when in
 12 September it was?
 13 **A.** No, I don't.
 14 **Q.** Right. Probably the early part of September or
 15 mid-September?
 16 **A.** Possibly, I don't recall exactly when.
 17 **Q.** You ran through until March 2002, am I right?
 18 **A.** Yes, that's correct.
 19 **Q.** In your witness statement you say that after March 2002,
 20 you had limited involvement?
 21 **A.** I had less involvement from that time because I took
 22 over the management of the category team, so I had
 23 direct reports.
 24 **Q.** Was Mr Barry reporting to you?
 25 **A.** Mr Barry did report to me, yes.

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1 Q. If we go back to the position as it was in
 2 September 2001 when you took over tobacco products,
 3 I can't remember now, how far had the migration gone at
 4 that stage, migration to the RBA?
 5 A. We were all pretty much fully done. In fact, I think
 6 there is a graph in the attachments which shows that we
 7 had -- were certainly over 90 per cent through I believe
 8 the sites and most sites had transferred to the RBA at
 9 that point.
 10 Q. At this stage the Shell price file that was being sent
 11 out to the contractors had two prices on it; is that not
 12 so?
 13 A. That's correct.
 14 Q. Yes, and you had the Shell recommended price and the
 15 Shell maximum price?
 16 A. That's correct.
 17 Q. That's correct. Now, the Shell recommended price was
 18 the effective minimum price, wasn't it?
 19 A. No, that's not the case. We made a recommendation on
 20 price that enabled the retailer to meet his margin, and
 21 we had a maximum price over which the retailer was not
 22 free to go over. He could go to any point up to the
 23 maximum.
 24 Q. Well, now, could you take annex 9, please, and go to
 25 tab 15. {D9/15}. You should have there an email to you

1 from Bernie Streeter dated 9 January 2002. So that we
 2 have the right tab.
 3 A. Yes, that's correct, yes.
 4 Q. What I would like to do is to go to the first email in
 5 the string, which is the one on the second page, and
 6 this starts at the first holepunch, and it's an email
 7 from you dated 13 December 2001. Could you read the
 8 email in its entirety, please.
 9 (Pause)
 10 A. Yes.
 11 Q. Now, in the email there is a paragraph beginning "if
 12 poss", do you have that?
 13 A. Yes.
 14 Q. In the second line you refer to "min and max retailers"?
 15 A. Yes.
 16 Q. So that, does it not, indicates that your view at the
 17 time was that there were two prices, there was the
 18 minimum price and a maximum price?
 19 A. It's unfortunate terminology, but we were all absolutely
 20 clear that we gave retailers a recommended and
 21 a maximum, they could price at any point up to the
 22 maximum, they didn't have to go with retail or actually
 23 the maximum, they could go any point up to the maximum,
 24 we were absolutely clear on that.
 25 Q. If it's so unfortunate, why did you use that rather

1 strange abbreviation, "min"?
 2 A. The reason that "min" is appearing is that in our minds
 3 as category managers, we knew that the minimum price the
 4 retailer had to charge to get his margin was the
 5 recommended retail price.
 6 THE CHAIRMAN: Could you just explain that a bit more fully,
 7 how the recommended price and the margin worked?
 8 A. We gave the retailers a recommended retail price, and
 9 that was around the margin that we had promised them on
 10 that category. They may choose not to reach their
 11 target margin on the category, for the reasons that
 12 David Moss talked about earlier, or they may choose to
 13 price above the recommended retail price and actually
 14 make themselves some extra margin. But we had promised
 15 them in the retail agreement that that would be the
 16 target margin on the category.
 17 THE CHAIRMAN: What's the significance of the target margin?
 18 A. Their earnings from the sales within that category are
 19 based on it.
 20 MR LASOK: I still don't quite understand why you are using
 21 the abbreviation "min". Isn't it nothing other than the
 22 minimum price that it was accepted would be charged at
 23 the petrol station?
 24 A. It's simply not the case. Retailers could price at any
 25 point up to the max, we were all very clear on that.

1 DR SCOTT: In your statement at 8.5 you explain this:
 2 "Contractors could choose to set the prices lower
 3 than the RRP but they would clearly achieve lower
 4 margins"?
 5 A. Yes.
 6 DR SCOTT: As we heard from Mr Moss, if their margins went
 7 too low, Shell then had to pick up the gap, so that
 8 there was a concern, as I understand it, from Shell's
 9 point of view, that those margins didn't fall too far
 10 otherwise you ended up picking up the ...
 11 A. There is that, but also you wouldn't want unhappy
 12 retailers that weren't making adequate income from
 13 running their sites because clearly you would then be
 14 suffering turnover issues so it's not in anybody's
 15 interests for the retailers not to make money.
 16 DR SCOTT: Yes, we have heard from elsewhere the importance
 17 of the relationships running through this whole area, to
 18 ensure that people didn't unfortunately price too low,
 19 their margins fall and then they became unhappy, whether
 20 as it flowed through from the manufacturers to Shell and
 21 then down to the contractors, those relationships
 22 presumably were similar in terms of guarding margins?
 23 A. I wasn't party to the discussion, I am sorry, I am not
 24 sure I understand, but we were concerned that our
 25 retailers made an adequate amount of money from running

1 our sites, that was our primary concern.

2 **THE CHAIRMAN:** As far as the cost of the tobacco products,

3 they were all receiving the cigarettes at the same

4 price, which was the price negotiated by Shell with the

5 manufacturers; is that right?

6 **A.** Actually they bought all of their products through

7 Palmer & Harvey, a wholesaler who distributes most of

8 the tobacco in the UK, so the retailers bought directly

9 from Palmer & Harvey.

10 **THE CHAIRMAN:** But the price they paid Palmer & Harvey for

11 the cigarettes was the same price for everybody, all the

12 contractors?

13 **A.** All of our contractors paid the same price, yes, through

14 Palmer & Harvey.

15 **THE CHAIRMAN:** If they had consistently priced substantially

16 below the RRP, and for that reason they missed their

17 target margins, would Shell then boost up their income

18 to the minimum amount that they had been promised if it

19 was their fault in that way?

20 **A.** I am not quite sure what would have happened. Sorry,

21 it's probably a question for operations, I am not

22 familiar enough with the contract between us and the

23 retailer but it wouldn't have got anything more than --

24 there was a 70 per cent floor. I don't -- I am not

25 aware of it ever having happened.

1 **THE CHAIRMAN:** Yes. Sorry, Mr Lasok.

2 **MR LASOK:** You can put away annex 9. Could you turn to

3 annex 19, please, tab 33. {D19/33}. This is a letter

4 to you dated 3 September. Do you have it?

5 **A.** I have, yes.

6 **Q.** If you turn to the second page, there is a heading just

7 by the first holepunch which says "Richmond Kingsize",

8 and can you just read the paragraph or the two

9 paragraphs that follow, please.

10 (Pause)

11 If we look at the first of those paragraphs under

12 the heading, it refers to a move of Richmond Kingsize

13 from 3.64 and 3.65 to 3.70 and 3.71. Do you remember

14 what those prices were?

15 **A.** Could you rephrase that question? I am not sure

16 I understand.

17 **Q.** I am terribly sorry, it's just obscure. I'll put it to

18 you another way. The 3.64 and the 3.65 were the then

19 applicable Shell recommended price and the Shell maximum

20 price, and the 3.70 and the 3.71 were the new Shell

21 recommended and maximum prices that it was agreed

22 Richmond would go to.

23 **A.** The 3.64 and 3.65 may well have been in the price file

24 which was the recommendation and the max prices that we

25 sent to sites for them to decide how to price their

1 tobacco. There is then reference to 3.70 and 3.71,

2 which was a recommendation from the manufacturer for us

3 to put into the price file as our new recommendation to

4 the retailers for their recommended and maximum prices.

5 **Q.** I am just focusing for a moment on what these prices

6 refer to: the Shell recommended and the Shell maximum.

7 I think you have agreed that the 3.70 and the 3.71 were

8 to be Shell recommended and Shell maximum prices?

9 **A.** I am not saying that, no.

10 **Q.** What do you --

11 **A.** I'm saying the manufacturer, who has sent me this

12 letter, is saying that in a meeting that they -- that

13 the prices would move to 3.70 and 3.71, I haven't said

14 that.

15 **Q.** No, no, what I am putting to you, and I thought that you

16 had agreed with me, was that the 3.70 and the 3.71 refer

17 respectively to what was to be the Shell recommended and

18 the Shell maximum price, and I expressly said "to be",

19 without stating, putting to you -- at this stage at any

20 rate -- that it was something that had been agreed or

21 had been recommended, it was just what was envisaged.

22 I'm focusing now on the 3.70 was the Shell recommended,

23 3.71 was the Shell maximum.

24 **A.** This is what the manufacturer was proposing to me.

25 **Q.** Okay, we will come back to that later, in any event,

1 because then in the next sentence, the one beginning "it

2 was mentioned", the writer says that the natural price

3 may move to a greater minimum and maximum differential,

4 and I am now going to put to you that that is also

5 a reference to the Shell recommended price and the Shell

6 maximum price, and what she's putting to you in the

7 letter is the fact that it had been mentioned that the

8 spread between the minimum and the maximum price might

9 widen; is that correct?

10 **A.** (Pause). I am not sure that that is what she meant,

11 I can't recall.

12 **Q.** Do you recall what you thought it meant at the time?

13 **A.** (Pause). It may also have meant that the difference

14 between the manufacturer's recommended retail and

15 Shell's recommended retail would change and I am unsure

16 which, given the passage of time.

17 **Q.** Why would there be a reference to a greater minimum and

18 greater maximum differential and no reference to RRP?

19 **A.** I am not sure. I am not the author of the note.

20 **Q.** Did you write back and say that you didn't understand

21 what was being said here?

22 **A.** I am not sure I did.

23 **Q.** Did you write back saying that you disagreed with what

24 was stated here?

25 **A.** No, I often didn't write back to suppliers, I quite

1 often had meetings and then took the actions that I felt
 2 needed taking, and then basically sent them the price
 3 file which held the output of my decisions following
 4 meetings.
 5 **Q.** Could you turn to tab 36, please. This is a letter
 6 dated 4 October 2001. It's got some handwritten
 7 annotations on the right-hand side. Do you know who
 8 made those annotations?
 9 **A.** Yes, that's my writing.
 10 **Q.** Right. If we look at the paragraph under the heading
 11 "Price File", I'll just read it out, it says:
 12 "I pointed out that the price file I received by
 13 email the previous week contained what appeared to be
 14 errors on all manufacturers' prices. I left a revised
 15 copy of what I believed the prices were intended to be.
 16 It was agreed that you would look into this and re-send
 17 the price file to me once the corrections have been
 18 made. I have attached a revised required differential
 19 sheet. This is to be used in conjunction with the
 20 Imperial Tobacco business plan."
 21 You have written alongside that "action", so you
 22 were going to correct the price file in accordance with
 23 what was agreed?
 24 **A.** "Action" and some of the other terms there are notes to
 25 myself, having received the meeting notes, to do some

1 work on the category. So "action", as with all of these
 2 recommendations made by manufacturers, doesn't
 3 necessarily mean that I am going to do it, but it means
 4 I am going to do some work on the category, I'll be
 5 taking other manufacturers' recommendations, I'll be
 6 looking at what margin Shell were going to make as
 7 a result of making changes to prices and I might well be
 8 looking at what the competition were doing with price as
 9 well. All part of the decision-making process when we
 10 came to look at price.
 11 **Q.** If we turn to the next page --
 12 **THE CHAIRMAN:** Well, wait a minute. There we have two
 13 things saying "action", one says "look", and then over
 14 at page 298 there are five of them that say "follow up",
 15 and then one of them that says "check". So "action"
 16 does seem to mean something different from "follow up",
 17 "look" or "check" So what did you understand "action" to
 18 mean rather than "follow up" or "check"?
 19 **A.** "Action" is a note to myself to get hold of the price
 20 file and do some work on prices.
 21 **THE CHAIRMAN:** Well, what would "follow up" mean, then?
 22 **A.** Again it's a note to myself to check some things, so
 23 with the Small Case Filter I am having a look at the
 24 pricing and the amount of bonus being paid there.
 25 I have to say I don't particularly recall the difference

1 between the notes to myself, but they were notes for me
 2 following a meeting, having received minutes back from
 3 a supplier. For me it's really to note to get on and do
 4 something around this category. I had a number of them
 5 and it was to remind myself I needed to go and have
 6 a look at some work relating to cat 2 category.
 7 **MR LASOK:** Turn to the second page of the letter. At this
 8 stage I want to have a look at the heading
 9 "Richmond Kingsize". Could you just read the paragraph
 10 at the bottom of the page under that heading, please.
 11 **A.** Is it page 298?
 12 **Q.** It's stamped "298" in the bottom left-hand corner.
 13 **A.** Thank you. (Pause).
 14 **Q.** If you refer --
 15 **THE CHAIRMAN:** Sorry, I don't have the page.
 16 **DR SCOTT:** The pages in our copy appear to be oddly
 17 numbered, in that we start with page 295, page 296 is
 18 a price requirement sheet, page 298 appears to be the
 19 second page of the letter, and page 297 appears to be
 20 the signature page of the letter.
 21 **MR LASOK:** Yes. I had thought it was only my bundle that
 22 was weird, and I had assumed that I was the only person
 23 being victimised in this way. I have exactly the same
 24 phenomenon, but I was working on the clearly unfounded
 25 proposition that sense had percolated through to the

1 other versions of the bundle. It's quite right,
 2 certainly in my copy the pages are in the wrong order,
 3 with the second page headed "Price Requirements" not
 4 being the second page of the letter, so we are looking
 5 at physically it's the third page, but it's the one
 6 stamped 298.
 7 Now, this particular paragraph under the heading
 8 "Richmond Kingsize" follows on from the paragraph headed
 9 "Richmond Kingsize" that we have in tab 33. You may
 10 want to look back at that to refresh your memory, if you
 11 want. So in tab 33 we have ITL writing that there was
 12 an agreement at a meeting that Richmond Kingsize would
 13 move to between 3.70 and 3.71.
 14 Then if we look at tab 36, which is your annotated
 15 version of the follow-up letter, ITL points out at the
 16 end of the paragraph at the bottom of page 298 that the
 17 natural price should now be 3.70 and 3.71.
 18 Your marginal note is "check". Why wasn't it
 19 "nonsense"?
 20 **A.** It was one of the many categories that I was managing,
 21 so I wrote notes to myself to remind myself to go and do
 22 something. Price was a tiny bit of the workload
 23 relating to category management. And I no doubt will
 24 have gone off to have a look at the margin on the
 25 category relating to those products, to have a look and

1 see whether the recommendation fits in with what we
 2 wanted to do on the category. And I believe I will have
 3 gone off and done that, and actually I didn't change the
 4 price file because I made the decision that we would
 5 leave it where it was.
 6 **Q.** So as I understand it, you get a letter from Imperial
 7 saying that you have reached an agreement with Imperial
 8 as to pricing, and you don't write back to Imperial and
 9 say "You have got it wrong, there has been
 10 a misunderstanding", you don't write back explaining
 11 that you understand other details of the paragraph. You
 12 get a follow-up letter which clearly refers to the
 13 passage in the earlier letter which refers to
 14 an agreement, and you still don't write back and say
 15 "There has been some confusion". Am I right?
 16 **A.** I don't write back. I don't run around after suppliers
 17 letting them know what I am up to unless I have to,
 18 which is why, when I made a change, I sent them the
 19 price file, they can have a look at what I've decided to
 20 do.
 21 **Q.** Is it fair to say that you had so many balls in the air
 22 that you, on occasion, took your eye off one of them?
 23 **A.** That's not the case, I had to prioritise very clearly,
 24 and given that our retailers determined their own
 25 prices, and I was merely recommending to them, I was

1 more interested in things like planograms and other
 2 areas relating to the category than I was on price and
 3 informing suppliers of what I was doing.
 4 **THE CHAIRMAN:** But this was something different, this was
 5 them saying to you that you have accepted payments from
 6 them supporting particular prices and that they were
 7 going to pay you more money in relation to a price, and
 8 therefore those are the prices they are expecting to
 9 see. So it's slightly different from other instances,
 10 in that you clearly -- they are telling you that they
 11 have received --
 12 **A.** I think I've received --
 13 **MS ROSE:** I don't think that's quite right, I don't think
 14 they are saying they are going to pay more money. If
 15 you look at tab 36, what they are saying is that the
 16 promotion has come to an end.
 17 **THE CHAIRMAN:** But it says "I will arrange for the next
 18 payment to be made on 1 August through to 30 September".
 19 **MS ROSE:** That's right, because that's coming to the end.
 20 **THE CHAIRMAN:** Yes.
 21 **MS ROSE:** What they are saying is "Put the price up because
 22 we are not supporting it any more."
 23 **DR SCOTT:** So this is the payment for the prices having been
 24 3.64 and 3.65.
 25 **MS ROSE:** Exactly, and now they are saying "You can put them

1 up because we are not going to support the lower price
 2 any more".
 3 **DR SCOTT:** So that in terms of what was agreed, 3.64 and
 4 3.65 in tab 33 had been agreed, there had been
 5 a payment; now that you appear to be agreeing that
 6 that's coming to an end, so you are not going to get
 7 further support, what you are saying is that whilst they
 8 are suggesting the implication of that is a move to 3.70
 9 and 3.71, you are then going to take your own decision.
 10 Have I summarised that correctly.
 11 **A.** You have summarised it beautifully, thank you very much
 12 and if you look at the price part, you will see that
 13 I did go to a different price point. I haven't accepted
 14 3.70 and 3.71 at that point.
 15 **THE CHAIRMAN:** Except that in page 124 at tab 3, the
 16 reference to the agreement is not to an agreement at the
 17 meeting that it would be at 3.64 and 3.65, but that it
 18 would move from that to 3.70 to 3.71. So the agreement
 19 that is being recorded at tab 33 is not the agreement
 20 relating to the acceptance of the tactical promotion and
 21 the reduction, but the agreement relating to the end of
 22 the tactical promotion and what would happen to the
 23 prices then.
 24 **A.** Yes, that's correct.
 25 **MR SUMMERS:** I wonder if in fact we are all omitting to

1 notice the letters "TBC" in brackets at the end of that
 2 sentence.
 3 **MR LASOK:** Was that a reference to the dates or the price?
 4 **A.** I think it's probably the dates, but ... asking me to
 5 confirm.
 6 **Q.** Because the next paragraph asks for confirmation about
 7 the date.
 8 **MS ROSE:** Madam, I think we do need to read the next
 9 sentence which says:
 10 "It was mentioned that the natural price may move to
 11 a greater minimum and maximum differential. If this is
 12 the case, can you please ensure that the differentials
 13 reflect those of Dorchester and are no more expensive
 14 than Dorchester in these tiers."
 15 So it's clearly not the case that there is
 16 an agreement about 3.70 or 3.71, there is a recognition
 17 they may be different, and then a plea for a parity with
 18 Dorchester which in the event as we have seen was not
 19 acceded to.
 20 **MR LASOK:** Have you started your re-examination?
 21 **MS ROSE:** I am sorry, I am simply trying to ascertain that
 22 the documents are accurately put to the witness.
 23 **MR SUMMERS:** Forgive me, according to tab 36, the actual
 24 price change was 1 October, which was neither of the
 25 dates.

1 **MR LASOK:** Ms Parker, going back to the letter at tab 33, it
 2 says:
 3 "It was agreed at the meeting that Richmond Kingsize
 4 would move from 3.64, 3.65 to ... 3.70 and 3.71 either
 5 on 26 September or 4 October."
 6 And the writer goes on to say:
 7 "It was mentioned that the natural price may move to
 8 a greater minimum and maximum differential."
 9 So isn't the position that there was an agreement as
 10 to the move on one of two dates, but it had simply been
 11 mentioned that Shell might move to a greater minimum or
 12 maximum differential?
 13 **A.** I always avoided agreeing prices in meetings because
 14 I like time to go and look at the other factors so it
 15 would be highly unlikely for me to have agreed any
 16 prices in the meeting without going through looking at
 17 other things.
 18 **Q.** Why didn't you write back and say "I am terribly sorry,
 19 you have misunderstood what I said at the meeting, there
 20 wasn't an agreement"?
 21 **A.** Because the way that I operate, I received the minutes
 22 from the suppliers, I would write on the minutes and go
 23 away and determine what I was going to do, and then
 24 I sometimes made phone calls and sometimes didn't make
 25 phone calls but I would issue the prices which contained

1 our recommended prices to retailers, and that's where
 2 suppliers would learn about what I had done. That's the
 3 way I operated.
 4 **MS ROSE:** Madam, can I suggest this might be a convenient
 5 moment?
 6 **THE CHAIRMAN:** Yes, thank you very much. We will come back
 7 at ten past 2.
 8 May I just say to you, Ms Parker, that because you
 9 are in the middle of giving your evidence you mustn't
 10 discuss the case or your evidence with anyone in your
 11 team or anybody else at all over the lunch break.
 12 It occurs to me, Mr Howard, that I didn't turn to
 13 you and ask you if you had any questions to ask Mr Moss
 14 before I released him.
 15 **MR HOWARD:** I did observe that, yes.
 16 **THE CHAIRMAN:** But I was trusting in you to jump up
 17 instantaneously to correct my error, if you wished to
 18 ask him any questions.
 19 **MR HOWARD:** Yes, my springs are ready loaded, so to speak,
 20 but I decided I did not wish to ask Mr Moss any
 21 questions.
 22 **THE CHAIRMAN:** Well, I apologise for not having asked you.
 23 **MR HOWARD:** No apologies are required and whenever required,
 24 I will jump up and make a nuisance of myself.
 25 **THE CHAIRMAN:** Excellent. Thank you very much.

1 (1.12 pm)
 2 (The short adjournment)
 3 (2.10 pm)
 4 **MR LASOK:** Ms Parker, have you got annex 19 in front of you?
 5 **A.** Yes, I have.
 6 **Q.** Could you go to tab 49, please. {D19/49}. This is
 7 a letter dated 9 July 2002 to Mr Barry. Would you have
 8 seen this letter at the time?
 9 **A.** I don't recall ever having seen this letter, no.
 10 **Q.** It may well be that you can't help us very much about
 11 it, but you will see that the first heading concerns
 12 Drum, and in the second paragraph it refers to, in the
 13 first line "the RRP and maximum tiers."
 14 Now, it appears that ITL considered that the Shell
 15 pricing was tiered pricing; that's to say one price or
 16 another price. Wasn't that the case?
 17 **A.** I don't believe it was the case. I think suppliers were
 18 well aware that we were able to recommend to the
 19 retailers up to the maximum and we discussed it with all
 20 suppliers when we started the RBA contract and spent
 21 time taking each supplier through how we would now be
 22 working, on pricing but also on the change of
 23 distribution and everything else, so it's difficult to
 24 understand why they might not have grasped that, but
 25 certainly I would have understood that they would have

1 understood how it worked.
 2 **Q.** You see, we have a lot of ITL documents obviously that
 3 you wouldn't have seen that indicate that ITL thought
 4 that Shell was using tiered pricing, and you had two
 5 tiers?
 6 **A.** Certainly we explained to them that in actual fact we
 7 were only able to recommend to sites, we talked about --
 8 **THE CHAIRMAN:** When you say "we" explained to them, are you
 9 talking about meetings that you were actually personally
 10 at, or you just know that Shell took steps to explain to
 11 them?
 12 **A.** I know that each category manager explained to the
 13 suppliers that they were working with as we changed our
 14 operating platform we undertook to talk to each of our
 15 suppliers about the changes, and I know that we did it
 16 because not only were we changing what we could and
 17 couldn't do, we were changing the way that they were
 18 going to provide us with product, so we couldn't
 19 function had we not had the conversation, so we were
 20 going to change all our distribution and go through
 21 Palmer & Harvey, they would no longer be delivering
 22 directly to us. So we had to have that conversation
 23 about these big changes within our organisation.
 24 **MR LASOK:** Because if you would move to the next tab,
 25 tab 50, {D19/50}, this is an email from Breda Hughes to

1 Daryl Barry, could you just read that, please, to
 2 yourself.
 3 (Pause)
 4 Would you have seen that one before?
 5 A. I've not seen that before, no.
 6 Q. Because in this email ITL indicates that their
 7 understanding is that you have two price tiers, you have
 8 the Shell RRP -- I am looking now at the second
 9 paragraph beginning with the words "The Shell RRP" --
 10 price tier contains prices that range from 10p to 19p
 11 above the manufacturers' RRPs. Then you have the second
 12 price tier, which is the maximum Shell price tier, and
 13 that contains prices that range from 13p to 24p over the
 14 RRPs.
 15 So that was ITL's understanding of the position.
 16 What we can't find in the files is any communication
 17 from Shell which corrects ITL's misunderstanding of the
 18 position, if it was a misunderstanding. Do you have any
 19 explanation for that?
 20 A. Certainly in the time that I was managing the category,
 21 as we have already talked about, I was inclined to
 22 either have a brief conversation on the telephone or
 23 simply not communicate, if I was doing a particular
 24 thing, to suppliers, because we have already explained
 25 how we work and everybody understands that Shell is

1 unable to have direct impact on price actually on shelf
 2 any longer. So we had done all that, and there was no
 3 necessity to continually repeat it, because that's how
 4 we operated.
 5 Q. If you go to the next tab, 51 -- no, I don't think we
 6 need to go to 51. Go to 55. The better one, actually,
 7 for an internal ITL document is 19/37. {19/37}
 8 A. Is that 37 of annex 19?
 9 Q. 19. If you go back to number 37, you should have
 10 a national accounts bulletin from ITL concerning Shell,
 11 and if you look at round about where the first holepunch
 12 is you have on the left-hand side an account profile,
 13 and if you look to the right you have pricing, and it
 14 says that there are two tiers, there is the Shell retail
 15 price and the maximum price. I don't expect you to,
 16 since you never saw that internal ITL document, comment
 17 specifically on that one, but it's just another
 18 indication, as we have seen from the communications
 19 between Shell and ITL that ITL's understanding was that
 20 Shell operated a two tier pricing system, and as I said,
 21 it was never corrected so far as we know, and you are
 22 saying that you never would have corrected that
 23 misunderstanding?
 24 A. What I am saying is that, having laid out for them how
 25 we work, I wouldn't have expected in day-to-day contact

1 to continually remind them of that.
 2 Q. Could we look at tab 60, please. {D19/60}. This is
 3 a letter dated 15 July 2003 to Mr Barry. Are we on the
 4 right page on that one? I just mention that so that you
 5 know which document it is.
 6 A. I am sorry, yes, 188 at the bottom right-hand corner?
 7 Q. Yes, that's fine. Could you just read that to yourself,
 8 please.
 9 (Pause)
 10 This is a letter in which ITL raises with Shell the
 11 pricing at the Shell Select sites which had been called
 12 on by the ITL salesforce between 1 and 14 July. Would
 13 you have seen this letter, or similar letters?
 14 A. No, I've not seen the letter or similar letters, no.
 15 Q. In this letter, ITL, in short, points out that the
 16 majority -- I am looking at the second line -- of brands
 17 had shelf prices within the Shell recommended and
 18 maximum prices. But they then refer to Richmond and
 19 point out that they had shelf prices above both the
 20 Shell RRP and the maximum prices. ITL then states what
 21 the prices as set out in the price file ought to be, and
 22 there are two prices. We have the Shell RRP and we have
 23 the maximum.
 24 Later in the matter, they refer to a different
 25 aspect, which is sites selling above the Shell RRP and

1 maximum prices. I don't think we have the report that
 2 was enclosed. But this is a situation in which, again,
 3 we see ITL's understanding that, according to the price
 4 file from Shell, there should be two prices, either the
 5 Shell RRP or the Shell maximum.
 6 Now, I put it to you that that was a correct
 7 understanding of the position?
 8 A. (Pause). Well, in actual fact there is no mention of
 9 tiers here, and it is Breda, Breda is talking about the
 10 Shell recommended and the Shell max, as I would have
 11 expected.
 12 Q. But she says, "The Shell price file states the prices
 13 should be", and then she gives the Shell RRP and the
 14 Shell maximum?
 15 A. Imperial Tobacco were well aware that the retailers
 16 could price up to the max.
 17 Q. Why, then, were they complaining at all or raising with
 18 you at all the fact that there were, for example, sites
 19 pricing Richmond Kingsize 20s at 3.96 and 4.03, because
 20 those were below the max?
 21 A. The sites are quite entitled to price how they like, but
 22 actually they are pricing between the Shell recommended
 23 and the maximum, as I would have expected perhaps sites
 24 might elect to do, having given the information that we
 25 have provided them with in terms of recommendation.

1 Q. I am putting to you that ITL's understanding was that
 2 was not the case, ITL's understanding was that, in
 3 accordance with the Shell price file, the prices should
 4 be either at the Shell RRP or the maximum, and that's
 5 why they wrote the letter?
 6 A. Certainly if that was their understanding it wasn't the
 7 information that we gave to them about how we run the
 8 RBA.
 9 Q. We see no letter correcting this impression that ITL
 10 has, no email correcting it, do we?
 11 A. I am sorry, could you -- I don't understand the
 12 question. Is it a specific question?
 13 Q. The date of this letter is 15 July 2003, and thus far we
 14 have seen over a lengthy period of time ITL
 15 communicating to Shell its understanding that the prices
 16 at the sites will be either at the Shell RRP or at the
 17 Shell maximum, and you say that that was not the case,
 18 and that ITL had been told this in clear terms. But in
 19 the file we do not have one single letter or one single
 20 email in which Shell corrects ITL's impression. Can you
 21 explain that?
 22 A. My explanation will be around the fact that price was of
 23 very little importance to us as category managers, we
 24 spent very little time on price relating to the tobacco
 25 category versus all the other things we really cared

1 about, which is round getting availability on site, how
 2 it should be, because availability drives sales. So any
 3 communications and meetings and any emails will have
 4 a bias around the things that matter to us. So that
 5 would be part of my answer.
 6 The second part of my answer would be, as I've
 7 already said, we have already laid out how we work with
 8 our retailers and I do not have time to constantly
 9 repeat to suppliers how we worked on pricing, they knew
 10 how we worked on pricing. If they were choosing to
 11 ignore that, then I am not going to waste my time
 12 repeating that.
 13 Q. So your explanation is that they knew very well that
 14 their interpretation was wrong but they kept on writing
 15 to you referring to price tiers; that's your
 16 explanation?
 17 A. No, it's not my explanation, I did not say they kept
 18 writing to me in tiers.
 19 Q. Writing to Shell, I should say?
 20 A. Or writing to Shell in tiers. I have not seen this
 21 before and certainly my memory of what happened there
 22 wasn't that I was getting lots of emails or letters or
 23 there was conversations going on about tiers, it's the
 24 first time I've seen it or had to discuss it.
 25 Q. It's correct that you yourself had started the ball

1 rolling with the earlier email in which you had referred
 2 to minimum and maximum prices?
 3 A. No, as I explained earlier, the reason for the reference
 4 to minimums that we as category managers understood that
 5 the minimum price that the retailers had to charge in
 6 order to reach their target margins was the RRP.
 7 Q. I am going to move on now to another topic.
 8 DR SCOTT: Sorry, Mr Lasok, before you move on.
 9 Could you turn in your witness statement to
 10 paragraph 7.3?
 11 A. Could somebody let me know what tab? I am at my second
 12 statement.
 13 MR LASOK: Core bundle, volume 11, at tab 118, I think.
 14 {C11/118/163}.
 15 A. Thank you.
 16 DR SCOTT: This is your first witness statement, it's
 17 tab 118, page 163, paragraph 7.3. What you said in your
 18 evidence just now was that pricing came some way down in
 19 your list of priorities. What you are saying here is
 20 that pricing was still crucial at certain times in the
 21 here, the importance of getting pricing right after
 22 Budgets, the losses incurred could wipe out a very large
 23 proportion of the margin on the products given that
 24 margins on tobacco were always very thin.
 25 Now, I think we have seen in the evidence of

1 Mr Barry that efforts were going on to drive those
 2 margins up, and as we understand it, the margin wider in
 3 Shell than almost anywhere else, so those margins seem
 4 to be important here, and indeed in other parts of the
 5 evidence they come up quite a lot.
 6 Here margins and prices do seem to be really quite
 7 important to you?
 8 A. Would you mind if I just spent a few minutes re-reading
 9 it, and then I'll respond if I may?
 10 DR SCOTT: Yes, of course.
 11 A. Thank you. (Pause). I think it would be useful if
 12 I just set the context of the environment that we were
 13 working in so that you can understand this pressure of
 14 price or not, as it were. I am aware of confidentiality
 15 around numbers but given this is ten or 12 years ago,
 16 just to give you a perspective in terms of the
 17 importance of price. (Pause). Price was less important
 18 to us than something like planograms. Planogram
 19 compliance ensured that we had availability in site, and
 20 that's how you drive sales. At a Budget, there is all
 21 sorts of changes around taxation and it's quite easy to
 22 get the recommended retail prices wrong at that time,
 23 because there is a lot of schemes, products to change.
 24 So there were efforts around that time to make sure
 25 that we were accurate in terms of the prices that we

1 recommended to site. But I would still say that in
 2 terms of the -- if I was having to say what was
 3 important and what wasn't, particularly on tobacco, it
 4 was around getting the right products to the site and
 5 having a product available. Customers of tobacco were
 6 particularly loyal to their brand, and if the brand
 7 isn't available on shelf, then you lose that customer.
 8 That happens more so in tobacco than any other category,
 9 and that's why I talk about the planograms being the
 10 most important thing. However, I also talked earlier
 11 about we don't want our retailers to lose money, so we
 12 were very careful about the pricing around
 13 manufacturers' price increases and around Budgets, so
 14 I understand there is a sort of inconsistency there,
 15 category management is all about those things that drive
 16 the category, ie price and product and promotion. But
 17 in the case of tobacco, the most important things are
 18 about planogram compliance, and we spend a lot of time
 19 on that, versus discussions about price of which I have
 20 very few in comparison.

21 I hope that sets a bit of clarity.
 22 **DR SCOTT:** Yes. We understand, if you go to the previous
 23 page, 7.2, that selling tobacco in petrol stations is
 24 different from other retailing as customers are willing
 25 to pay higher prices for tobacco because often there are

1 few convenient alternatives nearby. You then go into
 2 should there be a study which shall consider whether the
 3 tobacco manufacturers run some pilots to assess
 4 empirically how much price elasticity there was, and as
 5 we understand it, you saw tobacco overall as pretty
 6 inelastic, which is why you were able to charge the
 7 margins you were, and in the evidence of Mr Barry, who
 8 we may not hear, he has different sorts of customer that
 9 he sees, and presumably you knew about the different
 10 sorts of customers, those who are brand loyal and those
 11 who move in various ways.

12 **A.** I haven't seen Daryl's evidence, I have to say, but
 13 certainly we developed our thinking in terms of
 14 segmenting customers, and that was over time, as we
 15 became more experienced as a team, but I've not seen his
 16 evidence so it's difficult for me to comment on that.

17 **DR SCOTT:** Would you understand from your understanding of
 18 the marketplace that there would be some customers who
 19 would be sensitive to pricing differentials between
 20 brands?

21 **A.** I certainly think customers would be aware if they --
 22 they get to the thresholds where they think "That's too
 23 much to pay for that and as a result I am not going to
 24 buy that from there again", I am not sure they are aware
 25 between brands. Certainly at the time that I was

1 managing the category, there was a feeling that
 2 customers were very loyal to one brand but they had
 3 a secondary brand they would go to if their preferred
 4 brand -- whereas in confectionery, for instance,
 5 a consumer has a five or six in their portfolio, so if
 6 your KitKat isn't there you are quite happy to eat
 7 Maltesers. But with tobacco, the cigarette customers,
 8 it's much more a part of who they are, as it were, and
 9 that was the thinking at the time, although I understand
 10 Daryl will have developed that thinking, but that was
 11 this high sense of loyalty to a particular brand that
 12 makes them less sensitive to price. But equally, the
 13 reason we had the max is that we didn't want customers
 14 to feel "Oh, I had to pay a massive amount for my packet
 15 of cigarettes". So we were concerned about price to the
 16 extent that we didn't wish them to come to Shell and
 17 think "We are being ripped off" because we didn't want
 18 that overall impact on our brand at a time when actually
 19 we were trying to be very competitive on price on fuel.

20 **DR SCOTT:** Thank you.
 21 **THE CHAIRMAN:** With the differences between the RRP and the
 22 maximum here, putting on one side whether it's actually
 23 a minimum or a particular tier, that's quite a narrow 4p
 24 difference, and then we saw in an earlier email a 1p
 25 difference being agreed or suggested or proposed or

1 whatever, whereas when we went earlier to an actual
 2 price file, the difference between the recommended and
 3 the maximum was 15p, 20p.

4 **A.** Yes.
 5 **THE CHAIRMAN:** What was the thinking as to how great
 6 a differential there should be between the RRP and the
 7 maximum?

8 **A.** As an overall shop, I gave -- this is overall shops,
 9 tobacco is slightly different because you are working
 10 with much narrower margins so sometimes we only have 1p
 11 or 2p to sort of play with. But the overall guidance on
 12 the store, we tried to have a 10 or 15 per cent
 13 difference, because convenience stores generally, in the
 14 sort of competitive set, were 10 per cent above the kind
 15 of supermarkets, and as the convenience stores can
 16 charge a premium, the feeling was it was somewhere
 17 between 10 and 15 per cent above, and so beyond that
 18 point you felt you would be insult pricing.

19 So that was a kind of guide but in tobacco we
 20 weren't always able to achieve that. So occasionally
 21 sometimes you do see a 1p difference in the knowledge
 22 that the retailer could charge 10p less than the
 23 recommended retail if they wished to do so. That was
 24 a very general guidance based on how we were trying to
 25 position ourselves as a convenience store within our

1 market.

2 **THE CHAIRMAN:** Yes, thank you. Yes, Mr Lasok.

3 **MR LASOK:** I would like to pass to another topic now. Shell

4 have accepted that under the trading agreements that it

5 had with the manufacturers, it had the ability to price

6 tobacco products at a particular level, subject to

7 linked products needing to remain within certain

8 competitive prices, price ranges, from one another, or

9 at parity, in order to receive the bonus payments, and

10 Shell has also said that in order to receive the bonus

11 payable, Shell would price any linked tobacco product at

12 a certain level relative to the price of that product.

13 **A.** Sorry, could you refer me to the document we are talking

14 about, first of all? I am not sure which tab we are on

15 or where we are.

16 **Q.** It's looks to me as though it's in the ITL appeal, the

17 Shell annexes, 18, and it's tab 7. {D18/7}

18 **A.** So I'm in annex 18?

19 **Q.** It's not the numbered annex 18, it's called file 18, ITL

20 appeal annexes, Shell.

21 **MS ROSE:** I am sorry, I don't have a copy of that, if

22 somebody could rustle one up.

23 **MR LASOK:** It's Shell's reply to the SO.

24 **THE CHAIRMAN:** Do you not have a copy? Mr Howard, does your

25 team have a spare copy for Ms Rose to look at?

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1 **MR LASOK:** There should be a document inside Shell's main

2 one and it says around about the first hole punch on the

3 first page, "Tobacco products: response to the OFT

4 statement of objections."

5 **A.** Has it a page number on it?

6 **Q.** 34. I am talking about the internal document pagination

7 at the bottom of the page. There is pagination at the

8 top of the page. If you look at the top of the page,

9 it's 86.

10 **A.** I have 49 open, page 49 top right-hand side.

11 **Q.** Could you turn to page 86, if you looking at the

12 pagination at the top. Could you read paragraphs 111 to

13 112, please.

14 (Pause)

15 You came on the scene several months after the first

16 trading agreement with ITL had been in operation; isn't

17 that so?

18 **A.** Yes, that's correct.

19 **Q.** But you were around when the second trading agreement

20 with ITL was signed. Did you participate in the

21 negotiation of it?

22 **A.** I don't recall or remember actually the negotiation

23 around it, but I must have been because I was the

24 category manager.

25 **Q.** Right. You can put that file away now, the one we were

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1 just looking at.

2 **A.** Then why have I been asked to read it?

3 **Q.** Because I have been directing your attention to what

4 Shell accepts the position to be or has accepted the

5 position to be, and it's in that context that I want to

6 ask you some questions concerning the operation of the

7 agreements with the manufacturer, that I thought that it

8 would be fair to tell you first what Shell had stated

9 the position to be.

10 So there isn't a question, it's just I am informing

11 you as to the background.

12 **A.** Thank you for that.

13 **Q.** Okay.

14 **MS ROSE:** Can I make it clear that it's not accepted that

15 that is an accurate formulation of what Shell has stated

16 the position to be, and that those paragraphs have been

17 taken out of their context in this document. So it's

18 difficult to see how it's relevant to the

19 cross-examination of this witness at all, but I just

20 want it on the record, it's not accepted that what has

21 just been said by Mr Lasok is an accurate representation

22 of Shell's position.

23 **THE CHAIRMAN:** Well, let's try and get towards an actual

24 question to the witness, and then we will decide whether

25 it's a fair question or not, and whether Ms Parker is

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1 able to answer it.

2 **MR LASOK:** So if you could put that away and go back to

3 annex 19, and to tab 40. {D19/40}

4 **DR SCOTT:** Sorry, was that 40 or 14?

5 **MR LASOK:** 40.

6 **DR SCOTT:** Thank you.

7 **MR LASOK:** You have there, hopefully at any rate, the

8 ITL/Shell agreement, it's called a business plan

9 investment, and it's dated 01/01/02 to 31/12/02. Do you

10 happen to know when it was agreed?

11 **A.** No, I don't remember that.

12 **Q.** Right. Do you remember anything at all about this

13 agreement?

14 **A.** Having prepared for today, then I remember the contents

15 of the agreement, but it wasn't a document I referred to

16 daily, in fact it was probably referred to annually when

17 we looked at what we had done at the end of the year.

18 **Q.** I put it to you that in this document Shell committed

19 itself to ensuring that the shelf prices at company

20 owned sites reflected the ITL products at a position

21 that was no worse than the relative price for other

22 similar products?

23 **A.** We had agreements and business plan documents with

24 almost every supplier that we dealt with, and I never

25 felt obliged to do everything in them, if anything. In

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1 fact, some of the agreements we had with suppliers we
 2 didn't do any of the things that were in them because
 3 they weren't in line with the strategy that we were
 4 following at the time.
 5 However, I recognise that sometimes some of the
 6 things that we wanted to do in own business plan on
 7 tobacco, for instance, would be in line with what the
 8 manufacturers were also planning, and therefore there
 9 were bonuses to be collected, but there are plenty of
 10 instances where you have a business agreement and you
 11 only elect to participate in parts of them, because your
 12 strategy is different or it changes throughout the year,
 13 or your priorities may change.
 14 So in having these agreements, we weren't
 15 necessarily feeling obligated, but you were aware that
 16 there were monies available for doing particular pieces
 17 of activity. We, for instance, had one agreement with
 18 McVities to run a variety of promotions but we decided
 19 that biscuits weren't an important product for us any
 20 longer and didn't run any of them and I collected no
 21 bonuses as an example of other instances where
 22 I wouldn't necessarily feel obligated to do what was in
 23 agreements.
 24 **Q.** But you would accept, would you, that if we see a Shell
 25 price file that complies with these parities and

1 differentials, we are seeing Shell complying with
 2 parities and differentials?
 3 **A.** Not necessarily. So we may well be pricing as
 4 manufacturers have recommended, having taken into
 5 account the margin that our retailers require in order
 6 to hit their targets.
 7 **Q.** So are you saying that the statement made by Shell some
 8 time ago that I pointed you to --
 9 **THE CHAIRMAN:** I am not sure that that really is a fair
 10 question to ask of this witness.
 11 **MR LASOK:** Okay.
 12 **THE CHAIRMAN:** You are saying, then, that you negotiated --
 13 or you don't remember but you say you must have been
 14 involved -- this arrangement in which you agreed that
 15 an annual payment of a certain amount would be made in
 16 return for you reflecting various differentials in your
 17 RRP's, and at the time you negotiated it and agreed to it
 18 you actually had no intention of complying with it in
 19 any meaningful sense at all?
 20 **A.** Well, it's negotiated because you know that sometimes
 21 you will be complying, because sometimes the price point
 22 which a manufacturer recommends may actually be the one
 23 you elect to go with when you looked at the margin that
 24 you might make, what competitors are doing and so forth.
 25 So the pot of money is available, so if your

1 strategy was in line, then there would be some monies to
 2 collect. In actual fact --
 3 **THE CHAIRMAN:** Presumably they are offering you some money
 4 to persuade you to do something that you wouldn't
 5 otherwise do. If you collect the money for doing what
 6 you were going to do, then why should they pay you that
 7 money, because you would have done that anyway?
 8 **A.** They are very interested in building a relationship with
 9 you as a retailer, so in actual fact I think -- I don't
 10 know if it was on this one or the previous investment,
 11 ITL did in fact pay [redacted] to us, we weren't
 12 complying, a lot of our prices weren't in line, because
 13 they were anxious to build a relationship with you, and
 14 so they had a budget to spend, and if they want to
 15 reward you for working more closely with them or, you
 16 know, getting out to meetings and getting on sites with
 17 you, it's all part of the process of relationship
 18 building, but you don't feel any obligation to do it,
 19 because you are quite happy to be without [redacted],
 20 it's nothing to us, it was incidental to us in the
 21 scheme of things. I didn't feel any obligation to do
 22 anything in any of the business plans, if it wasn't in
 23 line with our overall strategy to develop the category
 24 along the lines in which we were taking it.
 25 **DR SCOTT:** So we have to understand that you took

1 a different view to the view taken by Mr Moss of the
 2 approach of Shell employees to contractual obligations?
 3 You were quite happy to take money knowing that you
 4 hadn't complied with the contract; do I have that right?
 5 **A.** I wouldn't say it was done as overtly as that, because
 6 we did lots of other things, we worked closely with the
 7 manufacturer and put a lot of time into planograms, for
 8 instance, and discussing with them where we were going
 9 to take the business, and I suspect as a result of that
 10 Breda felt that, you know, we had a cohesive
 11 relationship and things were moving forward. So it
 12 certainly wasn't done as overtly as perhaps you may have
 13 articulated.
 14 But there were times when we didn't collect our
 15 bonuses and we didn't fight for them or anything because
 16 they were incidental in the bigger picture of hundreds
 17 of millions of pounds worth of turnover. There is
 18 instances where we didn't get the bonus. But I wasn't
 19 particularly bothered because I wasn't chasing it,
 20 particularly, I had other things to do really.
 21 **MR LASOK:** Could you turn in annex 19 to tab 43, please.
 22 {D19/43}. This is where ITL asks you to raise
 23 an invoice for the ITL/Shell UK business plan investment
 24 for 2001, and it indicates what the invoice should be
 25 for. I think the figures are confidential. There is

1 the specific figure for pricing which was the agreed
 2 figure, and the first trading agreement agreed with ITL
 3 before you appeared on the scene.
 4 So isn't this an indication that during 2001 Shell
 5 had complied with the first trading agreement?
 6 **A.** There are some evidences in the annex here that show
 7 that we didn't do as recommended on many occasions, and
 8 ITL still paid the bonus.
 9 **Q.** Well, are we now talking about the period when you were
 10 around or the period when Mr Conrad was around?
 11 **A.** This covers both, I think there is an overlap, isn't
 12 there, so I was on board for a quarter of this period
 13 managing tobacco. I had picked up in September, and
 14 this covers the period until the end of December, so
 15 I was ...
 16 **Q.** So you are saying that Shell's compliance ceased, how
 17 long after September?
 18 **A.** I am not saying it ceased, I'm saying that during the
 19 period in time in which I was managing the category in
 20 those last three months, there are examples in here, in
 21 I think annex 19, demonstrating that we didn't always
 22 take the recommendations of the manufacturers, in fact
 23 we did things completely differently.
 24 **THE CHAIRMAN:** Well, we have seen questions as to what the,
 25 how your prices for ITL products followed in relation to

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1 Richmond, et cetera, but this is dealing with something
 2 else, this is dealing with the relativity between the
 3 ITL product and the Gallaher product, which I don't
 4 think we have looked at, unless I am misremembering.
 5 **MR LASOK:** Partly because it's Mr Conrad who can give
 6 evidence concerning the documents that cover the first
 7 agreement between Shell and ITL up until the beginning
 8 of September, and I've carefully avoided asking
 9 Ms Parker questions about a period that's before she
 10 came on the scene. But at the moment, you seem to be
 11 saying that Shell ceased to comply sometime after you
 12 came on the scene.
 13 **A.** No, that's not what I said. I can only discuss the
 14 three months in which I was in office. What I am saying
 15 is in those three months there is evidence that I didn't
 16 always follow, if any, if at all, I would have to go and
 17 have a look at them and we could perhaps go into those
 18 if someone could direct me to the appropriate document,
 19 where I didn't take the manufacturers' price
 20 recommendations --
 21 **THE CHAIRMAN:** No, we are not talking about the price
 22 recommendations at the moment, we are talking about the
 23 differentials between ITL product and Gallaher product,
 24 so we are not talking about the 3.70 and 3.71 difference
 25 between the recommended price and the maximum price for

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1 an ITL product. This money is being invoiced by you as
 2 accepting payment in relation to appearing to
 3 differentials in the recommended pricing between the
 4 recommended price for an ITL product and the recommended
 5 price of the linked Gallaher brand. That's what we are
 6 talking about here. Is it your evidence that you would
 7 have presumably raised this invoice, or at least you
 8 were being asked to raise the invoice, and been paid
 9 that money even though you didn't reflect those agreed
 10 differentials between the ITL and Gallaher prices in the
 11 recommended prices that you set for those linked
 12 products?
 13 **A.** I wasn't consciously aware of working towards keeping
 14 those differentials between Gallaher and Imperial
 15 products. So if they are as laid out --
 16 **THE CHAIRMAN:** You were responsible for setting the RRP's,
 17 weren't you?
 18 **A.** Yes. Yes, I was. But I am not aware of having
 19 worked -- well, I didn't work towards achieving that
 20 bonus. I'm surprised if everything that Imperial
 21 recommended to me at the time in relation to parities
 22 was implemented. I would have to go and have a look at
 23 some of the documents to show you that. I think that
 24 ITL invoiced us in any case, whether or not our price
 25 files reflected their recommendations.

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1 **MR HOWARD:** I think there is a table which I showed you this
 2 morning, which actually shows the position, which is the
 3 table 8 in the ITL appeal, which actually has the
 4 comparison at that date, January 2002. But the raw data
 5 is obviously not in the files, but all the raw data is
 6 available, as it were, which shows what the position
 7 was.
 8 **MR LASOK:** Yes, I think it's fair to say that we know that
 9 in the period when Ms Parker was the category manager,
 10 the differentials got out of line, because that was the
 11 point that ITL itself made at the time. In the period
 12 before and after, the differentials weren't out of line.
 13 But we have come to, so far as the period before is
 14 concerned with Mr Conrad, and as far as the period after
 15 is concerned, it's Mr Barry, or rather it's the
 16 documents.
 17 Now, Ms Parker, if you are in annex 19, and you go
 18 to tab 56, {D19/56} you have another one of these
 19 requests addressed by ITL to Shell, in this case it's
 20 addressed to Daryl Barry, asking Shell to raise
 21 an invoice for payment to be made, this time under the
 22 2002 business plan. You see again that you have the
 23 price paid for pricing: you were around only until,
 24 what, March 2002 in the course of that?
 25 **A.** Yes.

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1 Q. Are you suggesting the request for an invoice was made
 2 by Shell in the knowledge that Shell hadn't been
 3 complying with the terms of the trading agreement?
 4 A. It's not Shell requesting an invoice be raised, it's
 5 ITL. So the -- sorry, could you repeat the question?
 6 Q. I'm sorry, ITL requesting. I am terribly sorry. Are
 7 you suggesting that ITL requested Shell to raise
 8 an invoice for a payment due under the terms of the
 9 second trading agreement in the knowledge that Shell had
 10 not complied with the terms of that agreement?
 11 A. I mean, this isn't directed directly at me, I wasn't
 12 in situ at the time, but as I discussed earlier, even in
 13 instances where we haven't always done as manufacturers
 14 have asked us to do or recommended to us, in the
 15 interests of a relationship they still might pay the
 16 budget that they have put aside for Shell through the
 17 business plan, particularly if a relationship is going
 18 well. So yes, they may still pay up on it, even if we
 19 haven't taken all of their recommendations or any of
 20 their recommendations, if things in other areas are
 21 going particularly well.
 22 Q. Or alternatively, if the differentials had got a bit out
 23 of line in the first couple of months of 2002, it could
 24 have then been sorted out for the rest of the year, they
 25 would have been quite happy to make a payment, I would

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1 suggest?
 2 A. It's difficult for me to make comment on that, I wasn't
 3 close to the business in the period after March so for
 4 nine months I wasn't as close to the categories so it's
 5 difficult for me to make a comment on that.
 6 Q. Can I be a bit precise about this, I think you will
 7 correct me if I am wrong, your evidence is that you were
 8 not sufficiently close enough to the business, to the
 9 tobacco side of the business, after March 2002, to tell
 10 us whether or not Shell complied with the agreement?
 11 A. My successor was very aware and worked with exactly the
 12 same premise that all category managers worked with, and
 13 that was that we could only recommend to sites what
 14 price they might want to charge. He, like I, because
 15 I did the handover to him, and I trained him but clearly
 16 he reported into me, I set the scene, he understood how
 17 we worked, and that whilst we listened to all the
 18 manufacturers, the driver in all of our pricing
 19 decisions was around the margin that it delivered for
 20 our retailers.
 21 DR SCOTT: As a matter of arithmetic, the margin is driven
 22 principally, as I understand it, because of the
 23 elasticities, by the absolute level of prices rather
 24 than by the differentials between different brands; is
 25 that correct?

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1 A. Yes, that's correct.
 2 DR SCOTT: So the principal focus for you and those either
 3 side of you sequentially was on the absolute level, so
 4 far as achieving margins for Shell and for the
 5 individual contractors?
 6 A. Yes.
 7 DR SCOTT: The differentials between the brands was a matter
 8 of separate consideration?
 9 A. It was, yes.
 10 DR SCOTT: So the question then is: in undertaking that
 11 separate consideration, how you and your predecessor and
 12 successor approached that, and what you have said is
 13 a variety of factors, and in that, you have downplayed
 14 the figure I am not allowed to say, which was the bonus
 15 for achieving the differentials?
 16 A. Yes.
 17 DR SCOTT: What you appear to be saying is whether those
 18 differentials were achieved was a matter of happenstance
 19 rather than a matter of purpose?
 20 A. I don't recall ever spending any time working towards
 21 maintaining differentials. I spent a lot of time on
 22 tobacco, focusing on getting those planograms right and
 23 that's my memory of the time which I spent in the
 24 category manager role of tobacco.
 25 THE CHAIRMAN: What other factors would you take into

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1 account when deciding what the difference in recommended
 2 price should be between Richmond and Dorchester or
 3 Embassy and whatever?
 4 A. I didn't spend very much time, if any, considering the
 5 differences between the brands.
 6 THE CHAIRMAN: But you must have arrived at a differential
 7 somehow, if it's not of -- well, if it's not of any
 8 great concern to you, then I would have thought the
 9 convenient thing to do would be to comply with
 10 an agreement that you had arrived at with the
 11 manufacturer, if there were no other particular factors
 12 that you wanted to --
 13 A. When we moved to RBA and the retailer basically wanted
 14 to decide their own price, our function became purely to
 15 recommend where they should be in order to achieve the
 16 margin. So any time spent thinking about the category
 17 was put into other elements of category management. So
 18 in the six months that I dealt with tobacco, I spent
 19 very little time considering the price part, but the
 20 manufacturers want to consider price because it's
 21 actually pretty much all they have to talk about now,
 22 they have lost advertising, they are about to lose
 23 sponsorship, so the two things they really want to talk
 24 to you about is: get my product in the most prominent
 25 position and price. But we negated our ability to

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1 control price and we let our retailers deal with it and
 2 gave them responsibility for dealing with that, but we
 3 were responsible for getting the right products in the
 4 right place and that's what the planogram is about.
 5 **DR SCOTT:** But you have told us in your evidence that the
 6 level of pricing was important from the point of view of
 7 margins.
 8 **A.** Yes.
 9 **DR SCOTT:** Getting that right meant producing a price file
 10 that got that right.
 11 **A.** Yes.
 12 **DR SCOTT:** So that the contractors had a clear idea of what
 13 would achieve their margins, and since you weren't
 14 pricing all tobacco products at the same price, that
 15 meant having a price file that contained details for
 16 every single tobacco category, subcategory.
 17 **A.** Yeah, it did.
 18 **DR SCOTT:** As I understand your evidence, you had a lot of
 19 things going on, as did your predecessor and successor,
 20 and so you may have been grateful to the tobacco
 21 manufacturers for their assistance, and you sent, as
 22 I understand it, the price files to the tobacco
 23 manufacturers to get that assistance.
 24 **A.** Yes.
 25 **DR SCOTT:** It seems unlikely, therefore, that in some sense

1 the price files did not at least reflect either their
 2 influence or their complaints about the relativities
 3 since, as we have heard, both the principal
 4 manufacturers were very concerned about such
 5 relativities.
 6 **A.** Yes, and they did, because the manufacturers were
 7 a source of information to us, and they were experts in
 8 their field. So as in all categories I would go to
 9 every manufacturer, talk to them about the category, but
 10 you know, then I would go back to my office and take all
 11 their views on board, look at what Shell was doing at
 12 the time in terms of pricing strategy, and maybe even
 13 check out what the competition were doing. So all those
 14 factors count. But I spent the least amount of time on
 15 price versus everything else. It was a small part of
 16 the role --
 17 **THE CHAIRMAN:** When you were in this job, did you have any
 18 sense of which ITL brand competed with which Gallaher
 19 brand?
 20 **A.** Yes. Yes. Because we had these sort of subdivisions of
 21 the premium or value for money. So sort of in your mind
 22 you had a bunch of products in one, in the premium
 23 category, and sorry, I can't remember them now. So yes,
 24 you sort of had in your mind those products which you
 25 regard as being premium and those that were value for

1 money. Yes. You would have a sense of that.
 2 **MR LASOK:** I would like to turn now to annex 9, please. If
 3 you go to tab 2, {D9/2} you have just below the middle
 4 of the page an email from Wes Feeney of Gallaher to you
 5 sent on 24 September 2001. The subject is a meeting to
 6 take place on the following day, 25 September. If you
 7 turn to the -- a certain amount of this is
 8 confidential -- next page, there is a final paragraph
 9 beginning with the words "It would appear". Do you have
 10 that? Would you just read that paragraph?
 11 **A.** Sorry, I am just trying to find the paragraph. This is
 12 a letter 20 August?
 13 **Q.** I am sorry, it should be tab 2 and it should be at the
 14 very top on the first line "From: Feeney, Wes" and then
 15 it's 24 September. Right? So he must have sent the
 16 original message because he says "I'll try again". Then
 17 we have the original message, and further down about the
 18 middle of the page he is talking about a meeting on
 19 25 September. That was to discuss a future agreement
 20 between Shell and Gallaher.
 21 If you look at the second page, you should have
 22 a paragraph there before you get to "agenda",
 23 a paragraph that begins with the words "It would appear
 24 that". He says in that paragraph that he thinks that
 25 the only major issues to overcome were those which he

1 has already listed and he says:
 2 "As retail pricing I assume will not be a problem."
 3 Now, this is the forerunner to the Gallaher
 4 agreement. So can I infer that you were negotiating
 5 with Wes Feeney about the trading agreement with
 6 Gallaher?
 7 **A.** Yes, I did have an involvement in that.
 8 **Q.** Right. The next document, tab 3, is dated
 9 1 October 2001. In this email Mr Feeney attaches his
 10 comments in relation to Shell's current prices and
 11 points out discrepancies in price list differentials.
 12 He says:
 13 "As this area is part of the proposed trading
 14 agreement, I would ask that these be remedied as soon as
 15 possible."
 16 I would just like by way of illustration to ask you
 17 to go to the fourth page. This is a page which should
 18 have a comments bit at the bottom on the left which
 19 says:
 20 "Mayfair 10s should be 7p under L&B KS."
 21 Do you have that page?
 22 **A.** Yes, I did.
 23 **Q.** Whose handwriting is that on the right, is that yours?
 24 **A.** That's my handwriting, yes.
 25 **Q.** So he was saying that Mayfair 10s should be 7p under

1 Lambert & Butler and therefore the price should be
 2 £2.04, and you are going to action it; is that not so?
 3 A. Sorry, I am on the wrong sheet here, sorry, I am on ...
 4 Q. I am afraid -- no, I have a "535" stamped?
 5 A. I have "535".
 6 Q. On the right, it says "Action, reduce Mayfair 10s by RSP
 7 to £2.04"?
 8 A. Yes.
 9 Q. So at that stage you were proposing to comply with
 10 Gallaher's differentials?
 11 A. I was taking his recommendation, yes.
 12 **THE CHAIRMAN:** Where is Mr Feeney's recommendation?
 13 **MR LASOK:** It's on the left-hand side of that same page,
 14 there is a title that says "Comments".
 15 **THE CHAIRMAN:** Oh, I see.
 16 **DR SCOTT:** This is the price file sent by Shell to Gallaher
 17 with comments on it --
 18 A. It has typed for Gallaher --
 19 **MR LASOK:** Perhaps we could ask Ms Parker.
 20 Am I right in thinking that what happened was that
 21 Shell sent a price file to Mr Feeny for his comments,
 22 and he sent it back with his comments on it?
 23 A. Yes, I think he's typed his comments on files, we have
 24 asked him to recommend, yeah, and then I've written --
 25 **THE CHAIRMAN:** So the price file, the table, as it were,

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1 that would have been created by Shell and sent to him,
 2 to Mr Feeney, and he is saying "Well, we are about to
 3 enter into this trading agreement" or "We have just
 4 entered into this trading agreement", and so his
 5 comments are what he suggests you need to do in order to
 6 bring this price file into compliance with those
 7 differentials.
 8 A. Yes.
 9 **MR LASOK:** If you go to tab 4 --
 10 **DR SCOTT:** Sorry, while we are in that, if you go to the
 11 previous page, is this your comment in the bottom?
 12 A. This is "534" stamped in the top right-hand corner?
 13 **DR SCOTT:** Sorry, I am going in the wrong direction, I am
 14 going to 536, sorry.
 15 A. 536, that is my writing --
 16 **DR SCOTT:** That is your writing --
 17 A. In the scrawl is mine.
 18 **DR SCOTT:** Put Dorchester down to 3.69 and Richmond up to
 19 3.69.
 20 A. Yes.
 21 **DR SCOTT:** So it looks like as though you are putting them
 22 to parity; is that right?
 23 A. I have taken his recommendation there.
 24 **THE CHAIRMAN:** And you said "leave maxs".
 25 A. He does say Dorchester should be the same price as

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1 Richmond, 3.65. In actual fact I've said 3.69.
 2 **DR SCOTT:** Getting that extra bit of margin.
 3 A. That was my job.
 4 **DR SCOTT:** Oh no, as we have said, the absolute price level
 5 is very much about the margin.
 6 A. Yes.
 7 **DR SCOTT:** The differentials is about what the manufacturers
 8 are concerned.
 9 **MR LASOK:** And this case is not about the absolute price
 10 levels, it's about the parities and differentials.
 11 Ms Parker, could you turn to tab 4, please. This is
 12 the following day, and Mr Feeney sends you an email
 13 which sets out what he describes as the final draft of
 14 the trading agreement, and asks you to run that by your
 15 legal department. If you turn the page, you will see
 16 that clause 1 under the heading "Pricing" says in (a):
 17 "Account agrees to maintain the price
 18 differential/price parities between Gallaher's brands
 19 and their respective competitive brands as set out in
 20 appendix 1 at all times."
 21 Appendix 1 is a few pages further on, stamped
 22 page 488. Just in case you are curious about this, we
 23 are going to come to the final signed agreement, and
 24 I am going to ask you some questions about that, but
 25 I thought it was fair that you should see the lead-up to

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1 the final agreement.
 2 A. Thank you.
 3 Q. Okay? So if we go to tab 5, we have a letter here dated
 4 6 November 2001 to you, and it's from Mr Feeney again.
 5 I wanted to draw your attention to the bit on the second
 6 page where, under the heading "Trading Agreement", he
 7 says that he's emailed it, asks for it to be returned
 8 signed, and the first bullet says:
 9 "Pricing - I left you with details of current
 10 pricing anomalies and would appreciate if these could be
 11 amended as soon as possible in view of the trading
 12 agreement commencing January 1, 2002. This action will
 13 ensure that maximum payments can be made from the start
 14 of the agreement."
 15 So at this stage you would agree with me, I hope,
 16 what he is doing here is he is trying to get a Shell
 17 pricing into line with the requirements under the
 18 Gallaher agreement so that maximum payments under that
 19 agreement can be made as from its inception?
 20 A. Yes, it would seem that is what he is trying to do.
 21 Q. Then we have tab 6.
 22 **THE CHAIRMAN:** The details of the current pricing anomalies,
 23 is that the earlier document we saw at tab 3 with the
 24 comments on the price files?
 25 Do you know, Ms Parker?

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1 A. It's a whole month before, so I am not sure whether it
 2 was -- it was before it, but it doesn't necessarily mean
 3 it's the same ones, to be fair. Could well have been.
 4 **MR LASOK:** So if you go to tab 6, we have another email from
 5 Mr Feeney. The one at the top of the page I surmise
 6 indicates that in his first email he forgot to attach
 7 the Shell trading agreement, and then he had to re-send
 8 it because the subject line says "Spot the mistake".
 9 The original message which starts at the first holepunch
 10 says:
 11 "I think we have got there in the end. Please find
 12 attached the trading agreement incorporating all the
 13 changes discussed and agreed during our last two
 14 meetings. I trust you will find everything in order.
 15 If not, please give me a call to discuss."
 16 And if we look at the next page, and just look at
 17 clause 1(a), it's what we have seen before. The next
 18 email at tab 7, he sends you the pricing differentials.
 19 If you look at the second page of tab 7, we have a list
 20 of parities, and then we have a list of differentials.
 21 The differentials are all expressed as being in
 22 absolute terms like, if you look under the first
 23 differential under the heading "Differential" is the
 24 Benson & Hedges and so forth against Embassy No 1, and
 25 he says differential plus 3p. These are not expressed

1 as maximum, because ... I am asked to read the whole bit
 2 in brackets, which is:
 3 "Currently RRP's £4.39 against £4.36, differential
 4 plus 3p. 10s packs differentials plus 2p."
 5 Then 8. Now, tab 8 -- do you have that?
 6 A. Yes.
 7 Q. This is an email to you in which he attaches a CPM
 8 briefing document, and he says to you by the first
 9 holepunch:
 10 "As discussed on Friday, please find attached the
 11 above. Whilst it is not yet finished all the background
 12 re: Shell and the retailers is completed, could you
 13 please have a look and let me know if you require
 14 anything changing or adding."
 15 Now, the CPM briefing document is attached, and this
 16 was a briefing document that was to go out to the people
 17 whom Gallaher were using to monitor the sites. Is that
 18 not correct?
 19 A. The CPM document, yes, it was about monitoring, but it
 20 was certainly -- it was the beginning of the agreement,
 21 and they wanted to send out their sales guys, their
 22 representatives, I can't remember what they call them
 23 now, to visit the Shell sites and see what was actually
 24 happening in site in terms of compliance with the new
 25 planograms, and to make sure that new brands and new

1 launches were on site so that we could then report back
 2 to our area sales guys to make sure that we were
 3 actually stocking the branch, stocking them where they
 4 should be.
 5 Q. By this stage, the transition to the RBA would have been
 6 completed, would it not?
 7 A. Yes.
 8 Q. If we look at the CPM briefing document, let's take the
 9 stamped page 440, I am just giving you the background to
 10 this document, point 1 says that CPM are to commence
 11 calling on the Shell group from cycle 01/2002. Can you
 12 remember what cycle 01 was?
 13 A. No, I am sorry, I can't. Cycle 01 isn't anything that
 14 has any resonance with me.
 15 Q. Then paragraph 2 refers to the network of 630 company
 16 owned outlets and it is recorded that all operate under
 17 the retail business agreement and I think that from the
 18 answer you gave me a moment ago, that must have been
 19 correct as a matter of fact at that time?
 20 A. Yes.
 21 Q. Then if we jump down to 6, and just in case,
 22 paragraphs 3, 4, 5 and 7 are confidential, but 6 isn't.
 23 A. Yes.
 24 Q. 6 states:
 25 "The agreement also states that all outlets will

1 merchandise Gallaher products as per the agreed
 2 planogram and that normal price list parities and
 3 differentials will be maintained."
 4 This is a reference, I would suggest to you, to the
 5 Gallaher/Shell trading agreement, not the RBA, but what
 6 it says here is that under the Gallaher/Shell trading
 7 agreement, normal price list parities and differentials
 8 will be maintained. Now, did you not look at this
 9 document when --
 10 **THE CHAIRMAN:** Perhaps the first question is: what do you
 11 understand that means?
 12 A. The agreed planograms are the ones that we have been
 13 working on, so we agreed with the products and what have
 14 you, and they've been launched. So they are going out
 15 to look at cigarette gantry and make sure that products
 16 are there and where they should be. And that normal
 17 prices, parities and differentials will be maintained.
 18 I find it hard to believe that this went out as it did,
 19 and I did not have that removed, knowing that our
 20 retailers can price as they want to but our price file
 21 we may elect to reflect, or may not, as the case may be,
 22 but given that this is talking about going out to sites
 23 and looking at shelf price, I find it hard to believe
 24 that I didn't get that removed, and I am sure I will
 25 have picked up the phone and had it removed.

1 **MR LASOK:** Could you turn to the next page, we have a page
 2 here that --
 3 **DR SCOTT:** Sorry, just can I ask two questions on that.
 4 One, as I understand it, you are agreeing on a bonus in
 5 the trading agreement, and now you are suggesting that
 6 they shouldn't be monitoring the compliance with the
 7 trading agreement.
 8 **A.** Not on the price, because the retailer sets the price.
 9 **DR SCOTT:** Yes, but the trading agreement, as I understand
 10 it, is about the effective parities and differentials.
 11 **A.** The trading agreement asks us to maintain differentials
 12 and parities, which we can recommend if we elect to,
 13 through the price file, but because we had put it into
 14 the price file, I know that retailers can do what they
 15 want, as you can see in some of the later documents
 16 which show when they went out the prices were, you know,
 17 below RRP and sometimes above it, above max. So in the
 18 trading agreement, I always knew that as much as we
 19 could do would be to reflect their recommendations in
 20 the price file, but the actual practice on site could be
 21 a very different thing, and the manufacturers knew that
 22 too.
 23 **DR SCOTT:** But are you suggesting that you would have
 24 objected to the monitoring team engaging in monitoring
 25 of the actual pricing?

1 **A.** Yes, on site, I would have done.
 2 **DR SCOTT:** And were you or were you not prepared to provide
 3 the electronic point of sale detail to the
 4 manufacturers?
 5 **A.** I don't believe any EPOS data ever carried any retail
 6 price site information on it, I don't think it was ever
 7 on there, it was total sales by category as opposed
 8 to -- I think, from memory, I am sorry, it's not --
 9 I need to -- I don't think it did.
 10 **DR SCOTT:** Yes, I cannot remember the detailed evidence,
 11 I just remember --
 12 **A.** I don't think it did. The EPOS is to try and establish
 13 where sales -- you know, which sales brands are selling
 14 well as opposed to what price they are selling at. The
 15 point of the EPOS data is so that we could build better,
 16 more accurate planograms to make sure the site has
 17 enough basings of those products they were selling well.
 18 I don't think it ever contained the actual retail
 19 selling out price or the shelf price, the actual one
 20 that retailers elected to go with. But I haven't seen
 21 any EPOS data in the last decade.
 22 **DR SCOTT:** We can understand that.
 23 **A.** So in summary, going back to what -- I am very happy to
 24 go to site and have a look and see what products are on
 25 site, what's available and whether they were planogram

1 compliant, and I wanted them to, because it's really
 2 useful information to go back to the field teams with,
 3 because it's planogram compliance that drives sales
 4 which is where we all make money, in sales.
 5 But I would have been very unhappy and I would not
 6 have allowed it to have happened, I would not have had
 7 Gallaher people going on to site to monitor or at least
 8 to talk to retailers about price; they could write down
 9 what the price was, but they couldn't go in and engage
 10 with the retailer about price. They could see what it
 11 was, it was in the public domain, that's not a problem.
 12 **MR LASOK:** Can I take a step backwards. Am I right in
 13 thinking that you thought that the agreement with
 14 Gallaher was one that concerned only the prices that
 15 were mentioned in the price files and didn't relate to
 16 the shelf prices in the sites?
 17 **A.** (Pause). When we entered into the agreement with
 18 Gallaher around -- with the price element in it, I never
 19 felt obligated, because I knew I couldn't, to have their
 20 recommendations implemented at site.
 21 **Q.** Could you go back to tab 6, please. This is the email
 22 from Wes attaching a fairly neat version of the trading
 23 agreement. I read out to you the bit where he said in
 24 the middle of the page:
 25 "I trust you will find everything in order and if

1 not, please give me a call to discuss."
 2 Now, you then have the trading agreement and you
 3 have seen clause 1(a) in which Shell is referred to here
 4 as "Account", agrees to maintain the price
 5 differentials, price parities, at all times. But if you
 6 go to the third page of the agreement, which is the
 7 stamped page 471, and to clause 5(a), it says:
 8 "If any store within the account store group does
 9 not comply with any term or terms of this trading
 10 agreement, Gallaher reserves the right to reduce the
 11 relevant payment referred to in paragraph 4 above."
 12 If you look at paragraph 4 above, the very first one
 13 in (a) is the payment in return for compliance with the
 14 provisions in paragraph 1, and paragraph 1 is the one
 15 about the maintenance of parities and differentials.
 16 Now, is it really the case that you thought that the
 17 agreement between Shell and Gallaher only concerned the
 18 price file and not the shelf prices at the sites?
 19 **A.** I was happy to do the agreement, because I knew that in
 20 the event that sites didn't take our recommendations or
 21 I decided not to recommend as manufacturers asked me to,
 22 there would be a reduction in price, and I wasn't
 23 worried about there being a reduction in the bonus
 24 because it was frankly so tiny, it just wasn't on my
 25 radar. So I am happy to work with these guys because

1 effectively we both want to drive cigarette sales,
 2 sadly, but effectively we are all working towards
 3 growing a margin and to grow our sales, so there are
 4 times when we are going to do things in tandem because
 5 ultimately we all want to sell more product. But
 6 I wasn't worried about not taking their recommendations,
 7 because it just merely meant a reduction in bonus which
 8 I didn't really mind if I didn't get any bonus.
 9 **Q.** If you look on stamped page 471, at clause 5(b), it
 10 says:
 11 "Performance in compliance with the terms of this
 12 trading agreement would be judged by Gallaher from
 13 a selection of store visits conducted by Gallaher
 14 personnel or contracted sales representatives from time
 15 to time and which visits shall be designed to monitor
 16 results."
 17 In the next, (c), it says:
 18 "If after any such store visits, it is apparent that
 19 an account has not complied with the terms of this
 20 agreement, Gallaher will advise account of this fact and
 21 provided remedial action is taken immediately at the
 22 outlet or head office, no reduction in the relevant
 23 payment shall be made by Gallaher."
 24 Did you not notice these clauses?
 25 **A.** I didn't mind about having a reduction in the payment,

1 but there would be occasions on which I will have taken
 2 the recommendation, so I was happy for them to visit the
 3 stores, because it gave me insight into how we were
 4 doing, were we planogram compliant, I didn't mind them
 5 writing down the retail prices, but I accepted that
 6 these are ways of managing a category, but I wasn't
 7 worried about having bonuses reduced or not paid at all.
 8 To give you some perspective, it was tens of millions of
 9 pounds worth of profit derived from category from sales
 10 and we are talking about a few thousand pounds in the
 11 bonus, so it really was totally insignificant in the
 12 overall prioritisation of what to do in the category.
 13 **Q.** Why did you agree to all this?
 14 **A.** In order to have a working relationship with the experts
 15 in the field, and I was happy to have dialogue with
 16 them.
 17 **Q.** Wouldn't it have been franker to have asked Wes to take
 18 out the bits of the agreement concerned with pricing?
 19 **A.** Because -- no, because sometimes we would have done as
 20 they had recommended, and as you can see we did, because
 21 it was in line with our margin aspirations and it did
 22 fit in with perhaps the brands that we did want to work
 23 harder to grow within the business, so there were
 24 occasions on which I did take their recommendations and
 25 was happy to do so if it was in line with what we wanted

1 to do. If there is a pot of money that the
 2 manufacturers have available to me as an account and
 3 they are willing to part with it for me doing my
 4 everyday job, then why wouldn't I? They were totally
 5 aware of the business agreement in which we operated
 6 with our retailers. So they were aware of the
 7 limitations --
 8 **Q.** They were aware therefore that you had no influence over
 9 the prices at the individual sites?
 10 **A.** They knew that I could recommend and prevent our sites
 11 from impulse pricing, they were well aware of that.
 12 **Q.** Why do we have these monitoring arrangements?
 13 **A.** The monitoring primarily was for planogram compliance,
 14 it really mattered to us, we really wanted to get our
 15 retailers to understand that we needed the right plans
 16 in the right place.
 17 **THE CHAIRMAN:** What about page 442, then? It says:
 18 "What if not all Gallaher brands have the correct
 19 parities? Answer: check in store with the manager and
 20 bring to his attention and endeavour to change during
 21 the" --
 22 **A.** I am sorry, I've lost the tab. Which tab are we --
 23 **MR LASOK:** It's tab 8.
 24 **A.** This is in the Q&A section. Could you direct me to the
 25 correct statement?

1 **Q.** If you look at stamped page 442, and it's the first one
 2 before the end, in the middle of the page.
 3 **A.** Yes, I don't believe this document went out as it is,
 4 this is a Gallaher produced document that was sent to me
 5 for checking and I believe I will have had that removed.
 6 It's absolutely not permissible to talk to our retailers
 7 about how they are pricing. They could talk to
 8 retailers about brands being stocked and they call it
 9 talking up, they could talk up a particular brand and
 10 explain to them why it was particularly important in
 11 forecourt, but to talk to our retailers about price was
 12 not acceptable and I don't believe this will have gone
 13 out in the condition in which we see it here.
 14 **THE CHAIRMAN:** Is that a good point to have a break?
 15 Ms Parker has been in the witness box for some time.
 16 **MR LASOK:** Yes.
 17 **THE CHAIRMAN:** We will come back in ten minutes.
 18 **A.** Thank you.
 19 (3.43 pm)
 20 (A short break)
 21 (3.53 pm)
 22 **MR LASOK:** My learned friends have asked me to raise with
 23 the Tribunal the question of how long this afternoon
 24 the Tribunal is able to sit, because it transpires that
 25 Ms Parker is available only today.

1 **THE CHAIRMAN:** Well, we will need to sit, then, until
 2 Ms Parker's evidence is finished. How much longer will
 3 you be, do you think?
 4 **MR LASOK:** I don't quite know. I am going as quickly as
 5 I can, but Shell wants me to take their witnesses to
 6 every single document. I'm not actually proposing to do
 7 that, because if I were to do that then we would be here
 8 over tomorrow. But I have to go to some documents.
 9 **THE CHAIRMAN:** Well, I think we can sit until 5. Would that
 10 be an all right? We will certainly sit until 5 and then
 11 we will see where we are.
 12 **MR HOWARD:** Can I say I will wish to ask questions of
 13 Ms Parker, I make that clear now.
 14 **THE CHAIRMAN:** Then it may be, I am afraid, Ms Parker, that
 15 you will have to come back tomorrow morning.
 16 **A.** Is it possible to consider next week?
 17 If I can make some calls at 5, my husband is on the
 18 night sleeper coming this way and I will be on a train
 19 going that way and we have to do a baton change at the
 20 other end. So I need to understand from him how urgent
 21 his work is tomorrow. But if I could do that, at 5.
 22 **THE CHAIRMAN:** Yes. Let's see where we are at 5.
 23 **MS ROSE:** If I can explain, madam, that Ms Parker has two
 24 young children and lives in Devon. We did make the
 25 position clear to my learned friends that she was

1 available only today and I understood the time estimate
 2 to be two hours in relation to her cross-examination.
 3 **THE CHAIRMAN:** Well, that's partly our fault, I am afraid,
 4 we have asked a lot of questions as well, but that's
 5 where we are at the moment.
 6 **MS ROSE:** Thank you.
 7 **MR LASOK:** Thank you.
 8 Ms Parker, we were at this tab 8 and we have looked
 9 at 442. Just for the sake of completeness, if you go to
 10 443, you should have, this is under the heading "Cycle
 11 01 Activity", and there is a paragraph 7 that says:
 12 "... correct pricing parities and differentials,
 13 please fill in the pricing and parity section in the
 14 HHC."
 15 Then if there are any problems they go to the
 16 forecourt liaison manager, who in turn advises
 17 Wes Feeney.
 18 If you go to tab 9, we have the signed version of
 19 the agreement, and I will simply draw your attention to
 20 the bit in the middle of the page, it's the sentence
 21 above the heading "Pricing", where it says:
 22 "In consideration of Gallaher agreeing to pay the
 23 sums of money referred to below, account agrees to and
 24 shall comply with the following."
 25 Then we have (a), which we have seen, and if we go

1 to clause 4, it's what we have seen before, clause 5,
 2 which is the compliance at store level, and the store
 3 visits, and remedial action, and we see on the last page
 4 of the agreement that it was signed on behalf of account
 5 by one JA Parker. Is that your signature?
 6 **A.** Yes, it is.
 7 **Q.** The date looks like 11 November 2001.
 8 **A.** Yes.
 9 **Q.** Now, Wes Feeney's email to you in tab 8 was
 10 27 November 2001.
 11 So I would suggest to you that his email on
 12 27 November can't have come to you as a surprise,
 13 because you had already signed an agreement that
 14 provided for store visits to monitor compliance with,
 15 among other things, Gallaher's pricing requirements.
 16 Isn't that correct?
 17 **A.** It wasn't a surprise, I was quite happy for them to
 18 visit the stores, for the reasons I talked about before
 19 the break. It was a positive thing for us that we could
 20 understand whether or not we were complaint to the
 21 planogram.
 22 **Q.** You do accept, do you, they have signed up to
 23 an agreement that contained clause 5?
 24 **A.** (Pause). Yes, I was happy for them to visit the sites
 25 and understood that if there wasn't the -- if our

1 recommendations hadn't been -- if their recommendations
 2 hadn't been taken and therefore the sites weren't
 3 following the recommendation, then there would be
 4 a reduction in the payments made to us, because all of
 5 this is in consideration of Gallaher agreeing to pay the
 6 terms, to pay the sums of money, so I always knew that
 7 it was in relation to the sums of money.
 8 **Q.** Provided that in 5(c) that remedial action would be
 9 taken, or rather it was envisaged in 5(c) that remedial
 10 action would be taken by Shell.
 11 **DR SCOTT:** Including remedial action by the outlet.
 12 **A.** Yes, and that's all about planogram compliance, so if we
 13 had a site who wasn't stocking particular products, we
 14 would -- and there is evidence of me talking -- I
 15 wouldn't go directly to the site, actually, I would go
 16 to the area sales manager who would report into David
 17 and ask to ensure that the retailer did stock products
 18 that were compliant.
 19 **MR LASOK:** I am sorry, where do you say that 5(c), or indeed
 20 any part of 5, is limited to planogram requirements?
 21 **A.** I didn't say that it was limited to but I gave an
 22 example of where I would be quite happy to go back to an
 23 account, go back to a site to take remedial action.
 24 **Q.** Let's be blunt, Ms Parker, this was an agreement which
 25 envisaged that Shell would secure compliance with

1 Gallaher's parities and differentials in the shelf
 2 prices at the independent contractor sites; that's
 3 correct, isn't it?
 4 **A.** No, it's not the case at all. The site visits were
 5 around getting planogram compliance, and from time to
 6 time, we would have taken their recommendations around
 7 differentials, and from time to time we wouldn't.
 8 **Q.** In which case, could you turn to tab 39, please. This
 9 is a letter dated 28 October 2002 addressed to Mr Barry.
 10 This is after your time but you had some involvement at
 11 this stage.
 12 On the second page at the top, first two lines, what
 13 appears to have happened is that Gallaher agreed to
 14 conduct Q&As for key brands throughout 2003 for the
 15 purpose of ascertaining the true pricing levels within
 16 the Shell estate. If you go to 42 --
 17 **A.** I am sorry, is there a question relating to that? Or
 18 could I have time to read -- I haven't read any of this
 19 ever before, so may I take time to read the document
 20 first, please?
 21 **Q.** Please read the document and do remember that if this is
 22 not something that you can give evidence on, tell us,
 23 because it is after the period that you were intimately
 24 involved with tobacco products.
 25 (Pause)

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1 This is an indication that Gallaher was going to
 2 check the prices at the sites of the independent
 3 contractors?
 4 **A.** They are quite welcome to check the prices, write them
 5 down, that's not a problem for us.
 6 **Q.** What about 42?
 7 **A.** (Pause). I've not seen this before, and if it had been
 8 sent to me I wouldn't have done anything with it and
 9 I would have picked up the phone to Wes and let him know
 10 that we couldn't do anything about that because it is
 11 pricing on site.
 12 **Q.** Because this is, B&H is the Gallaher brand, L&B KS is
 13 the ITL brand, and he is reporting back that this is the
 14 second outlet in a week in which a parity has not been
 15 respected and he wants action?
 16 **A.** I am unsure how Daryl responded because I've not seen
 17 this before.
 18 **Q.** The next email, 43.
 19 (Pause)
 20 **A.** Again, I am not sure how Daryl responded to that, so
 21 it's difficult for me to comment. I certainly wouldn't
 22 have used op date to communicate the price, all price is
 23 done to the recommendation through the price file.
 24 **Q.** I put it to you that it certainly illustrates how
 25 Gallaher saw the agreement with Shell working out, in

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1 that it did involve Gallaher in going around looking at
 2 the shelf prices at the sites of the independent
 3 contractors, and if shelf prices were out of line, it
 4 would raise the matter with Shell in the expectation
 5 that Shell would take action to secure compliance with
 6 the parities and differentials; isn't that the case?
 7 **A.** I can't see how Daryl -- I don't see -- I don't know how
 8 Daryl responded to that, so it's difficult for me to
 9 make a comment --
 10 **THE CHAIRMAN:** That's a different point, how he responded.
 11 You are being asked about what your interpretation of
 12 what Wes Feeney seems to have expected.
 13 **A.** Wes is being pretty bossy and perhaps trying to
 14 railroad, I don't know, it's very -- I would say it's
 15 quite controlling, but suppliers are quite controlling
 16 a lot of the time. I used to ignore most of it, as you
 17 saw earlier in the lack of response and I didn't always
 18 let them know what I was doing, but it could be tonal as
 19 well, it's a way to try and get control I suppose.
 20 **DR SCOTT:** He is writing this in the wake of your signing
 21 an agreement, and he is writing it in the context of
 22 that agreement, and he is asking you -- you, Shell -- to
 23 follow the agreement.
 24 **A.** But the context of the agreement is that we can only
 25 recommend prices to sites, and that we have no direct

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1 contact with sites around the actual shelf price that
 2 they use. So the agreement itself is written in the
 3 backdrop that all of our suppliers understand that all
 4 we will ever do is make a recommendation, and take
 5 action potentially if it goes over the max.
 6 **DR SCOTT:** But we have also had evidence that Shell was
 7 monitoring prices that went too low as well, so there
 8 was presumably contact between Shell and these
 9 contractors in that circumstance?
 10 **A.** I think you are referring to the utility disk.
 11 **DR SCOTT:** Yes.
 12 **A.** Yes. The utility disk is a number of things. My memory
 13 of it actually is the main reason for using a utility
 14 disk is when you were passing one site -- a site between
 15 retailers and you would change them over to make sure
 16 that they had all the products that we recommended and
 17 wanted retailers to stock. I think it happened to throw
 18 up price, but we didn't use it to -- I wasn't aware of
 19 using it to monitor price, because I wasn't particularly
 20 interested in the price at site level unless it got to
 21 the point where we were insulting customers and damaging
 22 the brand. So the utility disk existed but that was one
 23 function within it. Certainly I never used it within
 24 the category teams. It was not an operational tool. It
 25 wasn't information that was passed back up the line for

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1 the customer to use because we didn't have the time to
 2 be monitoring sites on price, particularly with the
 3 backdrop that we had, in their contract with us, we have
 4 given them ownership of that area of the business.
 5 **DR SCOTT:** If we go back to those words "via outlet or head
 6 office", what's being envisaged in the agreement that
 7 you signed appears to imply some communication.
 8 **A.** Certainly in relation to the planograms, we want to have
 9 dialogue with the sites around getting the right
 10 products in the right place. The pricing element of it,
 11 within the agreement, it just wasn't on our radar
 12 really.
 13 **MR LASOK:** Could you turn to tab 18, please. Now, just so
 14 that we can agree which document we are looking at, this
 15 should be, in the first line, an email from Wes Feeney
 16 sent 7 March 2002. Is that it?
 17 **A.** Yes, it is.
 18 **Q.** The first email is of course at the end and it's on the
 19 second page. If you would prefer to read both emails in
 20 one fell swoop, as it were, please do so. You might
 21 want to read the earlier one before the later one.
 22 **A.** I see, there is two, okay.
 23 **Q.** The later one is actually on the other side. It's the
 24 same tab, just turn the page.
 25 **A.** I have 18A.

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1 **Q.** It's that one there on the back of the page.
 2 (Pause)
 3 Now, I just want you to confirm my understanding of
 4 what you were saying to Wes in your email sent on
 5 7 March 2002, which is the one in the back of the page
 6 or rather on the second page, because there you start
 7 off by saying:
 8 "If we complied to planograms and delivered on the
 9 agreement, could you let me know what you have budgeted
 10 to pay out in terms."
 11 Then jumping over the next sentence, you say:
 12 "I am absolutely committed to getting compliance to
 13 the plan and despite the poor start, we will do
 14 everything we can to achieve compliance."
 15 For the sake of completeness, Wes' response starts
 16 off in the first line by referring to an amount, which
 17 is confidential, per outer, and that amount is the one
 18 that corresponds to the agreed payment in clause 4 of
 19 the agreement which is -- I don't know whether you want
 20 to look at it?
 21 **A.** I might just ...
 22 **Q.** Okay, it's at tab 9. If you go to clause 4 in tab 9 --
 23 do you have that?
 24 **A.** Yes.
 25 **Q.** You have the (a), (b) and (c) which set out the payments

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1 per outer and they all add up to the figure that is
 2 stated in the first line of Wes' reply.
 3 **MS ROSE:** I have a problem with this, which is that my copy
 4 of this has the figure blanked out, and I don't
 5 understand how my learned friend can put what that
 6 figure is in circumstances where neither I, nor
 7 I believe the witness, is able to see it. It appears to
 8 me to be a basic breach of natural justice. Call me
 9 a stickler.
 10 **THE CHAIRMAN:** I am not sure why it is blanked out. It is
 11 a Shell document --
 12 **MS ROSE:** No, it's a Gallaher document.
 13 **THE CHAIRMAN:** Yes, but it's to Shell, so Gallaher must have
 14 been happy for Ms Parker to see these figures when
 15 Mr Feeney sent them.
 16 **MS ROSE:** Madam, I agree it's bizarre, but that's what we
 17 were told by the OFT.
 18 **MR LASOK:** Well, I think this is a Shell claim for
 19 confidentiality.
 20 **THE CHAIRMAN:** Well, if it is, then presumably Ms Rose can
 21 see the figures.
 22 **MR LASOK:** I think all that she needs to do is ...
 23 **MS ROSE:** We have asked for the figures in the past and been
 24 denied them.
 25 **DR SCOTT:** You mean you don't have an unredacted copy of the

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1 agreement signed by your client?
 2 **MS ROSE:** No, sir, I have that, but what I don't have is
 3 an unredacted copy of this email. The assertion has
 4 been made --
 5 **MR LASOK:** You don't have a copy of your own email?
 6 **MS ROSE:** It's not our email, it's an email from --
 7 **MR LASOK:** It is, actually --
 8 **MS ROSE:** -- Wes Feeney of Gallaher, and we do not have
 9 an unredacted copy, and we have been asked, I am told,
 10 and been refused one. I agree with my learned friend
 11 Mr Lasok that that is bizarre, but perhaps he would like
 12 to take that up with his clients.
 13 **MR LASOK:** Well, we can sort that one out, but the Tribunal
 14 is an entirely objective forum, and subject to
 15 clarifying the position, one can see that the things are
 16 the same.
 17 **MS ROSE:** I am sorry, I can't see that because I can't see
 18 the figures.
 19 **THE CHAIRMAN:** Well, let's try and make some progress,
 20 nonetheless.
 21 **MR LASOK:** Yes.
 22 **THE CHAIRMAN:** What is the point that you are making?
 23 **MR LASOK:** The point that I wish to ask, the question I wish
 24 to put to you, is that as I read this, your email to
 25 Wes, you are indicating to him Shell's absolute

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1 commitment to compliance with the agreement as a whole.
 2 **A.** That's not correct. I've demonstrated in the email my
 3 absolute commitment to compliance to the plan.
 4 **Q.** Well, you say at the first line:
 5 "... if we comply to planograms and delivered on the
 6 agreement ..."
 7 **A.** Yes.
 8 **Q.** So you are asking him: how much do we get if we deliver
 9 on the agreement?
 10 **A.** Yes.
 11 **Q.** You say that the later bit where you talk about getting
 12 compliance to the plan refers to the planogram but not
 13 to the agreement?
 14 **A.** It specifically refers to planogram compliance, which we
 15 spent a lot of time working on, and totally committed to
 16 the concept that planograms drive category growth. That
 17 was our sole, that was our primary focus on this
 18 category and a number of others as a category team.
 19 **THE CHAIRMAN:** You don't think that he might have mistakenly
 20 read that as indicating that you were committed to
 21 complying with the agreement as a whole?
 22 **A.** He knew, we spent so much time poring over planograms,
 23 he knew that -- he understood the situation with price
 24 and he knew that we were prepared to spend time getting
 25 planograms right.

1 We even went to the extent of producing planograms
 2 by postcode, which was incredible.
 3 **DR SCOTT:** But if he was so clear about that, then it seems
 4 slightly surprising that he embraces the payments in
 5 4(a).
 6 **MR SUMMERS:** The poor start, which you mention later in the
 7 sentence, it's hard to see that that relates to
 8 compliance to the plan because, in his reply, he says
 9 "With regard to the poor start, the levels achieved",
 10 and that clearly relates to turnover.
 11 **A.** Yes, I am sorry, could you --
 12 **MR SUMMERS:** I am sorry, it's on page 211.
 13 **A.** (Pause). I am not sure, unless I went back and looked
 14 at other documents. But what I would say is when you
 15 put a new planogram out, which we had, it does take
 16 a few months to get things looking how they should,
 17 because sites have got stock left from previous
 18 planograms and they can be slow to adopt the new one.
 19 We allow leniency there as well, obviously, he is stuck
 20 with stock he can't shift, so it takes a while for
 21 planograms to actually be out there as they should be.
 22 If he was, to be honest, talking about poor starts
 23 in terms of price, I wasn't going to do anything about
 24 it in any case.
 25 **MR LASOK:** Right, I would like to move on to another topic

1 now.
 2 It's right, isn't it, that the parities and
 3 differentials applied both to the Shell recommended or
 4 minimum price and to the maximum price? You may not
 5 agree with the fact that the Shell recommended price was
 6 a minimum one, but the P&Ds applied to both prices,
 7 didn't they?
 8 **A.** I am not sure.
 9 **Q.** Well, if you look at 13, in annex 9, {D9/13}, this is
 10 Wes Feeney on 20 December 2001, copied to you, and there
 11 is an attachment, just below the first holepunch you
 12 have the email where he attaches the price file and, at
 13 the end of the email he says:
 14 "I would also add that parities and differentials
 15 apply to both rec and max prices."
 16 **A.** Well, it seems he felt they did. I have to confess,
 17 I am not sure just at the moment.
 18 (Pause)
 19 **DR SCOTT:** Sorry, lower down on that page, you send a note
 20 to Bernie Streeter:
 21 "If poss we would like to send a pile with both
 22 Shell and P&H codes with min and max retails case size
 23 not cost to site, including the alcohol."
 24 **MR LASOK:** We have already seen that, and this is an email
 25 that reappears, it's also in annex 9, tab 15. {D9/15}.

1 The first email in the string that's at tab 15. It
 2 surfaces again in annex 19, at tab 38, {D19/38}. It's
 3 the first email, and annex 19, tab 41, {D19/41}, it's
 4 the first email. I think I've taken Ms Parker to this
 5 particular document, it's the reply in this particular
 6 tab that I hadn't previously gone to.
 7 Well, does that refresh your memory, perchance?
 8 **A.** With regard to what?
 9 **Q.** To the fact that the parities and differentials applied
 10 to both the Shell recommended and the maximum price?
 11 **A.** Actually it doesn't, I cannot remember just at the
 12 moment how the parities and differentials worked.
 13 **Q.** Okay. Because it's also stated in one of the ITL
 14 emails, which is annex 19, at 41. If you can't
 15 remember -- I think actually you would get it from 19,
 16 tab 50, which is, I think, something that I have already
 17 taken you to. I asked you a question about tiers, tier
 18 pricing in 19/50, but 19/50 is also an email from ITL,
 19 which shows that they regarded the parities and
 20 differentials as applying to both the pricing tiers.
 21 **A.** Perhaps they did. As far as I can remember, the purpose
 22 of us having two prices to recommend to sites was that
 23 we were recommending what they should price at and they
 24 could price up to it and beyond it, as long as they
 25 didn't exceed the max. The relationship between RRP and

1 max and differentials and parities I just can't
 2 remember, if there were any.
 3 **Q.** I think it's right to point out that in the Gallaher
 4 agreement we have just looked at there is no indication
 5 that the parity and differential requirements were
 6 limited to one only of the two prices.
 7 Now I want to turn on to something slightly
 8 different. I've earlier made the comment that before
 9 and after the period in which you were actively involved
 10 as the category manager, and you were there from
 11 sometime in September until 2001 until March 2002, but
 12 on either side of that, by and large Shell did maintain
 13 the parities and differentials that it signed up to in
 14 the trading agreements. In the period before, it was
 15 just the trading agreement with ITL, the period after it
 16 was the trading agreements both with ITL and Gallaher.
 17 Now, you weren't around before, you had a limited
 18 involvement afterwards, so I am going to take that into
 19 account, I am not going to bother you with questions
 20 about the period before or after.
 21 In between times, I put to you that the
 22 differentials got out of line a bit, in that period from
 23 September 2001 to March 2002. Would you agree with
 24 that?
 25 **A.** I haven't conducted any sort of analysis on what

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1 happened with the differentials before I came on board,
 2 during then or after. I haven't seen an analysis so
 3 I can't compare. What I can tell you is that I didn't
 4 spend much time considering them while I was in the
 5 post, and that both my predecessor and my successor
 6 worked under the premise that we had this RBA agreement
 7 and, like me, they understood that retailers managed
 8 their own price. Particularly my successor because he
 9 reported to me, and I did the handover and I took him
 10 through that, and we lived and breathed it.
 11 **MS ROSE:** Can I just clarify, I am not clear whether
 12 Mr Lasok is putting that the parities and differentials
 13 were adhered to in relation to shelf price, or in
 14 relation to the recommended and maximum retail price.
 15 Can he make clear which it is he is saying?
 16 **MR LASOK:** The parities and differentials, to be clear, were
 17 adhered to in the price files before and afterwards, and
 18 ITL and Gallaher believed that they were substantially
 19 complied with at the level of the individual sites.
 20 **MR HOWARD:** I am sure it's not productive to get involved in
 21 a debate about it at the moment, but there is a big
 22 danger in Mr Lasok asserting that in fact there was
 23 adherence and proceeding on that basis, when you
 24 actually have the adherence data that I've referred you
 25 to.

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1 **THE CHAIRMAN:** Well, part of the difficulty is that it's not
 2 really clear what Ms Parker thought she was agreeing to,
 3 if anything, when she signed the agreement. As
 4 I understand it, you don't accept that you were agreeing
 5 to the differentials being complied with at the stores.
 6 It also seems that you don't accept that you were under
 7 any obligation to reflect the differentials in the price
 8 files, either in the recommended or the maximum prices.
 9 What you are being asked is whether you know whether
 10 your predecessor or successor in the job took the same
 11 approach as you do, or whether you don't know what
 12 approach they took.
 13 **A.** With regard to the differentials and parities I don't
 14 know what approach they took, but I do know that both of
 15 them understood and knew about and worked -- as I've
 16 discussed, they understood the RBA and we all worked
 17 within it in terms of the limits of what we could do on
 18 price.
 19 **MR LASOK:** So can I just clarify this, because I wasn't too
 20 sure, in relation to the answer that you made to my
 21 previous question what the position was.
 22 Are you saying that you don't know what Daryl Barry
 23 was doing in relation to the price files?
 24 **A.** I am not saying that.
 25 **Q.** Ah, now, what are you saying?

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1 **A.** I'm saying that he understood how the RBA worked and
 2 knew that the limit of his contact with price was
 3 restricted to a recommendation to sites.
 4 **Q.** But am I right in saying that, if we took you to a price
 5 file that was compiled by Shell in the period in which
 6 Daryl Barry was doing it, you couldn't really tell us
 7 anything about that document and about what Daryl's
 8 thinking was when he put the prices together, or could
 9 you?
 10 **A.** No, I couldn't, because I wasn't managing the category,
 11 so I didn't know what the competition were doing at the
 12 time, I didn't know what strategy they were taking in
 13 terms of which sectors they were trying to grow, I am
 14 not even sure what margin they were trying to achieve at
 15 that point, the things he would have been taking into
 16 account.
 17 **Q.** That's why I am not going to ask you questions about the
 18 period in which Daryl Barry was doing it.
 19 Now, it's true, isn't it, that the parities and
 20 differentials in Shell's price files were the result, or
 21 at least the pricings co-ordinated by Shell with the
 22 manufacturers, and you communicated the price files to
 23 the manufacturers so that, among other things, the
 24 parities and differentials could be checked and if
 25 necessary corrected?

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1 A. I communicated the price files to the manufacturers so
2 that they could see what we were recommending to sites,
3 and I took their recommendations, all of them, they all
4 got to see it, so I took all of their views on board
5 when determining what we were going to do with the price
6 file.

7 Q. In the period in which you were around, I put it to you
8 that Gallaher and ITL thought that Shell did have
9 control of shelf prices and Shell never told them
10 otherwise?

11 A. That's absolutely not the case. As I talked about
12 earlier, every supplier was talked about what we were
13 doing, there was enormous change to the way that we
14 worked, both on distribution and on the way that our
15 retailers had been given the chance to be entrepreneurs,
16 which was a big change to the way we worked. Every
17 supplier was taken through that.

18 Q. It may be a bit going over old ground on this: if you
19 take annex 19, and go to tab 35, page 2, {D19/35/2}, you
20 have seen this already, this is the letter dated
21 4 October 2001. If you go to the second page, could you
22 look at the two headings "Small Classic Filter" but also
23 the bit about Richmond Kingsize at the bottom which we
24 have already seen.

25 (Pause)

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1 Now, the bit about Small Classic Filter is about
2 a promotion and a payment that ITL was making to Shell,
3 but you see that what happened was that the point made
4 by the writer of the letter was that only part of the
5 estate had stocked the brand, and of that part, only
6 another part had actually adhered to the promotional
7 price.

8 If you look at the bottom of the page, we have the
9 bit about the specific price or the natural price of
10 Richmond.

11 I put it to you that this is an indication that ITL
12 believed that you, Shell, were capable of getting
13 results in terms of securing pricing at a particular
14 level, in the sites, and by now, we are 4 October 2001,
15 and you did not write back and tell them that they were
16 operating under a misapprehension?

17 A. No. What it shows is that we did a promotion, and some
18 sites selected to do the promotion and some didn't,
19 which retailers, they are able to opt out of promotions.
20 If they don't want to do that, they don't have to take
21 them all, they are quite at liberty to do that. I think
22 in actual fact she then suggests we carry on with it and
23 try it again and I declined because clearly there is no
24 real appetite from the retailers to do it, is what it
25 shows.

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1 Q. If you go to -- sorry.

2 THE CHAIRMAN: In that circumstance, how do you ensure or do
3 you ensure that the benefit of the bonus, or the half of
4 the bonus that you are getting, gets through to those
5 stores who did actually implement the promotion?

6 A. What we would have done is reduced the price to all
7 stores, in actual fact, and there are benefits to
8 a retailer of having a site, and the reason we do it is
9 that if you reduce the price of a product into store,
10 and even if a retailer doesn't run it, the benefit is
11 that they have actually got stock on site, so even if
12 you don't get the benefits of extra sales immediately
13 because there has been a price drop and consumers have
14 bought more, you get the benefit of a retailer being in
15 stock -- because if he is canny enough he will buy
16 product anyway -- and there will always be availability
17 of that product. So promotions aren't just about
18 getting customers to buy product, they can often be
19 about getting availability on site. But we were
20 rewarded with the outer bonus based on those stores that
21 actually did take part.

22 THE CHAIRMAN: So you would then fund the other half of the
23 reduction yourselves, then?

24 A. Through the -- I am trying to remember the specific
25 mechanic on this, but we didn't have the ability to have

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1 a number of cost prices going into sites, with one
2 blanket cost price, so it would have been reduced. As
3 I say, there are benefits to manufacturers of sites
4 taking extra stock.

5 MR LASOK: Could you turn to tab 40, please. This is the
6 2002 ITL/Shell agreement, and you have here the first
7 paragraph which I have already drawn your attention to,
8 at the bottom under the heading "Payment" you have under
9 the reference to "price policy", it says:

10 "Subject to the correct pricing policy being
11 followed, the full payment will be due after
12 31 December 2002."

13 Then going back up the page to the first holepunch
14 we have:

15 "Price files must be provided to ITL and any errors
16 corrected within two weeks of notification to head
17 office. ITL must be given the opportunity to respond to
18 other manufacturers' price offers, but may choose not to
19 respond."

20 Doesn't that indicate that ITL believed that Shell
21 had control of shelf prices?

22 A. No, it doesn't, it's back to the same issue with
23 agreements, sometimes we did take the recommendations
24 and comply and picked up the bonus, and sometimes we
25 didn't.

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1 Q. What was the purpose of ITL insisting that it had to be
 2 given an opportunity to respond to other manufacturers'
 3 price offers if you didn't have any control over the
 4 shelf prices at the sites?
 5 A. I don't want to speak for ITL but they would want to
 6 respond -- if a competing brand was dropped in price,
 7 they may wish to respond, and therefore recommend to me
 8 that I reduce my recommended retails, and it's one for
 9 ITL.
 10 Q. How would that work through to shelf prices?
 11 A. I would be recommending to the retailer, and if he chose
 12 to do it, he could do it, and if he didn't want to do
 13 it, he didn't have to do it.
 14 Q. While we are going through this, 41, if you look at the
 15 first email, this appears at 19/38, but this is the one
 16 that refers to "min" and "max" again. I draw your
 17 attention to the fact that you say:
 18 "Would you mind forwarding the entire price list for
 19 MG40, 41 and 42 to Breda, Wes and Andy (so that they can
 20 sense check the info for range inclusions and correct
 21 price parities and differentials)."
 22 A. This is a new planogram so it meant we had to overhaul
 23 the whole category and the whole price file, which is
 24 quite complicated, but it's almost like doing -- it is
 25 like doing a manufacturers' price increase or a Budget,

1 because you are falling into my category. So I wanted
 2 each manufacturer to see what we were proposing going
 3 out for their comment before I then took into account
 4 what we were going to do with margin.
 5 Q. Then we have Wes Feeny's response, which starts at the
 6 bottom of the previous page, but in the middle of the
 7 page there is an email from you to Bernie Streeter in
 8 which you say:
 9 "I am happy to action the comments Wes has made."
 10 You carry on to say:
 11 "I will forward the ones I have had from the other
 12 manufacturers. Take a look and see if there are any
 13 discrepancies and if not, we will action them."
 14 A. So in this instance I have taken some of Wes'
 15 recommendations, I've wanted to check there isn't any
 16 discrepancies in terms of margin that the retailer will
 17 achieve, or anything odd between brands, and then we
 18 would be able to action.
 19 Q. But throughout all this you never ever tell the
 20 manufacturers that Shell has no control over shelf
 21 prices?
 22 A. They have -- they are very clear and have been told that
 23 we cannot go any further than recommended retail price,
 24 and if they insult customers by going too high we can
 25 then take action. I think I have to say I don't think

1 we ever did, but they were aware of it. I didn't see
 2 the need to spend time reiterating something that was
 3 absolutely clear, and was a business model we were all
 4 working with and having for quite some time by now.
 5 Q. I fail to understand, we have been looking a few moments
 6 ago at the Gallaher saga in which there is a prolonged
 7 exercise in which Gallaher communicates actually with
 8 you about things like pricing and getting the pricing
 9 into line with the requirements of the future
 10 Gallaher/Shell agreement, so that you will get a maximum
 11 payment, drafts are exchanged, and you sign the
 12 agreement, and you get the document about the CPM
 13 monitoring.
 14 I am afraid to say this points only in one
 15 direction, and that is that Gallaher was operating on
 16 the basis that Shell was able to secure the result that
 17 Gallaher was seeking to achieve through its agreement,
 18 and that result was that P&Ds respected in the stores,
 19 sites, of the independent contractors.
 20 This is -- now we will come to the question, because
 21 I like a bit of speech before I get to a question --
 22 where is the record of your communication to Gallaher
 23 that they have simply got it wrong?
 24 A. The saga, as you call it, between Gallaher and I, most
 25 of the communication between Gallaher and I is around

1 planogram compliance, and the agreements, the amounts of
 2 money reflecting the agreements with ITL and Gallaher
 3 reflect the fact that price was less important than
 4 other areas, and the amount of communication around
 5 planograms and the time spent on it was certainly
 6 tenfold than price. The fact that there were no
 7 documents of me going back to manufacturers repeating
 8 the business model under which we operate is because
 9 they already knew, we all knew in day-to-day business
 10 that's how we operated, which is why when we went onto
 11 site to look at the shelf labels and to look at price,
 12 they were below the max, sometimes below RRP, sometimes
 13 above RRP, they were generally up to the max.
 14 Q. And Wes Feeny is asking you to comment on the Gallaher
 15 agreement in draft form, which contains pricing
 16 provisions, monitoring of stores, remedial action to be
 17 taken to secure compliance inter alia with the pricing
 18 provisions, and he is asking you for comments, and you
 19 never give him a response indicating that he is
 20 operating under a misconception?
 21 A. Most of the CPM activity is around planogram compliance,
 22 as we talked about. In terms of price, in terms of the
 23 CPM I think I've said that one part of it I would have
 24 certainly have made sure was removed before it went to
 25 site. I will have dealt with that so that they were not

1 going out talking to retailers about price. But
 2 I didn't operate that way. I didn't have time to be
 3 running around mollycoddling suppliers; I had bigger
 4 things to do, frankly.
 5 **MR LASOK:** Other things to do. No further questions.
 6 Discussion re timetabling
 7 **THE CHAIRMAN:** Well, is that a convenient moment for you to
 8 see if you can make arrangements to come back tomorrow,
 9 unless Ms Rose and Mr Howard can say how long they are
 10 going to be roughly in re-examination and asking any
 11 further questions?
 12 **MR HOWARD:** I would think I would be at least half an hour.
 13 I think it would be unsatisfactory, bearing in mind the
 14 amount of time the witness has already been giving
 15 evidence, and the time, to try and squeeze it in.
 16 Obviously if you say that's what we should do, that's
 17 what we will do.
 18 **THE CHAIRMAN:** No, I don't think that would be appropriate.
 19 So you would ask your questions first and then there
 20 would be re-examination. Very well. Well, I think
 21 let's close for today now, then.
 22 **MR HOWARD:** Could I respectfully suggest that we ask behind
 23 the scenes, we try and find out what the availability
 24 is. If it's possible for Ms Parker to come back
 25 tomorrow, fine. If not, then at her convenience in the

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1 next week or two, we try and slot in another hour in
 2 which to do that.
 3 **MS ROSE:** Can I suggest, I don't know whether it's possible
 4 for the Tribunal to sit early tomorrow morning, because
 5 one of --
 6 **DR SCOTT:** Sorry, it's my fault and I am afraid I have
 7 a very important meeting in relation to urgent things
 8 going on in my charity.
 9 **MS ROSE:** You don't need to apologise to me. The problem is
 10 child care. The point I was going to make was that it
 11 might be possible for Ms Parker to have somebody take
 12 the children to school, but she would need to be back in
 13 Devon in time for their return. That was the point
 14 I was making.
 15 **THE CHAIRMAN:** Well, unfortunately we can't sit any earlier
 16 than 10.30 tomorrow.
 17 **MS ROSE:** You can't sit any earlier than 10.30?
 18 **THE CHAIRMAN:** No. Well, we will rise today. It would be
 19 useful if, once you have had your discussion, you could
 20 let us know via the referendaire or via one of the
 21 ushers what arrangement you have come to so that we know
 22 what is going to happen tomorrow morning. If it's not
 23 going to be Ms Parker, it will then be Mr Conrad?
 24 **MS ROSE:** It will be Mr Conrad, and he has to be dealt with
 25 tomorrow morning, so in fact it probably can't be

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1 Ms Parker tomorrow, because otherwise that will cause
 2 a problem with Mr Conrad.
 3 **THE CHAIRMAN:** Well, and then who would we have tomorrow
 4 afternoon? Is that when we have Mr Goodall slotted back
 5 in?
 6 **MR HOWARD:** I am getting whispered at from behind about
 7 timetable. I think we should assume in the light of
 8 what has just been said that we will have Mr Conrad
 9 tomorrow morning. I think we have to now start to think
 10 about timetable.
 11 **THE CHAIRMAN:** Yes.
 12 **MR HOWARD:** This is the OFT's letter, they have estimated
 13 two hours for him, and 1 to 1.5 hours for Mr Culham.
 14 That therefore means that we would finish Mr Culham, if
 15 that is adhered to, sometime in the early afternoon.
 16 The question I am then being asked is whether we are
 17 going to start Co-op, and whether Mr Goodall will start
 18 evidence. My suspicion is that we want to say something
 19 in opening about Co-op, but we will be relatively short.
 20 But my suspicion in the light of the timing so far is
 21 that we will not get to Mr Goodall, and I just want to
 22 check that Mr Goodall, therefore, who has sat around
 23 already for a day or two, that he doesn't need to come
 24 tomorrow. But we are in Mr Lasok's hands to some
 25 extent.

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1 **THE CHAIRMAN:** Have you anything to contribute to the
 2 debate, Mr Lasok?
 3 **MR LASOK:** No, save that our estimates for cross-examination
 4 were necessarily provisional, based on trying to get
 5 through this as quickly as possible, but I can't resist
 6 making the point that we spent half a day yesterday in
 7 re-examination, and with all due respect to Mr Howard,
 8 on any view that could have been cut down. But he no
 9 doubt can make the same kind of and will make the same
 10 kind of comment about me, and that's just part of life's
 11 rich pattern.
 12 **MR HOWARD:** I generally refrain from being rude, but the
 13 re-examination actually I think will have turned out to
 14 be extremely valuable but we will all debate that on
 15 another occasion. The real point is I can't estimate
 16 re-examination until I know what is examined.
 17 **THE CHAIRMAN:** Well, it seems unlikely that we will reach
 18 Mr Goodall tomorrow, so if your question is: can
 19 Mr Goodall be reassured that at the earliest he will be
 20 here on Friday morning, then I think that that is the
 21 case.
 22 **MS ROSE:** Can I clarify: it looks as though tomorrow is not
 23 going to be feasible for Ms Parker in the circumstances.
 24 Can I just get an idea from the Tribunal what day you
 25 have in mind for hearing the remainder of her evidence?

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1	THE CHAIRMAN: Well, I don't have any day in mind at the	1	
2	moment. That I would welcome you discussing with your	2	Discussion re timetabling173
3	colleagues as to when would be an appropriate time in	3	
4	liaison with Ms Parker to slot her in.	4	
5	MS ROSE: Could I ask that we should have permission to	5	
6	discuss with her her availability, given that of course	6	
7	she is still in witness purdah?	7	
8	THE CHAIRMAN: Yes, to that extent you can breach the	8	
9	witness purdah but obviously not in relation to anything	9	
10	else.	10	
11	MS ROSE: We won't discuss anything else.	11	
12	THE CHAIRMAN: So tomorrow morning it looks like it's going	12	
13	to be Mr Conrad at 10.30, and then Mr Culham and then	13	
14	the opening in relation to Co-op.	14	
15	MR HOWARD: Yes.	15	
16	THE CHAIRMAN: Well, thank you very much, Ms Parker,	16	
17	I realise it's been a long day for you, but your	17	
18	evidence has been very helpful, and as you have heard,	18	
19	we need now to discuss when you can come back for a few	19	
20	further questions from Mr Howard and re-examination from	20	
21	Ms Rose.	21	
22	So we will meet again at 10.30 tomorrow morning.	22	
23	(5.00 pm)	23	
24	(The court adjourned until 10.30 am on	24	
25	Thursday, 6 October 2011)	25	

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