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IN THE COMPETITION

APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

7 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 10)

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

APPEARANCES

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

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

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

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

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

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

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1 Friday, 7 October 2011
 2 (10.00 am)
 3 **THE CHAIRMAN:** Yes, Mr Howard.
 4 **MR HOWARD:** Good morning. I will now call Mr Culham.
 5 **THE CHAIRMAN:** Yes.
 6 MR KENNETH CULHAM (affirmed)
 7 Examination-in-chief by MR HOWARD
 8 **MR HOWARD:** Good morning, Mr Culham. Your statement should
 9 be contained in core bundle 3 at tab 35, if you could be
 10 handed that. {C3/35} Could you please identify that the
 11 statement at that tab is your statement?
 12 **A.** Yes, it is.
 13 **Q.** And that the contents are true?
 14 **A.** Yes, they are.
 15 **Q.** Just before Mr Lasok asks you some questions, you tell
 16 us that you retired in, I think, 2009?
 17 **A.** That's correct.
 18 **Q.** Okay. I understand that you have been here for the
 19 whole of this week, waiting to give evidence?
 20 **A.** Yes, I did come into London Monday afternoon, so I have
 21 been here the week, yes.
 22 **Q.** Let me apologise to you for having wasted your time this
 23 week, but we are grateful for your coming.
 24 Can I, just in relation to one aspect of your
 25 evidence, seek some clarification which relates to

1

1 a matter that the Tribunal raised yesterday. You tell
 2 us at paragraph 31 {C3/35} that you were responsible for
 3 managing the Shell account until 2001, and then it was
 4 subsequently handled by Breda Canavan, later Hughes and
 5 now Martin, until 2003. Then you say you were
 6 responsible for supervising Ms Canavan and continue to
 7 be involved with the account on this basis.
 8 You will be asked questions by Mr Lasok about all
 9 sorts of things so I do not want to go into great
 10 detail, but could you explain to us two things: first,
 11 when in 2001 did you cease to be responsible for
 12 managing the account? And secondly, after that date, to
 13 what extent did you have involvement and knowledge of
 14 what was going on while Breda was dealing with it?
 15 **A.** Okay, I think it was September 2001 when the
 16 responsibility for the direct management of the account
 17 was passed to Breda. My recollection is I was, I think,
 18 given other accounts to manage and Breda was the only
 19 direct report I had at the time, so she was working
 20 directly for me, but I didn't see everything she wrote
 21 or attend every meeting that she went to.
 22 **Q.** To what extent were you involved, at least generally, as
 23 to what was going on on the Shell account?
 24 **A.** I would like to think I was very familiar with what was
 25 going on on the Shell account.

2

1 **MR HOWARD:** Thank you very much indeed.
 2 Cross-examination by MR LASOK
 3 **MR LASOK:** Mr Culham, could you turn to page 10 of your
 4 witness statement, please. {C3/35/10} Could you look at
 5 paragraph 47, please. The second half of that
 6 paragraph --
 7 **A.** Sorry, did you want me to read it?
 8 **Q.** Could you look at paragraph 47. You don't have to read
 9 it out loud, perhaps if you could read 47 and 48 to
 10 yourself.
 11 **A.** Okay. (Pause) Yes, I've read the paragraph.
 12 **Q.** The bit in 47 from the middle of the paragraph, it's the
 13 sentence beginning "an example is that", from that point
 14 to the end of paragraph 48, your witness statement is
 15 more or less word for word the same as Mr Batty's
 16 witness statement. I wondered how that had come about?
 17 **A.** I hadn't seen Mr Batty's witness statement until this
 18 week, and that was my witness statement which I went
 19 through with Ashurst, the lawyers, and the quotes in
 20 terms of the sales were taken from the business plan
 21 that we produced back in, I think, 2001 or 2002.
 22 **Q.** Now can I just ask you about two of these things. In
 23 paragraph 48, you deal with a presentation given by
 24 Daryl Barry in October 2002, don't you?
 25 **A.** I'm quoting about that presentation, because I was given

3

1 those documents to look at, yes.
 2 **Q.** Ah, so somebody gave you documents to look at. When did
 3 they give you them?
 4 **A.** Some time in the year 2010, I don't really -- the time.
 5 **Q.** So you didn't attend the presentation?
 6 **A.** From reading that presentation, I would say that was the
 7 internal Shell presentation, and I was not at the
 8 presentation when that document was presented.
 9 **Q.** Right. Now, what about the second half of paragraph 47,
 10 where does that come from? The bit that I draw your
 11 attention to, starting with the words "An example is
 12 that"?
 13 **A.** That was run as a promotion, it was run at the time when
 14 I was the direct account manager for Shell, and it's my
 15 knowledge of managing the account at the time, and the
 16 comments were taken from the category manager at the
 17 time of Shell.
 18 **Q.** So you derive this explanation from comments made to you
 19 when?
 20 **A.** The comments were made to me back in 2001, via the Shell
 21 category manager.
 22 **Q.** I would like to take this in stages. The first stage is
 23 going to be from 1 March 2000 to the time of the first
 24 trading agreement between ITL and Shell. Perhaps
 25 I ought to draw your attention to the first trading

4

1 agreement so that we know where we are talking about.
 2 Do you have annex 19? Could you go to tab 27, please.
 3 {D19/27} That is the ITL/Shell UK business plan
 4 investment for 2001?
 5 A. Yes, that's correct.
 6 Q. In your witness statement, when you refer to this, this
 7 is paragraph 41 of your witness statement, maybe you
 8 could just have a quick look at that. So you have
 9 paragraph 41, and --
 10 A. I am just reading it at the moment.
 11 Q. Yes.
 12 A. Yes, okay.
 13 Q. But you don't refer to the date on which either of those
 14 trading agreements was negotiated or signed. Do you
 15 know?
 16 A. I don't recollect the date they were signed. I would
 17 believe they would usually be in the first quarter of
 18 the year, but I can't be certain on that.
 19 Q. You don't say in your witness statement that you were
 20 involved in the negotiation of either of these
 21 agreements?
 22 A. The first one I certainly was, I actually remember
 23 producing that document.
 24 Q. So this is tab 27?
 25 A. Tab 27, yes.

5

1 Q. Okay. Do you happen to know when you produced it?
 2 A. Early in 2001, but I don't remember the date.
 3 Q. Okay. So we are looking at the period from 1 March 2000
 4 to early 2001. Now, it's right, isn't it, that in that
 5 period, 1 March 2000 to the early part of 2001, Shell
 6 had committed to compliance with ITL's parity and
 7 differential requirements?
 8 A. Shell hadn't committed to -- sorry, can you repeat the
 9 period you are talking about?
 10 Q. Yes, it's 1 March 2000 to the time of the signing or
 11 agreeing of the first trading agreement. If you can't
 12 remember, say you can't remember.
 13 A. I can't remember in 2000, and there isn't a copy of
 14 the -- is there a copy of the 2000 trading document?
 15 Q. No, but we have some indication that that must have been
 16 so, because if you look at tab 13, {D19/13} this is also
 17 in 19, perhaps if you just read that document to
 18 yourself.
 19 (Pause)
 20 A. I've read the document.
 21 Q. I am sorry?
 22 A. I've read the document.
 23 Q. Okay. Now, this is a proposal for a deal on the supply
 24 and storage of pre-buy stock, isn't it?
 25 A. Yes, it is.

6

1 Q. If you look at the paragraph numbered 2, it says:
 2 "The current differentials against other
 3 manufacturers' products will be maintained."
 4 Does that refresh your memory as to whether or not
 5 Shell had committed to maintaining parities and
 6 differentials at that stage?
 7 A. I don't know what the current differentials were at that
 8 time, so I can't comment on whether there was
 9 any trading agreement or any other agreement to comply
 10 with them.
 11 Q. Well, were there differentials in existence at that
 12 time?
 13 A. Imperial Tobacco had an objective to try and achieve
 14 differentials within accounts, yes.
 15 Q. But, as I understand it, you are not saying that this
 16 sentence is a misleading or wrong sentence?
 17 A. Sorry, could you --
 18 Q. Well, the sentence says:
 19 "The current differences against other
 20 manufacturers' products will be maintained."
 21 A. But I don't know what the differentials were, so I don't
 22 know if it was in line with our differentials or Shell's
 23 differentials.
 24 Q. Oh, you are thinking that --
 25 A. I don't know, is what I am saying.

7

1 Q. So you don't know what the word "differentials"
 2 refers to?
 3 A. I do know what Imperial Tobacco's differentials were,
 4 but I can't remember at this point whether Shell were
 5 agreeing to our differentials that we would like, or
 6 they were doing different ones. I don't know.
 7 **THE CHAIRMAN:** But it seems to indicate there were some
 8 differentials which had been communicated to Shell that
 9 they had signed up to.
 10 A. I'm saying I can't remember what it was. My belief is
 11 it probably was, but I can't remember whether there was
 12 a contract in place or a trading agreement or, you know.
 13 So I would, if I was to -- my belief is there probably
 14 was, but I can't say for certain there were.
 15 **MR LASOK:** If you look at the next sentence it says:
 16 "In addition, the following will be implemented to
 17 reflect the change in relative RRP's."
 18 Does that help you with your recollection of what
 19 the differentials referred to here might be?
 20 A. This is where we had repositioned the price of several
 21 of our brands in the marketplace, and that's why the
 22 request was put to Shell to actually suggest new
 23 differentials for our products.
 24 Q. Okay. Now, if you look at the next tab, 14, you get
 25 Shell's reply. {D19/14} If you look at the numbered

8

1 paragraph 2, Shell says:
 2 "The Shell selling out prices will continue to
 3 reflect the differences in RRP's."
 4 Does that help you?
 5 **A.** Well, that would suggest there certainty was -- Shell
 6 were happy to set their price policy in line with the
 7 differentials that we were looking for.
 8 **Q.** Now, if we look at tab 18, we have a letter from you to
 9 Mr Conrad of Shell. At this stage, I would just like
 10 you to look at the bottom of the first page of the
 11 letter. There is a heading "Business agreement", and
 12 you request Mr Conrad to send two invoices, the first of
 13 them being an invoice for an amount that is
 14 confidential, in respect of the retail price
 15 differential policy in respect of the period 1 July 1999
 16 to 30 June 2000.
 17 Now, on the face of it that is a payment made to
 18 Shell in return for it complying with the retail price
 19 differential policy, isn't it?
 20 **A.** It's a payment we made to Shell at a period when they
 21 had direct managed sites for them advising sites prices
 22 that were in line with the Imperial Tobacco differential
 23 policy, or better.
 24 **Q.** Now, you comment on this document in your witness
 25 statement, so perhaps if you could go to your witness

9

1 statement, to paragraph 88. {C3/35} Perhaps if you
 2 could read paragraph 88 to yourself.
 3 **A.** I've read the paragraph.
 4 **Q.** I wanted to ask you a couple of questions about the
 5 sentence in the middle of that paragraph, where you say:
 6 "However, as I indicate above, this payment may well
 7 have been made [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 I think I've just read out something that's
 12 confidential. Perhaps I shouldn't have read it out.
 13 Now, Mr Culham, do you remember the basis upon which
 14 the payment was made to Shell?
 15 **A.** In what context, sorry?
 16 **Q.** The payment, the letter that we have just seen at tab 18
 17 asks Shell to issue an invoice to ITL for a payment.
 18 You accept that that was a payment under the
 19 differential provisions in the trading agreements, you
 20 yourself have written this letter. Do you remember the
 21 reason why you wrote the letter?
 22 **A.** I haven't seen any trading agreements for the period
 23 that this invoice is talking about, so there isn't
 24 a trading agreement for the year 2000 to my knowledge.
 25 **THE CHAIRMAN:** Could you just focus on the question you are

10

1 being asked, Mr Culham. You have written to Mr Conrad
 2 saying "Please send me an invoice for the amount", which
 3 is the amount which appears to be payable from ITL to
 4 Shell if they comply with the retail price differential
 5 policy.
 6 One might infer from that that you thought they had
 7 complied with it, and that was why you were asking them
 8 to send you the invoice for that amount of money.
 9 Now, in your witness statement, you indicate that
 10 that may or may not have been the case, and what
 11 Mr Lasok is asking you is: do you remember whether, when
 12 you asked them to send you the invoice, you were doing
 13 that because they had complied with it, or do you not
 14 remember whether they had or not, or do you remember
 15 that they hadn't complied with it, but for some other
 16 reason you were asking them to invoice you for that
 17 amount?
 18 **A.** My recollection of the occasion was we were building
 19 business relationships with Shell, and the amount that
 20 was involved as that part of the trading agreement was
 21 a relatively small investment. I can't say what prices
 22 were charged in Shell at the time, but if they had not
 23 been in line, we would have still paid the money as sort
 24 of an incentive, but we [REDACTED]

11

1 **DR SCOTT:** Mr Culham, the amount which we are not meant to
 2 mention was a small investment, you say, but in the
 3 letter that we saw earlier on there was a pre-buy
 4 agreement, which presumably was worth a good deal more
 5 to Shell than this modest investment. Is that right?
 6 **A.** Shell -- I assume you have the confidential -- Shell
 7 were pre-buying some stock prior to an MPI, yes.
 8 **DR SCOTT:** So that would actually be worth a good deal of
 9 money to Shell in terms of improved margin, because they
 10 could then sell that stock at the increased prices, and
 11 as you say elsewhere in your statement, Shell was almost
 12 the most expensive place you could go to to buy
 13 cigarettes?
 14 **A.** Shell was, I think, almost the most expensive place to
 15 buy cigarettes, yes.
 16 **DR SCOTT:** So that you were in fact giving Shell a very
 17 substantial reward by allowing them to pre-buy on the
 18 terms of the letter that we have looked at?
 19 **A.** If Shell had chosen to put their prices up following
 20 an MPI they would make extra profit from that, yes.
 21 **DR SCOTT:** Yes, Shell have explained to us their concern
 22 about margins, and your own evidence suggests that Shell
 23 had a propensity for taking as much money as they could.
 24 So there was actually quite a reward for Shell in that
 25 agreement?

12

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1 A. There was a potential for stock profit for Shell in that
 2 letter, yes.
 3 DR SCOTT: And in return for that, you were looking for them
 4 to observe price differentials?
 5 A. We were asking them to, yes. But as I have said, and as
 6 is put in all the internal business documents as part of
 7 the Tribunal, in every one we have put down that Shell
 8 set their own selling out price.
 9 DR SCOTT: Yes, no doubt Mr Lasok will talk to you about
 10 that.
 11 There is one other question in relation to
 12 paragraph 88 that I would like to ask. In paragraph 88
 13 you use the phrase "relative price maxima". Was that
 14 a phrase that came to you as you wrote your witness
 15 statement, or was it a phrase that was in common
 16 currency during the period around ten years ago when
 17 these papers were written?
 18 A. Everything, whenever we were talking to accounts,
 19 everything was related to a maxima price. So I can't
 20 recollect whether that exact phrase was used, but we
 21 would always seek, in discussions with accounts, to seek
 22 a maximum price for activity we were undertaking.
 23 DR SCOTT: Thank you.
 24 MR SUMMERS: Good morning, Mr Culham. May I just also ask
 25 you: what significance would you attach to the dates

1 between which the invoice extends?
 2 A. I can't remember, because that seems to be a mid-year --
 3 MR SUMMERS: It appears to be for a whole year period,
 4 doesn't it?
 5 A. Yes, but it's running from July to July. I don't know
 6 the reason for that.
 7 MR SUMMERS: Was it the financial year?
 8 A. Not for Imperial Tobacco. I can't comment whether it
 9 was Shell or not. I honestly don't know the reason why
 10 it was that period of time.
 11 MR SUMMERS: So to the best of your knowledge it didn't mark
 12 the commencement of any particular arrangement?
 13 A. Not to my knowledge now. I have no recollection of why
 14 it started at that time. Obviously I was managing the
 15 account in 99, and -- in 1999, but I don't know why that
 16 period was chosen.
 17 MR SUMMERS: Thank you.
 18 MR LASOK: Now, Mr Culham, when I was asking you about the
 19 document at tab 13 -- maybe you, so that you know what
 20 I am talking about, could turn to tab 13. {D19/13}
 21 I was asking you about the reference to "current
 22 differentials", and you said that you didn't know what
 23 the differentials were. And I think you said that you
 24 have no recollection of the differentials that were
 25 around at that time, the Shell differentials?

1 A. What I am saying is we may have been achieving
 2 differentials better than was our objective, I don't
 3 remember what they were. That's what I am trying to
 4 say.
 5 Q. So you don't remember the Shell differentials applicable
 6 at the time of the letter in tab 13?
 7 A. As I think I said earlier, it could be they were in line
 8 with the recommended retail price, they could have been
 9 different, I don't remember what they were at the time.
 10 Q. To be absolutely clear about this, what I am asking you
 11 is: what were the Shell differentials? That is to say,
 12 what was the differential policy pursued by Shell at
 13 that time? Which brands were at parity, which brands
 14 had a differential? Do you remember anything about
 15 that?
 16 A. My recollection is Shell -- sorry, the industry
 17 categorised the tobacco market by three price sectors.
 18 Shell chose to premium price each price sector by
 19 a differing amount. I can't remember exactly which
 20 amount was which sector, but they would premium price
 21 premium brands where Imperial Tobacco had a relatively
 22 weak presence by less than they would premium price the
 23 cheaper brands where Imperial Tobacco was a stronger
 24 company.
 25 So our brands were higher premiumed than, for

1 example, Gallaher and other competitors' main brand.
 2 Q. Maybe I'll rephrase the question again. If you go to
 3 paragraph 88 of your witness statement, and at the
 4 sentence that I and Dr Scott have drawn your attention
 5 to, you refer to -- and I think I will have to read this
 6 out in order to make sense of the question.
 7 THE CHAIRMAN: Well, whose confidentiality is it?
 8 MR HOWARD: It's not confidential in mine.
 9 THE CHAIRMAN: It must be either ITL or Shell's.
 10 Mr Kennelly, do you have any strong feelings about
 11 this being read out?
 12 MR LASOK: I am not sure now whether this is confidential in
 13 the witness statement, because I have a marked-up
 14 witness statement that has been provided to us by ITL.
 15 MR HOWARD: Insofar as there is any confidentiality in this
 16 paragraph, we waive it.
 17 MR LASOK: Thank you very much.
 18 MR KENNELLY: And it's certainly not Shell's confidential
 19 information.
 20 MR LASOK: What I want to ask you about is the bit in the
 21 middle of that paragraph where you say that the payment
 22 may well have been made irrespective of whether Shell's
 23 RRP's and its SSSPs were -- and then you say:
 24 "... at or below the relative price maxima set out
 25 in the applicable differential schedule."

1 When you wrote that, had you seen the differential
 2 schedule for this period, that's to say the period
 3 1 July 1999 to 30 June 2000?
 4 **A.** Sorry, I am not clear. Are you saying our -- Imperial
 5 Tobacco's differential schedules in -- as far as I can
 6 remember in the time I have been employed by the
 7 company, were related to the RRP's set at the time. So,
 8 therefore, the differentials at that time that Imperial
 9 would have liked to achieve would be based on the
 10 relative RRP's at that time.
 11 **DR SCOTT:** So if we then put that together with what you
 12 told us earlier on about Shell having three levels of
 13 premium, the different categories --
 14 **A.** They did have, yes.
 15 **DR SCOTT:** -- if Shell simply added those levels of premium
 16 to the different categories; yes?
 17 **A.** To different price sectors, yes.
 18 **DR SCOTT:** Then within those price sectors the prices would
 19 necessarily reflect the differentials in the RRP's? Do
 20 I have that right?
 21 **A.** They would if Shell adopted the policy that I explained,
 22 ie different price --
 23 **DR SCOTT:** That you thought they had adopted?
 24 **A.** I thought they had adopted, yes.
 25 **DR SCOTT:** Yes, I think I understand. Yes, thank you.

1 **MR LASOK:** Are you saying that you didn't see the
 2 differential schedule at the time when you wrote
 3 paragraph 88 of your witness statement?
 4 **A.** Sorry, I am not clear.
 5 **THE CHAIRMAN:** What you are being asked, Mr Culham, is in
 6 paragraph 88 you refer to the applicable differential
 7 schedule, and in relation, it seems, to the period
 8 1 July 1999 to 30 June 2000. What you are being asked
 9 is: what was that schedule? Did you have that schedule
 10 in front of you when you wrote this paragraph, or when
 11 you were considering this paragraph in your witness
 12 statement?
 13 **A.** I would have been aware what the schedule was based on
 14 the RRP's, and I don't remember whether I had the
 15 schedule in front of me when this witness statement was
 16 produced. I don't remember that from last year.
 17 **THE CHAIRMAN:** But are you saying that there was a schedule
 18 in existence at that time, or might that just be, in
 19 effect, the ITL RRP's?
 20 **A.** I think my recollection is there was a schedule at that
 21 time. There would have been -- or we would have been
 22 passed objectives to achieve or try to achieve variation
 23 differentials, so there would have been a schedule.
 24 Whether it was called a schedule, whether it was called
 25 a pricing objective, I don't remember.

1 **THE CHAIRMAN:** I am not sure if I've helped at all,
 2 Mr Lasok.
 3 **MR LASOK:** Do you remember, when you wrote paragraph 88,
 4 having beside you a piece of paper that set out the
 5 Shell parity and differential requirements applicable in
 6 the year ending 30 June 2000?
 7 **A.** I don't recollect having a piece of paper to that effect
 8 at the side of me.
 9 **Q.** Right. Why did you say that the differential schedule
 10 had relative price maxima?
 11 **A.** Because that's the way we were operating and producing
 12 schedules with those words being used. So my knowledge
 13 of dealing with Shell and many other accounts was how we
 14 were operating at that time.
 15 I may not have had the exact piece of paper, but
 16 I had experience of dealing with national accounts with
 17 Imperial for, I think it was 16, 17 years, so I am aware
 18 how we were operating, the type of documents that we
 19 produced. But I don't believe I had it with me when
 20 I wrote this document -- my witness statement, sorry.
 21 **Q.** When you wrote the letter at tab 13, you used the word
 22 "maintaining". You say:
 23 "The current differentials will be maintained."
 24 Now, I put it to you that that means that Shell
 25 would keep to the differentials specified in the

1 schedule?
 2 **A.** It could be Shell were keeping to that schedule, or it
 3 could be they were deviating from it on some brands;
 4 I don't remember.
 5 **Q.** I am not talking about what Shell were actually doing as
 6 a matter of fact. I am talking about the, effectively,
 7 condition that you are putting to Shell set out in
 8 numbered paragraph 2. The condition is that current
 9 differentials against other manufacturers' products will
 10 be maintained. I am putting to you that that meant that
 11 they had to maintain the differential.
 12 **A.** As I mentioned earlier, at the time I think Shell
 13 were -- obviously Shell were always setting their own
 14 prices. Sometimes their policy coincided with our
 15 differential policy, and quite a lot of the time in
 16 fact, but other times some brands were not in line with
 17 our differential policy. So the incentive we offered
 18 Shell was to try and encourage them to set their pricing
 19 in line with our differentials, but my recollection,
 20 having dealt with the Shell account for -- personally
 21 for 15 years, they didn't always follow our differential
 22 policy.
 23 **Q.** Right, I'll try this another way. Let's imagine that
 24 you are employed by somebody, and your employer says to
 25 you "Mr Culham, we would like to maintain your salary

1 for the forthcoming year at current levels". Would you
 2 regard that as an indication that your employer regarded
 3 it as free to reduce your salary below current levels?
 4 **A.** Well, they weren't. From what you have just explained,
 5 they were going to maintain my salary for the year
 6 afterwards.
 7 **Q.** Thank you. So when you use the word "maintain" here in
 8 your letter, the communication that you are making to
 9 Shell is that Shell is to maintain the differentials,
 10 not stray from them; is that not correct?
 11 **A.** My recollection at the time of dealing with the account
 12 personally and when supervising Breda, Shell's policy
 13 quite often meant that our differentials were
 14 achieved --
 15 **THE CHAIRMAN:** That's not what you are being asked,
 16 Mr Culham. You are being asked: what did you mean?
 17 What were you trying to achieve by setting this
 18 condition? Regardless of whether you in fact achieved
 19 it, what were you trying to do when you wrote to Shell
 20 saying "current differentials will be maintained"?
 21 **A.** My objective on behalf of Imperial Tobacco was to
 22 achieve the price list differentials on our products.
 23 But what I am trying to say is Shell did -- Shell's own
 24 policy did achieve our objective, but some brands were
 25 not in line with our policy. It was still my objective

1 to try and achieve them.
 2 **MR LASOK:** Right. Now, are you saying that if ITL had
 3 a policy of parity between an ITL brand and a Gallaher
 4 brand, you would be perfectly happy if Shell priced the
 5 ITL brand at a lower price than the Gallaher brand?
 6 **A.** If that was Shell policy, we would be very happy if they
 7 did that, yes.
 8 **Q.** Let's have a look at the document at tab 7. {D19/7}
 9 I'll just run through the sequence for you. Now,
 10 the one at tab 7 is a national accounts brief for the
 11 Shell account, and the NAM is identified as yourself.
 12 Did you draw up this document?
 13 **A.** As the account manager, I would have had input into it,
 14 but personally Breda Canavan, who later appears as the
 15 account manager, produced the document.
 16 **Q.** You saw the document before it went out?
 17 **A.** I would have seen it after it was produced, because it
 18 was produced in the Bristol office and I was working
 19 remotely from 130 miles away.
 20 **Q.** What is the purpose of this document? Who does it go
 21 out to and what's it for?
 22 **A.** This is an internal document that was produced for our
 23 multiple trade reps who visited various multiples to
 24 check on distribution of our products, display of our
 25 products, amongst other things.

1 **Q.** Right. If you look at one of the boxes on the left by
 2 the first holepunch, it's the box "Price and
 3 availability survey"; do you have that?
 4 **A.** I have, yes.
 5 **Q.** You have alongside it a comment box, which says:
 6 "Hamlet 5s are currently 7p above Classic 5s. Shell
 7 have been informed and are waiting action. A new brief
 8 will be issued once this has been resolved."
 9 If you go to tab 8, {D19/8} the next one, and look
 10 at the same box, in the second line, we have:
 11 "Hamlet 5s are currently 7p below Classic 5s. Shell
 12 have been informed and are waiting action."
 13 Then if you go to 9, {D19/9} this is a letter from
 14 you dated 11 June 2000.
 15 Just below the midway point in the page, you have
 16 a heading "Budget, March 2000". Could you read the two
 17 paragraphs that follow.
 18 (Pause)
 19 **A.** I've read those paragraphs.
 20 **Q.** Then if you go to 11, {D19/11} that is another national
 21 accounts brief. In the "Price and availability survey"
 22 box, we have:
 23 "Hamlet 5s and Classic 5s pricing has now been
 24 resolved and should now be the same."
 25 Now, I am not going to ask you about what was

1 actually going on so far as the pricing of Hamlet 5s and
 2 Classic 5s are concerned, because I don't expect that
 3 you would have knowledge of exactly where the pricing
 4 was in the shelves in the Shell sites.
 5 What I am going to do is put to you this question:
 6 when you look at that sequence of documents, that
 7 indicates that ITL wasn't really too fussed about the
 8 absolute price level of Classic 5s, which were the ITL
 9 brand; what they wanted was parity with Hamlet 5s. That
 10 was what ITL wanted: is that correct?
 11 **A.** No, it couldn't be further from the truth. Actually
 12 reading the documents, as we have just done, what
 13 happened is a budget I think in the March, at that point
 14 our Classic brand went up to £2.95 and Hamlet, which has
 15 the same RRP, was at £2.88, and the documents that
 16 counsel has referred to was my effort to reduce the
 17 price of Classic down to £2.88 in the Shell sites.
 18 **Q.** I am sorry, if we go back to tab 7, tab 7 indicates that
 19 at the level of Breda Canavan and yourself, you had been
 20 told that Hamlet 5s were 7p above Classic 5s. Why did
 21 you take any action about that?
 22 **A.** Can I point out that was actually a typo error, which is
 23 why the following week, the word was changed to -- it
 24 was changed from "above" to "below". It was a typo
 25 error by Breda on the first issue.

1 Q. How do we know that it's a typographical error?
 2 A. Because if you read the correspondence, Hamlet was £2.88
 3 throughout this period and Classic was £2.95.
 4 Q. No, how do we know that this was a typographical error?
 5 A. I am telling you under oath it was a typographical
 6 error.
 7 Q. How do you know it was a typographical error?
 8 A. Because I was the account manager at the time and I know
 9 the retail prices that Shell were selling at at the
 10 time.
 11 Q. How do you know that this was a typographical error?
 12 A. I repeat what I have just said.
 13 Q. Because the other possibility is that you had simply
 14 been misinformed, and this was not a typographical
 15 error. It was that you had been informed that Hamlet 5s
 16 were above Classic 5s, and later you were informed that
 17 the position was otherwise. It's not a typographical
 18 error. It might have been an error, but it wasn't
 19 a typographical one. That's what I am putting to you.
 20 A. I completely disregard -- sorry, disagree with what you
 21 have said. It was a typographical error, which is why
 22 the following week the document was sent out with the
 23 change underlined, I think it's in bold and underlined.
 24 Q. And why did you say that the two products should be
 25 priced at parity?

25

1 A. Shell at that time were applying a premium to the RRP of
 2 cigars, and Classic had the same RRP as Hamlet. So
 3 Shell's policy would therefore lead to those brands
 4 being on the shelf at the same price.
 5 Q. Quite so. Parity?
 6 A. Under Shell's policy.
 7 Q. Yes. It was at parity?
 8 A. Under Shell's policy.
 9 Q. It was not the case that you would be perfectly happy
 10 for Shell to reduce the price of Classic 5s below
 11 Hamlet 5s?
 12 A. Classic 5s was above Hamlet. I was trying to get Shell
 13 to bring Classic down in price.
 14 Q. Why do you say in tab 9 -- perhaps you could turn to
 15 that. Do you have tab 9 in front of you?
 16 A. I will.
 17 Q. It's the bit just by the second holepunch:
 18 "Classic cigars should now be sold at 2.88, the same
 19 as Hamlet 5s."
 20 A. Because that's what the buyer had told me he was doing;
 21 Mr Conrad.
 22 Q. So he told you that they were going to be priced the
 23 same?
 24 A. He told me their premium price policy at the time on
 25 cigars was to add the same premium to Hamlet and

26

1 Classic. Therefore, his price file advised sites it was
 2 2.88, and I am just repeating back what he has told me.
 3 Q. And in tab 11, this is going out to the people who are
 4 going to go round the sites checking the prices, and you
 5 are telling them that the price of Hamlet 5s and
 6 Classic 5s should now be the same?
 7 A. Shell had decided to put them at the same price, so I am
 8 informing our merchandisers they should be the same
 9 price.
 10 DR SCOTT: Mr Culham, I'm getting a little confused by some
 11 of your answers, in that you were asked whether you were
 12 unconcerned about the absolute level of Shell's pricing
 13 as distinct from parities and differentials.
 14 A. We did not influence their absolute price unless we were
 15 offering tactical funding at various points with
 16 an account, but this product did not have any tactical
 17 funding. Shell's absolute price was theirs to set.
 18 DR SCOTT: So in fact what you are saying to me now is that
 19 you were, except in the cases of tactical funding,
 20 relatively unconcerned about the absolute level of
 21 pricing, and you recognised that Shell was one of the
 22 most expensive places to buy tobacco products; that's
 23 right?
 24 A. Yes, that's correct.
 25 DR SCOTT: If you look at tab 11, and you look in the box

27

1 marked "Price and availability survey", the document
 2 says that:
 3 "The current Shell pricing policy is as follows ..."
 4 As you said earlier, what they appear to have done
 5 is segmented the market between premium, mid-price and
 6 economy, and they are adding particular amounts to the
 7 recommended retail prices. Yes?
 8 A. They are, with the exception of Benson & Hedges
 9 Superkings, which is a Gallaher brand, where they have
 10 chosen to add more to, so that was good for us.
 11 DR SCOTT: That was good for you?
 12 A. Yes.
 13 DR SCOTT: So from your point of view, that was a plus. So
 14 you are not going to complain about that?
 15 A. No.
 16 DR SCOTT: The effect of those increases was, as
 17 I understand it, with that exception, to maintain the
 18 parities and differentials reflected in the RRP's; is
 19 that right?
 20 A. If Shell had followed that policy across all the range,
 21 yes, it would give the relative differentials in the
 22 RRP's, yes.
 23 DR SCOTT: Your understanding is, at least in these three
 24 areas of cigarettes, that's their policy?
 25 A. Correct.

28

1 **DR SCOTT:** And we see no unhappiness with that, and indeed
 2 happiness at the 11p on Gallaher brands. What that does
 3 is that, to use the phrase which we have discussed
 4 before, maintains the differentials; yes?
 5 **A.** Yes, as Shell's policy has chosen, yes.
 6 **DR SCOTT:** And in that sense, you were prepared to reward
 7 Shell by pre-buy agreements?
 8 **A.** Shell were pre-buying stock for an MPI, yes.
 9 **DR SCOTT:** And to insert in those pre-buy agreements
 10 a condition that they did maintain those differentials?
 11 **A.** The clause was in there to encourage them to respect the
 12 differentials in the RRP, yes.
 13 **DR SCOTT:** Thank you very much.
 14 **MR LASOK:** Now, at this stage -- and remember we are talking
 15 about the period from March 2000 until the signing or
 16 the agreeing of the first trading agreement -- ITL dealt
 17 with Shell on the basis that the prices in the Shell
 18 price file, or agreed with ITL, would be the shelf
 19 prices in the Shell Select sites, and if they weren't,
 20 the shelf price would then be wrong and would be
 21 corrected. That's so, isn't it?
 22 **A.** I think we are talking about the period when Shell had
 23 direct managed control of the sites; is that correct?
 24 **Q.** In the latter part of this period, from October 2000
 25 they are moving to the RBA arrangement.

1 **A.** Okay. So when Shell had direct control of the sites,
 2 they could obviously set their own policy and then set
 3 the shelf price that the sites were selling at. When
 4 the RBA agreement came in, in latter trading agreements
 5 with Shell we took out the compliance or any expectation
 6 of compliance, because we knew both what the Shell
 7 people had told us and from store visits that the agents
 8 could set the prices themselves, within guides, within
 9 guidelines set by Shell.
 10 **Q.** So you were talking about shelf prices?
 11 **A.** When Shell directly managed the sites, they can set
 12 their shelf prices at head office level, yes.
 13 **Q.** So what was going on was that Shell was maintaining the
 14 differentials pursuant to ITL's policy at shelf price
 15 level?
 16 **A.** I can't recollect whether they actually maintained it.
 17 The principle was if they had followed the guidelines of
 18 RRP plus, yes, that would have led to differentials
 19 being achieved at site level. Whether they actually
 20 achieved it or not in every single brand obviously
 21 I can't remember now.
 22 **Q.** If you discovered that a shelf price was out of step
 23 with the requirements, then it was a wrong shelf price
 24 and you would have it corrected?
 25 **A.** Well, we couldn't correct it. We might like -- we would

1 highlight what we saw as an error to Shell personnel,
 2 and we would feed information into Shell. I think at
 3 this time it was Alex Conrad, sometimes he would listen
 4 to what I have suggested, sometimes he wouldn't, but
 5 I can't, on balance, say he did listen X per cent of the
 6 time and he didn't listen -- sometimes he would listen
 7 and sometimes he wouldn't. Sometimes he might take
 8 action, sometimes he wouldn't.
 9 **THE CHAIRMAN:** But this document that we are looking at at
 10 11, am I right in thinking that this is in fact telling
 11 the people who were going to go round and visit the
 12 Shell stores what they should be looking out for on the
 13 shelves?
 14 **A.** Yes, it's what we believed was the Shell policy at that
 15 time and was passed to the people calling on the
 16 outlets, yes.
 17 **THE CHAIRMAN:** So this was telling them the Shell pricing
 18 policy in the expectation that if they saw something on
 19 the shelves that did not coincide with the Shell pricing
 20 policy, they would report that back up to Mr Conrad and
 21 he could then alert Shell to that?
 22 **A.** No, the process that took place, the merchandisers,
 23 I think they were using computers then, but -- I am
 24 certain they were. If an error -- sorry, if something
 25 was not in line with these prices that were on the

1 sheet, the merchandiser, all they would do is record the
 2 absolute shelf price they see when they go in a store,
 3 and then all the information was fed back to Imperial in
 4 Bristol. And I would see a report of sites that were --
 5 if any errors were there. So the merchandisers wouldn't
 6 go back to Mr Conrad at all.
 7 **THE CHAIRMAN:** No, but the point of telling them this
 8 information must be -- if all they have to do is go into
 9 the shop and make a note of what the prices are, why do
 10 they need to know what you are telling them in this box?
 11 **A.** Because the merchandisers were calling on, you know,
 12 masses of different outlets, and obviously if they went
 13 into a major supermarket they would see a price at X,
 14 and it was just to give them a guide, what expectation.
 15 So if they saw a price at Shell of, say, £6, and another
 16 store was £3 they wouldn't necessarily think the Shell
 17 price is wrong. It's just to give them a perception
 18 that Shell were selling above RRP.
 19 **DR SCOTT:** You said that this information wouldn't go back
 20 to Mr Conrad.
 21 **A.** No, no, I said it wouldn't from the merchandiser.
 22 **DR SCOTT:** Oh, I see, it went back to Bristol, was
 23 consolidated --
 24 **A.** That's right, and I would get the summary.
 25 **DR SCOTT:** Sorry. I understand.

1 A. Apologies.
 2 **MR LASOK:** That's one of the reasons why I was so testy with
 3 you about tab 7, because tab 7 looks like a summary of
 4 a report back from the merchandisers, and tab 8 looks
 5 like a summary of a report back from the merchandisers.
 6 And whatever had happened, all that these two documents
 7 are doing is summarising how the merchandisers have
 8 reported back, and you say that it's a typographical
 9 error.
 10 A. Can I say with 100 per cent certainty it's
 11 a typographical error. There is no doubt in my mind,
 12 the correspondence -- I actually do remember this case,
 13 and we were trying to get -- or I was trying to get the
 14 price of Classic down from £2.95 to £2.88.
 15 Q. We are talking about Classic 5s?
 16 A. Correct.
 17 Q. And you were trying to get it down from £2.95 to £2.88?
 18 A. Correct.
 19 Q. And the problem was resolved when? If you look at
 20 tab 11, we see that it seems to have been resolved by
 21 3 July.
 22 A. It seems to be, yes.
 23 Q. So if we go to tab 10(a), {D19/10(a)}, you should have
 24 two horizontal lines drawn in the middle of that page.
 25 It's a Shell price file. I don't suppose you have ever

1 seen this before?
 2 A. I haven't seen it before, no.
 3 Q. But it seems to be the prices prevailing as from or as
 4 at the date of 15 June 2000. You have two horizontal
 5 lines in the body of the page. The lower one is at
 6 Hamlet. Do you have that?
 7 A. I have, yes.
 8 Q. That's 2.95. Then the upper one is Classic Small
 9 Cigars 10. Do you have that?
 10 A. I have, yes.
 11 Q. Then if you go three above that, you get to Classic 5s?
 12 A. Yes.
 13 Q. And you see that the price is 2.95, parity with Hamlet?
 14 A. In the correspondence prior to this, in the letters,
 15 I was asking for 2.88.
 16 Q. But I would put it to you that you weren't concerned so
 17 much with the absolute price level as the parity with
 18 Hamlet, so that if they moved to 2.95 you were
 19 comfortable with that?
 20 A. Our objective -- Shell set their own policy, if Shell
 21 had chosen to sell it at 2.95, that's their choice. At
 22 the time the issue was raised with Mr Conrad, Hamlet was
 23 at 2.88 and my correspondence is seeking to ask
 24 Mr Conrad to bring the price of Classic down to 2.88.
 25 Q. So effectively what happened was that you are suggesting

1 that there was a Hamlet move up to 2.95 and Shell
 2 obliges ITL by moving Classic 5s to parity with Hamlet,
 3 and the problem was then resolved?
 4 A. I think you have got that the wrong way round.
 5 Q. You see, what have I got wrong? What I have is
 6 a document, this is the one at 9, in which you say that
 7 Classic cigars should now be sold at 2.88, the same as
 8 Hamlet 5s.
 9 A. That was our recommendation to Shell, yes.
 10 Q. Then we have, in 11, a resolution of the problem, but
 11 when we look at the price file at 10(a), we see that
 12 Classic 5s and Hamlet 5s are indeed at parity, but they
 13 are at 2.95.
 14 A. My suggestion to Shell is to bring Classic down to 2.88,
 15 and Shell chose to go a different way. I can't control
 16 what Alex Conrad chose to do.
 17 Q. I think we are in agreement on that, because my point to
 18 you is that you were not concerned with the absolute
 19 price level, it doesn't matter to you whether it was
 20 2.88 or 2.95, because your concern was parity between
 21 Classic 5s and Hamlet 5s?
 22 A. Can I just ask the question, before answering your
 23 question: was this at the time of any manufacturers'
 24 price increases? Was anything going on in the market
 25 that I am not aware of? Was there a manufacturers'

1 price increase at this time?
 2 Q. I don't think there was at this time of that year.
 3 **DR SCOTT:** What had happened in the year 2000 was that there
 4 had been a Budget announcement which led to increases on
 5 21 March.
 6 A. Can I just note this down?
 7 **DR SCOTT:** Yes. Then on 22 March, in parallel, there were
 8 ITL MPIs and Gallaher MPIs. Then the next MPI wasn't
 9 until August, with Gallaher going on 8 August and ITL
 10 following on 21 August.
 11 A. So you said 21 March and 22 March?
 12 **DR SCOTT:** That's right.
 13 A. Okay.
 14 **DR SCOTT:** Just so that you know what happened in both,
 15 Classic in ITL's portfolio goes up 8p for five, and
 16 Hamlet in Gallaher's positive also goes up by 8p for
 17 five.
 18 A. Okay.
 19 **MR LASOK:** The point I am putting to you is that the matter
 20 was resolved by Classic 5s being priced at parity with
 21 Hamlet 5s, but you weren't concerned with whether parity
 22 was achieved at 2.88 or 2.95?
 23 A. The request that I had put to Shell was to reduce
 24 Classic to 2.88. If Shell had chosen to put it to 2.95
 25 that's their choice.

1 Q. Thank you. So you agree with me?
 2 A. I am agreeing that Shell control their pricing. We made
 3 a recommendation, they ignored it, they made their own
 4 decision.
 5 Q. The point that I am putting to you is precisely that,
 6 that from ITL's perspective, what you were concerned
 7 with was the parity. Do you agree with that?
 8 A. I was concerned with it, and my objective and what
 9 I wrote to Shell, which you can see from the letter, was
 10 asking him to bring Classic down to 2.88. He chose not
 11 to do that.
 12 Q. The fact is that you were happy with parity, whether it
 13 was at 2.88 or 2.95?
 14 A. Shell set their own pricing policy at a premium price
 15 retailer.
 16 Q. The answer to that question was either a yes or a no.
 17 A. It's not an answer yes or no.
 18 Q. Did you complain to Shell after you discovered that they
 19 had put the two, the Classic 5s and the Hamlet 5s, at
 20 the same price, but at 2.95 rather than 2.88?
 21 A. I wouldn't have complained to Shell if they had chosen
 22 that, but our request was to bring Classic down to 2.88,
 23 but they chose to go a different route.
 24 Q. I would like to turn now to another sequence,
 25 correspondence between ITL and Shell. It's the one

37

1 starting at tab 17 {D19/17}.
 2 MR HOWARD: It just may help everybody if I point out that
 3 if you go to tab 62(a) {D19/62(a)} -- and I hope
 4 Mr Lasok will forgive me, it's not meant to interfere
 5 with cross-examination -- but you actually there have
 6 a complete analysis of the prices. It's probably just
 7 easier to see actually what happened. The cigars point
 8 is on the very last page of this.
 9 The pricing of the cigars at this time you can see
 10 on that page of both the Classic 5s, the Small Classic
 11 and the Hamlet cigars from January all the way through.
 12 So far as one wants to see actually what was happening,
 13 you can see it there.
 14 MR SUMMERS: Mr Howard, can you just indicate who produced
 15 this document?
 16 MR HOWARD: I beg your pardon?
 17 MR SUMMERS: Could you indicate who produced this document?
 18 MR HOWARD: This is Shell's document. This is, as
 19 I understand it -- but Shell's counsel will tell me if
 20 I am wrong -- this document, 62(a), is at this stage,
 21 I think, a record of what is actually their retail
 22 price.
 23 We heard the evidence yesterday about sometimes at
 24 this stage there being discrepancies, but this is what
 25 they were setting as their retail price, as I understand

38

1 it. It's a Shell document. I am simply --
 2 DR SCOTT: I think that's very helpful. I'll take it out so
 3 I can see it. The print is small. We start with parity
 4 at £2.80, that continues for a while, then, as has been
 5 explained, Hamlet goes to 2.88, and that presumably is
 6 the context, Mr Culham, for you to want Classic 5s at
 7 2.88. But in your letter you say 2.88, then you mention
 8 parity, hence Mr Lasok's question about which you want.
 9 Then you achieve that, so they are then, on 15 June,
 10 both at 2.95. Then, as we saw yesterday, Hamlets go up
 11 to £3.05. We have a period where there isn't any
 12 information. By the time information is restored,
 13 Classic 5s had moved up to £3.05 as well. But that
 14 follows a manufacturers' price increase, the August MPI.
 15 So by the time you reach the end of the year, parity
 16 is restored at £3.05?
 17 A. That appears to be what's on here. Can I ask one other
 18 question? You very kindly mentioned there was an 8p MPI
 19 on 22 March, I think. Do we know what the Budget
 20 increase was the day before? The reason I ask the
 21 question is both started off at 2.80. If the Budget
 22 increase was 15p, that could explain why we have ended
 23 up at 2.95, and I don't know the answer to the question.
 24 DR SCOTT: The Budget increase was apparently 8.1p per five.
 25 A. On cigars?

39

1 DR SCOTT: On cigars.
 2 A. So that could be why both brands started off at 2.80.
 3 There was an 8p Budget increase, and an 8p
 4 manufacturers' price increase. That could be why both
 5 brands have ended up at £2.95.
 6 DR SCOTT: Except that this says "Increase as a result of
 7 Budget announcement", so only 8p of the 15p movement
 8 seems to be the result --
 9 A. Sorry, I thought you said there was an MPI as well,
 10 I thought.
 11 DR SCOTT: Yes, but the MPI says "increase as a result of
 12 the Budget announcement of". I am not sure what that
 13 means, and you may be able to inform us.
 14 A. Sorry, I thought you said there was an MPI in March as
 15 well. Apologies.
 16 MR LASOK: Could you go back to tab 17, please. {D19/17}.
 17 I just want to run through the sequence here in order to
 18 ensure that I have it right. At tab 17 you should have
 19 a letter dated 18 September 2000 --
 20 A. Yes, I do.
 21 Q. -- to Mr Conrad. Again, could you read the whole of the
 22 letter, please, to yourself.
 23 (Pause)
 24 A. Yes.
 25 Q. So the gist of it is that -- and I'll take it from the

40

1 passage just after the second holepunch, or rather it's
 2 at the second holepunch. And you record an agreement to
 3 issue by Shell, to issue a trade bulletin informing all
 4 sites of the lower cost price and a Shell Select selling
 5 out price of 3.55 effective from 28 September. The
 6 selling out price is the shelf price, isn't it?
 7 **A.** Well, Shell produced the Shell Select price file, yes.
 8 **Q.** But the intention here was that the shelf price would be
 9 3.55?
 10 **A.** The intention was we had reduced the price of Richmond
 11 by repositioning in the market, reduced the RRP level so
 12 we are, therefore, asking Shell to reduce their selling
 13 out prices.
 14 **Q.** So the answer was yes?
 15 **A.** We were asking Shell to reduce their shelf prices, yes.
 16 **Q.** Shelf prices?
 17 **A.** Their head office set price and of ultimately the price
 18 the consumer paid in their sites, yes.
 19 **Q.** Then you say, in the next paragraph but one:
 20 "The full cost details are as follows and will be
 21 maintained until the next Budget or MPI, assuming you
 22 implement and maintain the [I think the figure is not
 23 confidential] 3.55 selling out price on 28 September."
 24 Then various figures are given.
 25 So, as I understand it, what you are saying is: this

1 is the deal, here are the full cost details, we will
 2 maintain these until the next Budget or MPI on the basis
 3 that you implement and maintain the £3.55 shelf price on
 4 28 September; is that correct?
 5 **A.** We were seeking -- how we got to 3.55 was --
 6 **Q.** No, I am sorry. The answer to the question is either
 7 yes or no. I'm not fussed about the 3.55.
 8 **A.** It is relevant.
 9 **Q.** The question is: is this the deal? You are saying to
 10 them "Here are the full cost details, we will maintain
 11 those until the next Budget or MPI, but it's on the
 12 basis that you, Shell, implement and maintain the 3.55
 13 selling out price on 28 September"; is that correct?
 14 **A.** Prior to this price reduction, Shell had set their price
 15 policy at 10p above this level. The reason that 3.55
 16 was mentioned, they were previously selling at 3.65 and
 17 we were looking to achieve a 10p reduction in the
 18 selling out price across the market. That's why the
 19 3.55 is mentioned.
 20 **THE CHAIRMAN:** Well, as Mr Lasok said, he is not asking you
 21 about the 3.55, he is asking you about the nature of the
 22 agreement that you had with Shell about the 3.55. So
 23 just listen to his question again and see if you can
 24 answer it.
 25 **A.** Thank you.

1 **MR LASOK:** I'll take it slowly, because I may have been too
 2 fast.
 3 The question I am putting to you is this. Is it
 4 correct that you are setting out the terms of the deal
 5 with Shell, and the deal is as follows: you, ITL, will
 6 keep to the cost details set out in the letter, and you
 7 will keep to them until the next Budget or MPI on terms
 8 that Shell will implement and maintain the 3.55 selling
 9 out price on 28 September?
 10 **A.** Alex Conrad and I had a meeting and we agreed at that
 11 meeting that 3.55 would be their selling out price, and
 12 I agreed that Imperial Tobacco would continue to fund it
 13 for a period of time to the next MPI or Budget.
 14 **Q.** So the answer is yes?
 15 **A.** It's not -- I didn't impose the price. We had a
 16 meeting --
 17 **THE CHAIRMAN:** He's not asking you whether you imposed the
 18 price, he's asking you if that was the price that was
 19 agreed --
 20 **A.** It's the price that was agreed, yes. Sorry if I didn't
 21 answer the question straightaway.
 22 **MR HOWARD:** If it helps, this is not in fact controversial.
 23 **THE CHAIRMAN:** No, it isn't.
 24 **MR LASOK:** That's one of the worrying things.
 25 **MR HOWARD:** There is always a danger when you cross-examine

1 on non-controversial points that you may make something
 2 non-controversial into controversial --
 3 **THE CHAIRMAN:** That depends on the witness, Mr Howard.
 4 **MR HOWARD:** -- but it's not for me to teach Mr Lasok how to
 5 cross-examine.
 6 **MR LASOK:** Could you go to tab 19, please. {D19/19}. This
 7 is an email string. There are two emails. The first,
 8 which starts at the bottom of the page, is from
 9 Amanda Eager. It looks as though she introduces herself
 10 at the bottom of the page as having taken over
 11 responsibility from Julia Hann for the Shell account.
 12 **A.** Yes, she was a trading assistant of mine at the time.
 13 **Q.** If you go to the second page, you will see that in the
 14 second line she is sending the email in your absence and
 15 asks Shell to confirm the agreed selling price as 3.55
 16 effective from 28 September?
 17 **A.** Yes, I don't know where I was, but yes.
 18 **Q.** If you go back to the top of the first page, the reply
 19 from Mr Conrad, he just confirms that they would be
 20 retailing at 3.56. If you then go to tab 22 {D19/22},
 21 could you just read the email at tab 22, it's the one
 22 from you sent on 3 November to Mr Conrad.
 23 (Pause)
 24 **A.** Okay.
 25 **Q.** So what appears to have happened by now is that we start

1 off with the deal in the letter at tab 19.
 2 **A.** There is no deal in my tab 19, sorry.
 3 **Q.** Oh, it's 17, I am terribly sorry.
 4 **A.** Okay. Yes.
 5 **Q.** What it looks as though happened is that at some time
 6 between 18 September 2000 and 3 November, there was
 7 a variation of that, because instead of 3.55 it was
 8 3.56. And then you must have had a conversation with
 9 Mr Conrad because in the email at tab 22; right, tab 22?
 10 **A.** Yes.
 11 **Q.** If you look at the second sentence, you say:
 12 "You agreed to alter the selling out price from
 13 28 September in the first instance to 3.56."
 14 Then you say:
 15 "The move to the correct price, 3.55, from
 16 10 October was confirmed by you at our meeting on
 17 9 October."
 18 So it looks as though you started off with
 19 an agreement at 3.55, then there is some sort of
 20 discussion with Shell which results in it moving by
 21 stages: the first stage is 3.56 and then it's 3.55, and
 22 that's confirmed by a meeting on 9 October. Do you
 23 remember this?
 24 **A.** Yes, I had the meeting with Alex when I thought we had
 25 agreed a price of 3.55. After that meeting, Alex

45

1 decided to put them to 3.56, and then we had a following
 2 meeting when I asked him again to bring them back to
 3 3.55, to reduce the price further.
 4 **DR SCOTT:** There seems to be a little bit of confusion
 5 because he thinks he has moved it down by 10p -- this is
 6 in tab 19 -- and you said just now to us that ITL wanted
 7 a 10p reduction.
 8 **A.** Sorry, I can't -- I probably did say 10p, it could have
 9 been 11p. Apologies if I got the wrong --
 10 **DR SCOTT:** You said 10p and 10p is what he thinks he has
 11 done. So I can see ... now, it may be that if we look
 12 at the actual figures we can see what happened.
 13 **A.** It may have been 11p, so apologies if I said the wrong
 14 number.
 15 **MR LASOK:** At all events, by 3 November you have, at any
 16 rate, a revised deal that the price will be 3.55 from
 17 10 October, and --
 18 **A.** I believe we have an agreement with Mr Conrad that, as
 19 the table over shows, the sites weren't actually
 20 following the --
 21 **THE CHAIRMAN:** That's not what you were asked, Mr Culham.
 22 Just please keep your answers to the question that you
 23 were asked, if you can.
 24 **MR LASOK:** So you have your deal that it should be 3.55 from
 25 10 October, but in your email in tab 22 you are

46

1 observing from data that's been collected in the second
 2 half of October that a number of sites were charging
 3 above 3.55, and so you then ask Mr Conrad to re-issue
 4 instructions to sites urgently confirming the correct
 5 price at 3.55, and you ask him to send a copy for
 6 information.
 7 **A.** For those sites charging over 3.55, yes.
 8 **Q.** Then if you go to 24, and, again, this is an email
 9 exchange which starts from the bottom of the page and
 10 works upwards, the email at the bottom of the page by
 11 the second holepunch is from you to Mr Conrad, it's sent
 12 on 19 November. Could you just read that and then his
 13 reply, please.
 14 (Pause)
 15 **A.** Yes, well, I did a store visit myself on 19 November,
 16 and found the sites were still selling above the 3.55 --
 17 the site, sorry, was still selling above the 3.55 agreed
 18 price.
 19 **Q.** He apologises and discloses that an instruction had been
 20 given to reduce the price to 3.55, and says he
 21 reconfirmed this to the sites that week.
 22 **A.** He does, yes.
 23 **Q.** So at this stage, and we are now in November 2000, the
 24 position was that ITL was dealing with Shell on the
 25 basis that if you agreed a price with Shell, that would

47

1 be the shelf price in the Select sites; if you didn't
 2 see it on the shelf, it must be a wrong price, and you
 3 would take action to get Shell to correct the shelf
 4 price at the sites?
 5 **A.** If we had an agreement with Shell for a promotion, which
 6 this is, where we were spending money, we would
 7 certainly highlight sites that were charging above the
 8 price we thought we had agreed and were paying for.
 9 **Q.** Right. You comment on tab 17 in your witness statement
 10 at paragraphs 69 to 70 {C3/35}. Could you turn to that,
 11 please.
 12 **A.** Sorry, the tab or the --
 13 **Q.** It's your witness statement.
 14 **A.** Sorry, which paragraph?
 15 **Q.** It's paragraphs 69 to 70. In the last sentence of --
 16 **A.** Sorry, could I read it?
 17 **Q.** Could you read 69 to 70 to yourself, please.
 18 (Pause)
 19 **A.** Okay, I've read it now.
 20 **Q.** I am particularly interested in the last sentence of
 21 paragraph 69, and the last sentence of paragraph 70,
 22 which in my copy has square brackets, and
 23 an abbreviation for "confidential" in the margin.
 24 (Pause)
 25 I don't quite understand what you are saying here in

48

1 69 to 70, because in the last sentence of 69 you just
 2 refer to the document at -- the cross-reference is to
 3 17(a) and, I think, to 19(a), which are actually the
 4 same as 17 and 19 in the annex. You say that this
 5 permitted Shell to retain an additional 1p of the
 6 promotional funding intended for consumers for the
 7 retailer's own margin.

8 What I don't understand is this: as I see it, you
 9 start off with an agreement in the document in tab 17,
 10 which is conditional on shelf pricing at 3.55, and then
 11 there seems to be some variation of that agreement. But
 12 unless the agreement had been varied, you were perfectly
 13 entitled to say to Shell that it hadn't complied with
 14 its agreement and, therefore, you weren't going to give
 15 it the same funding or the same financial terms as you
 16 had agreed with it in the letter that we see at tab 17?

17 **A.** Well, the majority of funding for the reduction in price
 18 was paid off-invoice, so the money had left Imperial
 19 Tobacco and gone to Shell through lower cost prices.

20 **Q.** But you could have gone back to Shell and said "You
 21 haven't complied with the terms of your agreement?"

22 **A.** Dealing with retailers, it's sometimes very difficult to
 23 reclaim the money that they think they deserve.

24 **Q.** You see, I find it even more puzzling because at tab 24,
 25 in the reply from Mr Conrad, you even get an apology.

1 {D19/24}

2 **A.** The fact that Alex has apologised and then I say to him
 3 "Can we take some money back off you" -- we are looking
 4 at the business relationship with Shell in the medium
 5 and long-term. We were aiming to achieve a price of
 6 3.55. He is telling me he did it at 3.56, he is
 7 apologising, I'm not going to say to him "Pay me a few
 8 hundred pounds back" when we are hopefully heading
 9 towards a lower shelf price for Richmond in the
 10 long-term.

11 **Q.** Isn't it more than that, because the email that
 12 discloses the fact that there had been a meeting on
 13 9 October indicates that actually there had been
 14 an agreement, certainly at that stage, and there seems
 15 to have been an earlier agreement between the September
 16 letter and that email? All this was an agreement
 17 between ITL and Shell.

18 **A.** We had an agreement, but we delivered our part and paid
 19 the money. Shell didn't deliver the lower shelf price
 20 we were expecting.

21 **Q.** The next thing I would like you to look at is tab 25.

22 **THE CHAIRMAN:** I wonder if that's a good moment for us to
 23 have a break?

24 **MR LASOK:** Yes.

25 **THE CHAIRMAN:** We will have a break now for ten minutes.

1 Mr Culham, as you are in the middle of giving your
 2 evidence, that means you mustn't speak to anybody during
 3 this short break, certainly not anybody in your legal
 4 team. Do you understand?

5 **A.** Yes, I do.

6 **THE CHAIRMAN:** We will come back at 20 to 12.
 7 (11.30 am)

8 (A short break)

9 (11.40 am)

10 **MR LASOK:** If you could turn to tab 25 in annex 19 {D19/25},
 11 and look at the price. This is, again, one of these
 12 national accounts briefs, and look at the "Price and
 13 availability survey" box and the bit under "Richmond
 14 price".

15 So the instruction that is being sent out at this
 16 stage is that if the shelf price in the site was above
 17 3.55, your merchandiser was to ask the staff to test
 18 scan the price and correct the shelf ticket?

19 **A.** Yes. What the staff were asked to do, we understood
 20 Shell had issued a price to the sites of 3.55, but
 21 sometimes the price ticket on the shelf may not have
 22 been changed, so the site may well have been selling to
 23 consumers at 3.55, but the shelf price ticket could have
 24 been the previous price, which would have been whatever
 25 it was, I don't remember.

1 **DR SCOTT:** And you had discovered that on your own site
 2 visit. As I recall --

3 **A.** Yes, I had.

4 **DR SCOTT:** -- the shelf price was 3.65 and when it was
 5 scanned it turned out to be 3.56.

6 **A.** So we realised there was a problem, that the sites were
 7 not updating their price tickets on the shelf.

8 **MR LASOK:** We get the same thing in the next tab, tab 26
 9 {D19/26}, which is dated 4 December 2000.

10 **A.** Well, that's just a repeat of the same. The
 11 merchandisers visited outlets about every two months, so
 12 what was issued on the previous tab, November, so we do
 13 issue it quite frequently because they might get
 14 a brief, say week 1, but they don't actually visit the
 15 site until eight weeks later, so sometimes there is
 16 repetition in the briefs we issue.

17 **Q.** So you sent this one out, it's dated 4 December, would
 18 it have gone out on the 4th?

19 **A.** It could have been produced on the 4th, sent out on the
 20 4th, or could have been effective from the 4th. I don't
 21 remember, I can't remember.

22 **Q.** Unless it was corrected later, this would be the
 23 instruction that would cover a period of how many weeks?

24 **A.** Until there was a change to report, probably.

25 **Q.** By December 2000, in fact, the migration to RBA was on

1 its way, it's been started in October, but there is no
 2 reference here to a distinction being drawn between the
 3 Shell Select sites that were under the control of the
 4 independent contractors, and the other Shell Select
 5 sites. So the instruction is applicable to all Shell
 6 Select sites irrespective of whether they are under the
 7 RBA or not?
 8 **A.** I think one of the letters you asked me to refer to
 9 a while ago broke it down, that what was the agent sites
 10 and what were the managed sites, and I can't remember
 11 the figures but it did cover both aspects at that time.
 12 **Q.** You are still sending out instructions to the
 13 merchandisers that are applicable irrespective of
 14 whether the merchandiser was visiting an RBA site,
 15 an independent contractor site, or a site that is
 16 directly controlled by Shell?
 17 **A.** We were for a period of time, but once we realised the
 18 RBA network was growing, we actually stopped the
 19 merchandisers calling on the RBA outlets, and then our
 20 own self-employed sales representatives started calling
 21 on those. So there was a transition period, yes.
 22 **Q.** You don't mean to say that you ceased at some stage to
 23 monitor shelf prices in sites run by independent
 24 contractors?
 25 **A.** We have still visited the independent contractors and

1 reported on distribution, availability, planograms, and
 2 prices were reported back. But at the time, just after
 3 this, I do recollect that in my internal business
 4 development plan, what we call like a plan for the year
 5 with an account, it clearly says that we produce the
 6 recommended retail price, Shell produce their Shell
 7 Select price, but the agents have the ultimate decision
 8 on pricing.
 9 **DR SCOTT:** So if a sales rep went to visit one of these new
 10 contractors, what was their brief?
 11 **A.** Their brief was similar, but they were aware the
 12 agents -- I can't remember the timeframe of when the
 13 transition took place, so I don't think it was here.
 14 **DR SCOTT:** Let's assume that the RBA is in place, the sales
 15 rep is going to visit an RBA site, what are you
 16 expecting a sales rep visiting an RBA site to do?
 17 **A.** They were able to talk to the agent because he had more
 18 control over what he was doing on the site. So if, for
 19 example, we were doing price marked packs on a product,
 20 the sales representative might have encouraged the RBA
 21 to take the price marked pack or perhaps stock a line
 22 that Shell head office hadn't agreed to stock, because
 23 they had more freedom.
 24 I don't remember the exact terminology on here, but
 25 we had a falling out with Shell over one of our products

1 called Rizla, which is the papers, and Shell head office
 2 refused to stock it. But still about half the sites
 3 purchased the stock, some of it from our sales
 4 representatives and some of it through Palmer & Harvey,
 5 so they had more freedom to do what they wanted.
 6 **MR LASOK:** Now, we have evidence from other sources that
 7 indicate that the migration to the RBA was pretty well
 8 completed by August 2001. I think from memory in
 9 August 2001 there were something like ten Shell Select
 10 sites that weren't independent contractors and everybody
 11 else was, and your involvement, your direct involvement,
 12 with Shell ceased in -- when was it? Was it
 13 September 2001?
 14 **A.** I believe it was September 2001, looking at the
 15 correspondence, yes.
 16 **Q.** The difficulty is this: that if you turn to tab 60,
 17 {D19/60} now this is 2003, so it's quite some time after
 18 your direct involvement with the Shell account ceased,
 19 but it's a letter from Breda Hughes, as she then was, to
 20 Shell. You can see that she encloses a pricing report
 21 for Shell Select sites called on by the Shell salesforce
 22 in the first part of July 2003. She is raising the fact
 23 that certain shelf prices are out of line and asks Shell
 24 to investigate and let her know of the outcome of the
 25 investigation.

1 Now, do you happen to remember this kind of thing
 2 going on -- when I say "this kind of thing going on",
 3 it's the Shell salesforce vetting shelf prices at the
 4 independent contractor sites. Do you remember any of
 5 this after your involvement ceased in September 2001?
 6 **A.** I was not aware of Shell's salesforce vetting the --
 7 **Q.** I apologise, it's my mistake. It's the ITL salesforce.
 8 **A.** Yes. I think this confirms when I said the salesforce
 9 were calling on the RBA sites, rather than the
 10 merchandisers. This was after the transition from
 11 us(?), so we were still calling on the sites, yes.
 12 **Q.** So all that happened was that at a certain point in
 13 time, the merchandisers stopped monitoring shelf prices
 14 at the Shell Select sites, and that job was taken over
 15 by the ITL salesforce?
 16 **A.** Yes. As I said, there was a transition over time, yes.
 17 **Q.** But before and after, ITL was monitoring the shelf
 18 prices both at the independent contractor sites and at
 19 the Shell directly controlled sites, until of course the
 20 latter ceased to exist, and that was so, wasn't it?
 21 **A.** We were going into both modes of operation and recording
 22 the prices that the sites had on their shelf, yes.
 23 **Q.** And if prices were out of line in an independent
 24 contractor's site, you would raise it with Shell as the
 25 document we have just been looking at shows?

1 A. This document shows where the majority of prices were
 2 within the Shell recommended price and maximum price,
 3 which is what it says, and we have highlighted a couple
 4 of products where Richmond was being sold in Shell sites
 5 above the maximum price, which is what Shell advised the
 6 sites to sell at.
 7 Q. So the answer to my question is yes?
 8 A. Well, we were monitoring. We were going into the calls,
 9 yes.
 10 Q. And if prices in the independent contractors' sites were
 11 out of line, you would raise it with Shell?
 12 A. Out of line with the Shell maximum shelf price, yes.
 13 Q. Right. We will come back to this. Well, it's not
 14 quite, actually, because if you look at this document --
 15 well, you can't really speak to this because you weren't
 16 directly involved with Shell at this time, were you?
 17 A. Well, I was Breda Hughes' direct line manager at the
 18 time, so I didn't produce the document, true, but I am
 19 aware of what she was doing in her job. I did have
 20 regular meetings with Breda to understand what was going
 21 on, yes.
 22 Q. We can read the document ourselves, for what it says.
 23 A. Yes.
 24 Q. Right. Now, let's move back a bit. We are still at
 25 this period before we get to the first trading

1 agreement, and during this period, it's right to say
 2 that ITL would check the Shell retail prices to ensure
 3 that differentials were observed?
 4 A. We -- sorry, which period are we talking of?
 5 Q. This is from 1 March 2000, which is the relevant date in
 6 the OFT's decision, down to the commencement of the
 7 first trading agreement, which covered the calendar year
 8 2001.
 9 A. We were visiting site -- sorry, we were visiting the
 10 sites and recording the prices that were -- consumers
 11 were paying in those sites, and reporting to Shell sites
 12 that appeared to be out of line with their policy.
 13 Q. And you were also checking the Shell price file for
 14 compliance with the differentials?
 15 A. We were provided with a Shell price file, we looked to
 16 see whether our differentials were applied in that price
 17 file, and we would raise them with Shell if they were
 18 out of line. Sometimes Shell would take notice of what
 19 we said, and sometimes they didn't.
 20 Q. Now, if we turn to the first trading agreement, which is
 21 at tab 27, {D19/27} did you actually draft this
 22 yourself?
 23 A. I did draft that document myself, yes.
 24 Q. Right. Do you happen to know who on the part of Shell
 25 you were negotiating it with?

1 A. I can't remember now.
 2 Q. All right.
 3 A. I don't know.
 4 Q. Okay. Now, if you have the agreement, it starts off
 5 under the heading "Prices" with a reference to Shell UK
 6 setting the selling out prices at company-owned sites.
 7 That appears on the face of it to be Shell setting shelf
 8 prices at the company-owned sites; is that correct?
 9 A. Whether it was the price file or the shelf price,
 10 I can't recollect now what it referred to.
 11 Q. I put it to you that it must mean the shelf prices
 12 because otherwise the phrase looks a bit odd. If you
 13 said "In return for Shell UK setting out recommended
 14 prices or setting out in its price file prices
 15 reflecting ITL products no worse than" and so forth,
 16 that would be one thing, but you actually say "In return
 17 for Shell UK setting the selling out prices of
 18 company-owned sites" and we have seen other documents
 19 which use the phrase "selling out prices" where the
 20 context shows that it's a shelf price. So I put it to
 21 you that here you are talking about Shell UK setting the
 22 shelf prices at company-owned sites?
 23 A. This document, it was a long time ago it was negotiated,
 24 but it would suggest that Shell would set their selling
 25 out prices. But then the third paragraph is actually

1 quoting that some company sites, or 95 per cent of
 2 company sites to follow the Shell price guide. So I
 3 don't know what the first paragraph necessarily --
 4 because the first paragraph isn't relevant if you have
 5 the third paragraph. You have a 5 per cent discrepancy.
 6 **THE CHAIRMAN:** Just focusing, what did you understand by
 7 "company-owned sites"?
 8 A. That would be the approximately 600 sites that Shell
 9 were -- owned and were managing at that time.
 10 **THE CHAIRMAN:** But that would encompass both RBA ones and
 11 not yet RBA ones?
 12 A. I cannot remember when the RBA one started to come in,
 13 so apologies if I don't know that.
 14 **MR LASOK:** The migration to the independent contractors
 15 started in October 2000, so if you say that this was
 16 agreed in the first quarter of 2001, it could be
 17 anything between three and six months into the
 18 transition to independent contractors.
 19 A. So in which case it would cover some managed and some
 20 RBA sites.
 21 **THE CHAIRMAN:** Yes.
 22 **MR LASOK:** Then you have the reference to, the phrase:
 23 "Reflecting ITL products no worse than the relative
 24 RRP compared to other manufacturers' similar products."
 25 So what did you mean by that?

1 A. If you turn the page over, we have various price
 2 benchmarking products. So if you use Embassy No 1, for
 3 example, which is a premium brand, so we were asking
 4 Shell to price Embassy No 1 at least 3p less than the
 5 price of Benson & Hedges Kingsize, which is also
 6 a premium brand.
 7 Q. So that is a cross-reference to the price requirements,
 8 effectively?
 9 A. Yes.
 10 Q. Then in the next paragraph we have the copy price lists
 11 had to be provided by Shell, and Shell had to correct
 12 errors within two weeks of notification. Have I read
 13 that bit correctly? I mean, I haven't read it
 14 literally, but that's what it means, though?
 15 A. It says if Shell would provide us with a copy of their
 16 head office produced price list, and if we noticed any
 17 errors, we would highlight them to Shell.
 18 Q. The next sentence says:
 19 "ITL must be given the opportunity to respond to
 20 other manufacturers' price offers, but may choose not to
 21 respond."
 22 What was the purpose of that?
 23 A. We were hope -- seeking to ensure that our brands were
 24 competitively priced, so if another manufacturer did
 25 a promotion on one of their products, say

1 Benson & Hedges, for example, and brought it down by
 2 10p, we would have the opportunity to tactically fund
 3 Embassy No 1 and bring it down 10p, but we may or may
 4 not choose to do it.
 5 Q. Can I go back to the preceding sentence, because I am
 6 not sure that I understood your answer correctly. The
 7 sentence saying, or beginning "copy price lists must be
 8 provided", it just is an obligation on Shell's part to
 9 provide ITL with copies of their price lists, and
 10 then --
 11 A. Their shelf price, their proposed shelf price, not their
 12 cost price.
 13 Q. It's the shelf price?
 14 A. The price that was issued by Shell head office which
 15 then went to the sites, and the agents would then choose
 16 their price, because they had the decision, and the
 17 managed sites would follow the official shelf price,
 18 I would hope.
 19 Q. Then in the next paragraph you have the bit:
 20 "At least 95 per cent plus of company-owned sites
 21 must follow the official Select price policy
 22 guidelines."
 23 Now, that refers to all company owned sites,
 24 doesn't it?
 25 A. It does at that time, yes.

1 Q. What was the official Select price policy, or what were
 2 the official Select price policy guidelines that you
 3 were envisaging?
 4 A. I can't recollect what the Shell -- Shell's own price
 5 policy was at the time. It could have been RRP plus
 6 a premium on the -- against sectors(?). I don't know
 7 what their policy was at the time.
 8 Q. Now, could you go to paragraph 43 of your witness
 9 statement, please {C3/35}, and just read that to
 10 yourself.
 11 (Pause)
 12 I want to focus on the second half of that
 13 paragraph, and more particularly the sentence beginning
 14 with the words "I understood", because it seems to me
 15 that you are saying that your understanding that the
 16 reference in the contract to the "official Select price
 17 policy guidelines" is a reference to the pricing
 18 requirements set out in the price requirements document
 19 attached to the agreement?
 20 A. Did not exceed the maxima, yes.
 21 Q. That's what you are saying. You are saying that the
 22 words "official Select price policy guidelines" refer to
 23 the price requirements attached to the agreement?
 24 THE CHAIRMAN: You mean the following page in tab 25?
 25 MR LASOK: It's tab 27, I think.

1 THE CHAIRMAN: Yes, sorry, tab 27.
 2 A. Sorry.
 3 MR LASOK: Do you have tab 27?
 4 A. You told me 25 -- I apologise, it is 27.
 5 Q. The first page is headed "Business planned investment"?
 6 A. Yes.
 7 Q. Turn the page and you should have the price
 8 requirements?
 9 A. Yes.
 10 Q. I understand from your paragraph 43 that you are saying
 11 that in the contract the reference to the "official
 12 Select price policy guidelines" is a reference to this
 13 price requirements page?
 14 A. And does not exceed the price maxima set out in that
 15 price requirement guide, yes.
 16 THE CHAIRMAN: What you are being asked is: is it right,
 17 what you say in paragraph 43, that the document that is
 18 being referred to as the "official" Select price policy
 19 guidelines in fact is this document headed "Price
 20 requirements", the second page of tab 27?
 21 A. Yes, or better.
 22 THE CHAIRMAN: You are talking just the document?
 23 A. Apologies, but I don't know what the Shell policy was,
 24 but we --
 25 THE CHAIRMAN: What you seem to be saying here is that this

1 was the Shell policy.
 2 **A.** No, no, this was the Imperial policy, these price
 3 requirements.
 4 **MR LASOK:** Could I, madam, put the question in a slightly
 5 different way.
 6 Are you saying that the Shell price requirements in
 7 this particular page here were incorporated in the
 8 official Select price policy guidelines?
 9 **A.** I don't know whether they were or not. This was our
 10 proposal to Shell, and we -- as I said earlier -- paid
 11 a small amount of money with this price requirement as
 12 our objective. It was an incentive for Shell to follow
 13 our price requirements, but I don't recollect whether it
 14 absolutely followed it or not. It could have done.
 15 **Q.** I am sorry. It wasn't a proposal, this is an agreement;
 16 you accept that it was agreed?
 17 **A.** It was, yes.
 18 **Q.** Yes, and you have given evidence in your witness
 19 statement that your reading of the phrase "official
 20 Select price policy guidelines" is that that's
 21 a reference to the Shell pricing requirements?
 22 **A.** It could -- it could well be that the Shell-produced
 23 recommended guidelines to the sites did match up with
 24 that and that was our expectation, yes.
 25 **Q.** Yes. And that, indeed, would be the point of having

65

1 this provision, which says at least 95 per cent plus
 2 company-owned sites must follow those guidelines,
 3 because otherwise you wouldn't be interested at all in
 4 the pricing that Shell decided to adopt?
 5 **A.** Well, can I just point out that the following year's
 6 trading agreement, as it says in my witness statement,
 7 we took out the 95 per cent, because we realised Shell
 8 couldn't implement a shelf price that we knew exactly
 9 what it would be, because the agents chose their
 10 pricing.
 11 **Q.** I wasn't actually asking you about that. I may have
 12 been a bit obscure, or more than a little obscure, but
 13 the question I was trying to put to you is this: that
 14 ITL had no interest whatsoever in whatever pricing
 15 policy that Shell had, whether to price, for example, at
 16 2.88 or 2.95 or whatever. But it did have an interest
 17 in Shell pricing in accordance with the ITL price
 18 requirements?
 19 **A.** That was our objective, and that's why there was a small
 20 incentive to Shell to hopefully encourage them to take
 21 that into account in their decision, yes.
 22 **Q.** So you would never have had this provision unless the
 23 official Select price policy guidelines reflected ITL's
 24 pricing requirements?
 25 **A.** Sorry, would never have -- could you repeat the

66

1 question, sorry?
 2 **Q.** The provision is the sentence that says "At least
 3 95 per cent plus of company-owned sites must follow"?
 4 **A.** But I think this is the period where I don't know how
 5 many Shell Select sites were managed and how many were
 6 contractors at that point. This is in a transition
 7 period where previously they were all managed. So if we
 8 agreed a --
 9 **THE CHAIRMAN:** Sorry to interrupt, but just trying to move
 10 things along: the reason why the target of 95 per cent
 11 plus following the official Select price policy
 12 guidelines, you are being asked: was compliance with the
 13 official Select price policy guidelines relevant to this
 14 agreement because the expectation was that those would
 15 follow the price requirements set out in the agreement?
 16 **A.** Well, the reason it was 95 and not 100 is because --
 17 **THE CHAIRMAN:** I am not asking why it was 95 and not 100,
 18 I am asking: if this had said "At least 95 per cent plus
 19 of company-owned sites must follow the price
 20 requirements set out over the page" -- suppose it had
 21 said that -- would that have been saying something
 22 different, in your view, from what it in fact says?
 23 **A.** I think it's because the sites didn't get a copy of our
 24 price list differentials sheet. So we were trying to
 25 influence Shell head office, and on the back of that we,

67

1 in whoever it was I negotiated with, had the price
 2 requirements negotiated at head office level and
 3 hopefully most of those, or many of those, were
 4 incorporated into the Shell Select official price file.
 5 But it's the step, I don't know how many -- whether
 6 Shell actually did adhere to what we were looking for or
 7 whether they were against it. I don't know, I can't
 8 remember.
 9 **DR SCOTT:** So when one looks at paragraph 43, you say:
 10 "I understood this provision to mean that the
 11 incentive would be paid if the retail prices in
 12 95 per cent of all Shell Select sites, ie both managed
 13 and contracted outlets, did not exceed the price maxima
 14 set out in the relevant differential schedule attached
 15 to the agreement."
 16 Perhaps you can help me: I don't actually find any
 17 absolute price maxima in the price requirements
 18 schedule, so what did you mean by a price maxima in your
 19 witness statement?
 20 **A.** For example, Embassy No 1 at least 3p less than the
 21 price of Benson & Hedges, so that was a --
 22 **DR SCOTT:** So what --
 23 **A.** It wasn't an absolute price, it was a relative price.
 24 **DR SCOTT:** It wasn't the absolute price, it was the relative
 25 price that concerned you.

68

1 A. Yes.
2 DR SCOTT: So your concern was that whatever went out from
3 Shell, whatever the absolute price levels were,
4 reflected in differential terms what was in this piece
5 of paper?
6 A. Because we were looking for Shell -- yes. The quick
7 answer is yes.
8 DR SCOTT: Thank you. Thank you.
9 MR HOWARD: It might just be helpful -- again, I am only
10 trying to be helpful -- to note that that document
11 actually is dated at least -- it was produced some time
12 in July 2001, it says. So Mr Lasok perhaps ought to
13 establish whether it's that document or there was
14 an earlier one, or what. Otherwise we may be discussing
15 something that's just factually incorrect.
16 MR LASOK: I was actually coming to that.
17 Now, Shell accepted that commitment in the
18 agreement, didn't it?
19 A. Shell agreed to take into consideration our request,
20 yes.
21 Q. It committed itself to it?
22 A. Well, committed, but we did take a very realistic
23 approach to it. It wasn't an absolute every single
24 price in every single site. We were looking to build
25 relationships with Shell, and as I said earlier, it may

1 be a small amount of money, it may be a big amount of
2 money, but we didn't monitor every single price, every
3 single site. It was a general position, and we knew
4 full well that Shell set their own policy. I would
5 assume other manufacturers were talking to Shell at the
6 same time. They may have comments the same as we had
7 comments, and Shell would decide what to do. We were
8 trying to influence -- have influence at the discussion,
9 but not impose it upon them.
10 Q. We can see the existence of the commitment, because
11 every so often you would send Shell an updated price
12 requirement sheet, of which one example is the one that
13 we have here, which is in tab 27, which has details
14 correct as at July 2001. {D19/27}
15 A. I think what we would do at the time of any Budget
16 increase, brand repositioning or MPI, we would then
17 issue a new price requirement sheet based on the
18 relative RRP differences that we knew at the time.
19 Q. And you knew that you were doing that because you knew
20 that Shell had committed to subscribe to the price
21 requirements referred to in the contract?
22 A. I would say fully committed I wouldn't agree with, but
23 they had agreed in principle with. But they weren't
24 fully committed because our pricing was not always in
25 line with our expectation.

1 Q. These price requirements were applied as fixed and not
2 as maximum price relativities; is that not correct?
3 A. Anything but. If our brands were treated more
4 favourably by any retailer, including Shell, we would
5 have been happy.
6 Q. Okay. Well, could you go to tab 28, please. This is
7 a letter dated 19 January 2001 from you to Mr Conrad.
8 {D19/28}. Could you just read it to yourself, please.
9 (Pause)
10 If you look at the paragraph numbered 2, it's got:
11 "The current differentials against other
12 manufacturers' products will be maintained/restored
13 after the Gallaher MPI on 13 February 2001."
14 Does that not indicate that the parities and
15 differentials were being applied as fixed and not as
16 maximum?
17 A. No. We recognised that if we were putting our wholesale
18 price up to a retailer, including Shell, and Gallaher
19 were not increasing their wholesale price at that time,
20 our brands would not achieve their price position below
21 the Gallaher products.
22 So all we are saying is we have had an MPI, we have
23 put up the cost prices, but when Gallaher put up their
24 cost prices can you then respect the price differentials
25 that we would like to achieve.

1 Q. You see, if they were free and it was acknowledged by
2 ITL that compliance with the price requirements was
3 simply that you can't go above a certain level but you
4 can go anywhere below it, how on earth could you have
5 written this? You couldn't have said "The current
6 differentials against other manufacturers' products
7 would be maintained/restored", could you?
8 A. I wrote it in the knowledge at the time that we were
9 having a price increase, therefore, our brands were
10 likely to be more expensively priced or higher priced
11 than Gallaher products. But in the knowledge that
12 Gallaher's were having an MPI shortly afterwards, we
13 were asking for the price requirements to be respected
14 following the Gallaher MPI.
15 Q. Look at tab 30 {D19/30}. This is a document, was this
16 drawn up by you? It's signed by you.
17 A. Yes, I produced that document.
18 Q. Could you look down the page to the last full paragraph,
19 the two-line one that starts off with the sentence:
20 "Target differentials are achieved on all products
21 most of the time."
22 A. Sorry, just that one sentence?
23 Q. Yes, just that. That means, surely, that the
24 differentials were applied as fixed and not as maximum
25 price relativities?

1 A. It's just saying target differentials are achieved most
 2 of the time, so not all of the time but most of the
 3 time.
 4 Q. If you have a target differential of, let's say, 9p
 5 between two brands, would it be correct to say that that
 6 differential had been maintained if the difference in
 7 shelf price was 163p?
 8 A. In our favour?
 9 Q. Either way.
 10 A. So if our target differential was -- can I use lower
 11 numbers?
 12 Q. Yes.
 13 A. If our target differential was 3p and the retailer chose
 14 to make our brand 5p cheaper, we would be very happy
 15 with that.
 16 Q. No, no, that wasn't the question. The question was: if
 17 you say that the target difference is a 3p difference,
 18 would it be correct to describe a 5p difference as
 19 maintaining the target differential?
 20 A. No, it's better than our objectives.
 21 Q. Could you answer the question? The question is
 22 whether --
 23 **MR HOWARD:** What Mr Lasok ought to establish --
 24 **THE CHAIRMAN:** I am not sure it is a fair question, because
 25 I am not sure he has accepted that the target was

73

1 a fixed rather than a maximum one. He may have
 2 a different view of what the target differential is from
 3 the view that you are assuming he has when you put the
 4 question.
 5 **MR LASOK:** Let's take a parity. We will take Richmond and
 6 Dorchester. Would it be correct to say that the parity
 7 had been maintained if the price of Richmond was not the
 8 same as the price of Dorchester?
 9 **MR HOWARD:** Surely the question has to be: what was your
 10 target in respect of Richmond and Dorchester? That's
 11 the first question, otherwise --
 12 **THE CHAIRMAN:** Well, I think at the moment he is exploring
 13 what the word "maintained" is --
 14 **MR HOWARD:** I thought he was exploring what the target
 15 difference is. The word "maintained" is an ordinary
 16 word of English, we know what "maintained" means, but
 17 what was the target that you are saying had been
 18 maintained?
 19 **MR LASOK:** I think it's common ground what the target is.
 20 **THE CHAIRMAN:** Well, no, I am not sure it is.
 21 **MR LASOK:** Could you go back to tab 27 and look at the price
 22 requirements. Let's take the first one, which is
 23 Embassy No 1, and it's 20 packings at least 3p less than
 24 the price of Benson & Hedges Kingsize 20s. What's the
 25 target differential?

74

1 A. A minimum of 3p less than Benson & Hedges.
 2 Q. And it's not 3p?
 3 A. A minimum of 3, 3p or 4p or 5p or 10p, anything. 2p was
 4 not within target, anything above -- anything 3 and
 5 above was within target.
 6 Q. What would happen if the price on the shelf was so low
 7 that it took Embassy into a different pricing segment?
 8 A. Anything, we were looking for our brand to be 3p less
 9 than Benson & Hedges, so we weren't worried what pricing
 10 segment things were in.
 11 Q. What you wanted was your brand to be 3p less than the
 12 price of Benson & Hedges?
 13 A. At least 3p, as it says in the document.
 14 Q. Which price segment was Embassy in?
 15 A. Embassy was in a premium priced sector of the market.
 16 Q. So you would be perfectly happy if the price of Embassy
 17 was dropped so that Embassy was being sold alongside
 18 ultra cheap brands?
 19 A. We would not have worried about that at all. That would
 20 have been the retailer's choice. Our target was to be
 21 3p less than Benson & Hedges. If they sold it £2 less
 22 than Benson & Hedges, we would have been happy, but
 23 I don't think the retailer would have been.
 24 Q. Let's have a look at tab 31 {D19/31}.
 25 **DR SCOTT:** Sorry, just pausing on that, did you regard it as

75

1 part of your relationship management to point out if
 2 prices were missing margins, that you understood to be
 3 the target margins of the retailer, in this case Shell?
 4 A. We wouldn't know what their margin expectations were.
 5 However, if we noticed an obvious -- in the -- this is
 6 annex 29, 19, whatever it is? There is a document where
 7 they have mispriced 10s and 20s, so we have actually
 8 highlighted it, because no retailer could sell 20s at
 9 a 10s price and stay in business. So there are
 10 instances where, if it's glaringly obvious, we may have
 11 highlighted it.
 12 **DR SCOTT:** Thank you.
 13 **MR LASOK:** Could we look at tab 31, please. Do you have it?
 14 A. I have, yes.
 15 Q. Could you read the letter, please, to yourself.
 16 (Pause)
 17 If you look at the last paragraph on the first page,
 18 what we see is that -- there is a figure in the first
 19 line and third line that is confidential -- ITL had
 20 increased the wholesale price, that's the cost price,
 21 but it wanted Shell to maintain shelf prices at
 22 a particular level?
 23 A. We had had a manufacturers' price increase, and the
 24 correspondence we looked at a few minutes ago was
 25 referring to an agreed tactical promotional price, yes.

76

1 Q. But you were faced with a situation that, because you
 2 had increased the wholesale price, in the ordinary
 3 course of events the shelf price would also increase?
 4 A. That's what retailers would normally choose to do.
 5 Q. Yes. You didn't want the shelf price to go up, so what
 6 you actually did was to defer the wholesale price
 7 increase?
 8 A. Yes, we were extending the tactical support, which
 9 I think started back in September, and offering more
 10 tactical bonus to keep the shelf price lower than Shell
 11 would have sold it otherwise.
 12 Q. It's not quite that, because what it actually is is
 13 cancelling a wholesale price increase for a certain
 14 period of time?
 15 A. Deferring or cancelling, yes.
 16 Q. If you go to the next page, and go to the second heading
 17 "Going forward", you discuss here the price of Richmond
 18 and Dorchester, and effectively what you do is you put
 19 to Shell an offer to defer the Budget increase so that
 20 the Shell shelf price would be at either 3.60 or 3.61.
 21 Now, thus far, do I have it right?
 22 A. We were offering to spend tactical bonuses to achieve
 23 a lower shelf price than Shell would naturally have done
 24 themselves, yes.
 25 Q. When we get to the second holepunch, you say that the

77

1 support level will increase, but is subject to the
 2 prices being effective in all sites.
 3 A. Yes, it says that.
 4 Q. This is March 2001, when the migration to the
 5 independent contractors has already gone a considerable
 6 way forward?
 7 A. I can't say how far forward, but it's in the process,
 8 yes.
 9 Q. Then in the next paragraph, you say:
 10 "If you decide not to take up the offer will you
 11 please arrange to alter your selling out prices to the
 12 same as Dorchester Kingsize week commencing 19 March, as
 13 all MPI and repositioning price support will have
 14 finished from ITL."
 15 Why did you not say "Alter your selling out prices
 16 so that they are no more than Dorchester Kingsize"?
 17 A. At that time, if we go back towards the top of the page,
 18 where it has the "Going forward", we were aware that
 19 Shell had a premium price policy of 11p above RRP for
 20 Dorchester. So, therefore, we assumed that Richmond
 21 would be priced 11p above RRP, so we are just
 22 highlighting that we don't want Richmond to be above
 23 Dorchester.
 24 Yes, if I had put above "not above Dorchester", if
 25 it had been below Dorchester we would have been very

78

1 happy, but not above.
 2 Q. All right. If you look at paragraph 74 of your witness
 3 statement, {C3/35}, now, 74 deals with this particular
 4 document because you start discussing it in
 5 paragraph 73. So could you read, if you want to, 73 to
 6 74 to yourself. I do not know whether you want to read
 7 actually all the way down to the end of 76, it's up to
 8 you.
 9 (Pause)
 10 Have you read paragraph 76?
 11 A. I have, yes.
 12 Q. I just want to start off by looking at paragraph 76,
 13 because you say in that paragraph that in the letter we
 14 are looking at, you request:
 15 "That if the retailer chooses not to accept ongoing
 16 promotional support, the price of the ITL product is not
 17 increased above that of Dorchester."
 18 Could you show me where in this letter you say that?
 19 A. It doesn't use the word "not above" in the letter.
 20 Q. No, it doesn't. In paragraph 74, just over midway down,
 21 you have a sentence. It's after the reference to the
 22 January 2001 MPI. Do you have it? It's the sentence
 23 beginning "this letter", paragraph 74?
 24 A. Yes.
 25 Q. You say:

79

1 "This letter is a shorthand way of communicating
 2 that if Shell does not want its margins to fall when the
 3 promotion ends, it will need to increase its prices.
 4 This decision is for the retailer to make."
 5 Was it your own description that this letter is
 6 shorthand?
 7 A. Yes, because I -- as an account manager, I didn't spend
 8 hours and hours and hours drafting every single document
 9 produced, and sometimes you miss out words or you
 10 shortcut things that are in letters.
 11 Q. If we go to the paragraph in the letter on the second
 12 page by the second holepunch, this is the one "if you
 13 decide not to take up the offer"; do you have that?
 14 A. Second holepunch, sorry, yes.
 15 Q. "If you decide not to take up the offer". Do you have
 16 that one?
 17 A. Yes, I have, yes.
 18 Q. This is the shorthand bit?
 19 A. Yes, perhaps I should have put "to maintain your margin
 20 you need to increase the price of Richmond and not above
 21 the price of Dorchester". If I had sat down and drafted
 22 the letter now I would perhaps put a few more words in
 23 it, I accept.
 24 Q. They could have increased their margin by increasing the
 25 price of Richmond to almost any price that the market

80

1 was prepared to stand, couldn't they?
 2 **A.** I would hope they wouldn't, because we were trying to
 3 achieve and offer Shell a small incentive to achieve our
 4 target -- sorry, our target differential. So that was
 5 Richmond at no more than Dorchester.
 6 **Q.** I put it to you that in this letter what we have is
 7 a situation in which you make an offer, that's to say
 8 ITL makes an offer to Shell. The offer is of a payment,
 9 and the payment is designed to get Shell to stop giving
 10 parity treatment to Richmond and Dorchester.
 11 **A.** We are --
 12 **Q.** You are paying them to go below Dorchester, and you are
 13 saying "Well, if you don't take up this offer, you are
 14 going to have to price the same as Dorchester"; that's
 15 basically what the letter says?
 16 **A.** Well, the letter says we are offering tactical support
 17 to reduce the price of Richmond below Dorchester, yes,
 18 and if they don't take up the offer, for them to
 19 maintain their margin they would have to price Richmond
 20 at the same price as Dorchester. That's what it says,
 21 yes.
 22 **Q.** But it doesn't say that. It says, in the paragraph that
 23 we are looking at:
 24 "If you decide not to take up the offer, will you
 25 please arrange to alter your selling out prices to the

1 same as Dorchester."
 2 **A.** And as I've said, if I sat down to redraft the letter
 3 and spent more time on the letter, I would have put "not
 4 more than Dorchester".
 5 **Q.** Would you?
 6 **A.** Yes. That was what the price requirements in our
 7 trading agreements were saying, "price not more than or
 8 3p less than", or whatever. A letter is produced
 9 following -- is this following a meeting? I don't know
 10 if it's following a meeting or a phone conversation.
 11 Our price requirement sheets and our business plan, you
 12 sit down and spend longer producing those. This is a
 13 letter that I probably produced in 15 minutes or
 14 10 minutes, I don't know, and yes, in hindsight I should
 15 have put an extra couple of words in there, I accept.
 16 **DR SCOTT:** Mr Culham, in the previous paragraph in your
 17 witness statement, that's paragraph 75, you have just
 18 said that Shell was selling the Dorchester Kingsize
 19 brand in its outlets for 3.66 reflecting the Shell
 20 premium of 11p at that time.
 21 **A.** Correct.
 22 **DR SCOTT:** What you appear to be saying to them is, since
 23 there is parity in the RRP's, just apply the same
 24 premium, which you understood to be 11p, and you get the
 25 same price.

1 **A.** Correct, but --
 2 **DR SCOTT:** In other words, what you are saying to them is
 3 "Just follow your own policy, add the 11p, and that will
 4 achieve parity, which will in fact match your pricing
 5 requirement, leave aside the promotion"?
 6 **A.** Yes, and the reason I have probably included the
 7 Richmond part for this is if we go back six months,
 8 Richmond pricing support was going up, going down,
 9 holding at the Budget, holding at the MPI, and it's for
 10 clarify I put it in there. But if I'd just put in
 11 "follow your normal policy", yes, that would have served
 12 the same result.
 13 **DR SCOTT:** Yes. I think one of the things that we have
 14 observed, and we saw it in the schedule that we looked
 15 at earlier on, is that sometimes there was turbulence,
 16 and turbulence was followed by a return to what has been
 17 called natural pricing; in other words, the relativities
 18 reflecting the RRP's. Is that what you think you are
 19 suggesting here, if they don't take up the promotion?
 20 **A.** Well, I didn't see the schedule that you have referred
 21 to, I don't think, have I?
 22 From time to time the RRP's were in the public
 23 domain, we produced RRP's --
 24 **DR SCOTT:** Yes.
 25 **A.** -- from time to time we would do tactical promotions

1 which would hopefully give us an advantage, sometimes
 2 Gallaher's would follow and sometimes it would be the
 3 other way round. So --
 4 **DR SCOTT:** Similarly --
 5 **A.** -- we didn't do tactical promotions throughout the whole
 6 year because (a) we didn't have the funds to do it, and
 7 (b) it wouldn't be a tactical promotion if you are doing
 8 that.
 9 **DR SCOTT:** But in essence, what you appear to be looking for
 10 is that after a period of turbulence, whether it's
 11 a promotional period or MPI's conducted on different
 12 dates, sometimes, say, two weeks apart, you are looking
 13 for things to settle down again, in this case at 11p
 14 over RRP for both Richmond and Dorchester.
 15 **A.** Without any tactical -- that's what would happen, we
 16 would hope. And Shell had told us their policy was 11p
 17 above RRP.
 18 **DR SCOTT:** So that's your hope?
 19 **A.** Yes.
 20 **DR SCOTT:** So your hope is a return to parity?
 21 **A.** Or better than parity, but it would be parity in the
 22 case of Shell if they were doing the 11p --
 23 **DR SCOTT:** Which was your understanding of Shell's --
 24 **A.** Yes.
 25 **DR SCOTT:** Thank you.

1 **MR LASOK:** Could you turn to tab 33, please. {D19/33} This
 2 is a letter dated 3 September. It's 2001. The writer
 3 of the letter is in fact Breda Canavan and she is
 4 writing -- well, you can see what she is writing about.
 5 This may be after the time at which your
 6 involvement, direct involvement with the Shell account
 7 ceased?
 8 **A.** I think this is where -- about the time when Breda was
 9 taking over responsibility for the account, yes.
 10 **Q.** Could you look at the second page, please.
 11 **A.** The whole page?
 12 **Q.** The bit at the first holepunch under the heading
 13 "Richmond Kingsize", and it's just the two paragraphs
 14 there.
 15 (Pause)
 16 What she says here is that there was an agreement at
 17 a meeting. The meeting is referred to at the first line
 18 of the letter, and it appears to have taken place in the
 19 week before she wrote the letter. So she refers to
 20 an agreement between ITL and Shell at that meeting, that
 21 Richmond Kingsize would move to specific price points.
 22 She calls them their natural prices of 3.70 and 3.71.
 23 They were going to move either on 26 October or
 24 4 October. She says that it was mentioned that the
 25 natural price might move to a greater minimum and

1 maximum differential, and if that was the case, she says
 2 to Shell:
 3 "Can you please ensure that the differentials
 4 reflect those of Dorchester and are no more expensive
 5 than Dorchester in these tiers."
 6 Do you have any knowledge about this incident or
 7 what Ms Canavan was meaning by this letter?
 8 **A.** I think what she was saying was -- because the second
 9 part of it actually highlights that the price support
 10 from Imperial was finishing, so our tactical support was
 11 finishing. I don't remember what the RRP of Richmond
 12 was at the time, but when we say "natural prices", and
 13 I've used that in quite a lot of the documents myself,
 14 it's where a retailer would naturally choose to put his
 15 price absent any tactical support.
 16 So the discussion between Breda and Annie would have
 17 arrived at those natural price points, ie the Shell
 18 recommended retail price and the Shell maxima.
 19 **Q.** The significant thing is you have a reference to the
 20 greater minimum and maximum differential, that looks
 21 like the split between the Shell recommended retail
 22 price and the Shell maximum price?
 23 **A.** I think so, yes.
 24 **Q.** Then she says, well, you know, if you are not moving to
 25 3.70:

1 "If you are moving to a greater split between those
 2 prices, please ensure that the differentials reflect
 3 those of Dorchester and are no more expensive than
 4 Dorchester."
 5 So she is saying two things: the first is that the
 6 differentials have to reflect those of Dorchester; and
 7 secondly, that Richmond must be no more expensive?
 8 **A.** Well, that was our objective, to get Richmond no more
 9 expensive than Dorchester.
 10 **Q.** Yes, but also she is talking about the Richmond
 11 differentials would have to reflect those of Dorchester?
 12 **A.** (Pause) I can't say with 100 per cent certainty what
 13 she is saying, but if the Shell recommended retail price
 14 and maxima price had a wider differential, that's one
 15 way of reading the letter, or the differential between
 16 our brand and Dorchester. I am not sure which, it could
 17 be one of the two.
 18 **Q.** We have reached, therefore, the point at which you don't
 19 have any knowledge that can shed light on the meaning of
 20 this letter?
 21 **A.** If that ...
 22 **Q.** Well, you don't --
 23 **A.** I can't say for certainty what Breda --
 24 **Q.** That's fair enough. If you can't say for certainty out
 25 of your own knowledge, then there is nothing that you

1 can help us with. There is nothing wrong with saying
 2 that.
 3 **A.** The one thing I would point out is that she is now
 4 mentioning that Richmond's to be no more expensive than
 5 Dorchester. We were not looking for parity, we were
 6 looking for at least parity. So she has emphasised that
 7 in the letter to Annie Parker.
 8 **Q.** During this period, we are talking about the period of
 9 the first trading agreement, I think you say in
 10 paragraph 44 of your witness statement {C3/35} -- if you
 11 have paragraph 44 it's the first sentence -- you say it
 12 had become clear in the course of 2001 that Shell simply
 13 did not have the ability to control the actual retail
 14 prices in its contractor outlets. Right?
 15 **A.** Yes, that's what I've said.
 16 **Q.** Well, I am slightly puzzled about this. When in the
 17 course of 2001 did this become clear?
 18 **A.** I can't remember the date it became clear, but it
 19 happened in 2001. That's why we changed the proposed
 20 trading agreement. We were aware that things had
 21 changed so we changed the agreement.
 22 **Q.** So it hadn't become clear in March 2001, or in the first
 23 quarter of 2001 it hadn't become clear?
 24 **A.** Can I refer you to the document you just opened there?
 25 **Q.** Tab 30.

1 A. Can we go to that?
 2 Q. Yes.
 3 A. In the first paragraph, this was a document I produced
 4 in March 2001, it says:
 5 "The current agent agreement was introduced in the
 6 last 12 months and has given the operators a higher
 7 share of the profit generated ...
 8 "Shell directly manage about 300 sites, the balance
 9 of ... sites being run by agents ... who own the shop
 10 stock ... display but he or she makes the final
 11 decision."
 12 That was the document I wrote in March 2001.
 13 Q. What this document says is, to the best of your
 14 knowledge and belief, true?
 15 A. Correct.
 16 Q. Okay, turn to page 2, please. Just below the first half
 17 of the page -- I am told that the whole of this is
 18 confidential. Just below the first half of the page
 19 there is a heading in capital letters?
 20 A. I think you can say the words.
 21 Q. I am not sure about that. Anyway, do you have the
 22 heading?
 23 A. Yes, I have.
 24 Q. Could you look at the first line.
 25 A. Correct, yes.

1 Q. Okay.
 2 A. I'm looking at it, yes.
 3 Q. That was true, wasn't it?
 4 A. They had more --
 5 Q. You don't have to read it out.
 6 MR HOWARD: I think he can.
 7 MR LASOK: Can he? That's all right. I think it's your
 8 confidentiality.
 9 MR HOWARD: I know, but I can't think there is anything
 10 confidential about that line.
 11 MR LASOK: That was true, wasn't it?
 12 A. They were given the sites -- the Shell Select sites were
 13 given greater guidance from Shell head office, yes, than
 14 other oil companies.
 15 THE CHAIRMAN: Sorry, other what?
 16 A. Oil companies. Like, for example, compared to a BP site
 17 or something like that.
 18 THE CHAIRMAN: So reference to "other non-managed estate" is
 19 a reference to the estate of a different --
 20 A. Oil company. So, for example, BP or Texaco or Esso.
 21 MR LASOK: If Shell simply did not have the ability to
 22 control actual retail prices in the contractor outlets,
 23 that would have been a weakness, wouldn't it?
 24 A. Well, the title on that is covering both things.
 25 Q. But you see, I am reading from paragraph 44 of your

1 witness statement where you say:
 2 "During the course of 2001, it had become clear that
 3 Shell simply did not have the ability to control the
 4 actual retail prices in its contractor outlets."
 5 So where does this appear in this part of your
 6 report?
 7 A. Sorry, this was produced at the beginning of 2001, and
 8 it's saying "During the course of 2001, it appeared ..."
 9 Q. You asked me to refer to this document.
 10 A. Only insofar as the agents had final decision on their
 11 pricing.
 12 Q. Could you turn to the next page, please. It appears to
 13 be confidential as well. I think that the heading at
 14 the top of the page is not confidential and that is the
 15 word "Problems". Could you read item 2, please.
 16 I think item 2 is not confidential.
 17 (Pause)
 18 So we haven't got to this absence of ability to
 19 control at this stage in 2001?
 20 A. Because the Shell Select estate was partly managed by
 21 contractors and partly managed by managers still at this
 22 point, I believe.
 23 Q. Right.
 24 THE CHAIRMAN: Just staying on that page, under "Solutions",
 25 number 2, there it appears that you are suggesting that

1 the solution to price differentials not achieved at some
 2 agent sites and occasional errors from head office, the
 3 solution -- may I -- is that non-confidential now? -- is
 4 to report problems to head office, HO, for action,
 5 business plan, payment for differentials achieved. What
 6 does that mean?
 7 A. That was where the introduction of the payment into the
 8 business plan for that year for influencing or having
 9 influence or the incentive on the Shell price file to
 10 try and have more influence than we had up to that
 11 point.
 12 DR SCOTT: Mr Culham, if you look at paragraph 44 of your
 13 witness statement, you may have seen things that we have
 14 not seen. You refer to the second trading agreement in
 15 the middle of that paragraph:
 16 "... all that Shell was being incentivised to do in
 17 [the ITL/Shell trading agreement 2] was, for the for the
 18 recommended prices in its SSSP list, not to exceed the
 19 relevant price maxima set out in the differential
 20 schedule attached to the agreement."
 21 Have you seen or do you remember that schedule?
 22 A. What, the trading agreement 2?
 23 DR SCOTT: Yes.
 24 A. I have, yes.
 25 DR SCOTT: You have seen it?

1 A. I have seen it, yes.
 2 DR SCOTT: In that case I think you have an advantage over
 3 us, because certainly in my copy of tab 40 I don't have
 4 that schedule.
 5 MR LASOK: We don't have it either.
 6 DR SCOTT: Well, in that case you are in a much better
 7 position than Mr Lasok and myself.
 8 From your recollection of it, how were the price
 9 maxima set out?
 10 A. The price maxima in the trading agreement 2, which
 11 I think was for the year 2002, the fundamental front
 12 page of the document was very similar, apart from there
 13 was no compliance requirements within the agreement.
 14 DR SCOTT: You are welcome to check it. We have do have
 15 page 1.
 16 A. Okay. Sorry, apologies, I don't have a print-out,
 17 I have just page 1.
 18 DR SCOTT: Yes. In your witness statement you are referring
 19 to the differential schedule attached to the agreement,
 20 which implies that you have either seen it or you
 21 recall it.
 22 A. I would certainly recall it, because the first part of
 23 the trading agreement 2 does actually suggest no worse
 24 than the relative RRP's. So it would have been the
 25 updated document from the previous year relative to any

1 changes in the RRP that may have happened.
 2 DR SCOTT: And in what sense would that have included price
 3 maxima?
 4 A. As in trading agreement 1 where it says Embassy No 1 at
 5 least -- sorry, at least --
 6 DR SCOTT: So it would have referred to relativities rather
 7 than absolute prices?
 8 A. Yes, it would have done.
 9 DR SCOTT: So that, in fact, there were no price maxima set
 10 out in that document?
 11 A. The only price maxima we would have had is if
 12 Benson & Hedges is, for example, £4 we would like to
 13 achieve a price maxima of 3.97. It's all relativity.
 14 DR SCOTT: So it's all relativities?
 15 A. Because Shell, as in all other retailers, we couldn't
 16 control their upper price. If they wanted to sell
 17 everything for £10 a packet, they could do that.
 18 DR SCOTT: So that in that sense there were no price maxima.
 19 A. Not a price maxima, a relativity maxima.
 20 DR SCOTT: I understand, but there were no price maxima in
 21 the sense that I would normally understand price maxima
 22 from the language --
 23 A. Unless it's at a point where we are doing tactical
 24 promotions, in which case --
 25 DR SCOTT: That we understand. Thank you.

1 MR LASOK: Could we turn to tab 35, please. This, again, is
 2 4 October 2001. So this is after you have left the
 3 scene.
 4 I wanted to draw your attention to a bit on the
 5 second page. This is a situation in which there had
 6 been a meeting between Shell and ITL, and ITL had
 7 pointed out that a price file had contained errors and
 8 it was agreed that they would be corrected. Then when
 9 you get to the second page, the topic moves on under the
 10 heading "Small Classic Filters", and I think all of the
 11 figures are confidential, but there is a reference here
 12 to the fact that ITL had discovered that only a certain
 13 percentage of the Shell estate had stocked the brand,
 14 and only another percentage had adhered to be at
 15 promotional price. What happened was that ITL wanted
 16 something done about it.
 17 Now, I can understand you saying that by this stage
 18 it was recognised that Shell had limited ability to
 19 control actual retail prices, but this is a letter that
 20 indicates that ITL was still under the belief that Shell
 21 could and would do something about it?
 22 A. Well, you say I wasn't -- I was still Breda's line
 23 manager at the time, so I was aware, not of every single
 24 piece of correspondence, this Small Classic Filter
 25 paragraph is basically we had offered to do a tactical

1 promotion within Shell for our relative new brand called
 2 Small Classic Filter. As it shows, we offered to pay
 3 for a shelf --
 4 THE CHAIRMAN: Just try and focus on the question,
 5 Mr Culham, which is: if your evidence is that you
 6 realised after the transfer of all the petrol stations
 7 to the new RBA model, that you realised that that meant
 8 that Shell had lost control over the pricing of the
 9 product on the shelf, why were you still entering into
 10 deals with Shell, with Shell head office, offering them
 11 tactical bonuses relating to price maxima on the shelf?
 12 I think that's the question.
 13 MR LASOK: Yes.
 14 A. I think --
 15 THE CHAIRMAN: I do not want to know why you wanted to
 16 promote it, but the point is: why were you still going
 17 to the head office with this kind of deal, rather than,
 18 say, going to the individual stations?
 19 A. Shell, along with most other retailers, from time to
 20 time liked to run promotions in their site. Therefore,
 21 we would go into the Shell promotional calendar and
 22 that's why it was agreed at head office or discussed at
 23 head office. They would produce point of sale, the
 24 sites were free to take up the offer or not take up the
 25 offer, which is why the level that it's referring to

1 here, not all the sites did it, but Shell produced point
 2 of sale to go to the sites, and only --
 3 **THE CHAIRMAN:** What do you mean "point of sale"?
 4 **A.** Like a shelf talker to highlight the special price, that
 5 was produced by Shell, sent to the sites, and this is
 6 suggesting that only a low proportion of sites chose to
 7 run that offer.
 8 **THE CHAIRMAN:** So is this right: that if you struck this
 9 deal with Shell, Shell would then propose it to their
 10 sites, find out how many wanted to do it, and then they
 11 would sort of administer it for you with the sites?
 12 **A.** I don't know the internal workings of Shell, but
 13 tobacco, along with other categories, Shell would do
 14 promotions on sandwiches, soft drinks, tobacco, and
 15 those, if you go into a Shell site now or any other
 16 company, if you see a shelf talker advertising, I don't
 17 know, say, Coke at £2, that would be negotiated at their
 18 head office and then the sites choose to take it up or
 19 not.
 20 They don't go round each site saying "Do you want to
 21 do this promotion?", it's done through the head office
 22 of the company. That's what this was. We agreed
 23 a tactical promotion with Shell head office, that went
 24 in with their promotional calendar, the point of sale
 25 I hope would have been sent to all sites, and as this

1 shows, a low proportion of sites chose to take it up.
 2 But we didn't go to those individual sites, we went
 3 through Shell head office, but most chose not to do it.
 4 **MR LASOK:** Could you turn to tab 44, please {D19/44}. This
 5 is an internal ITL report concerning Shell, which is
 6 dated to 7 January 2002, and apparently updated in
 7 April. We don't have your signature there. Would you
 8 have seen this, in your capacity as the person who was
 9 overseeing Breda?
 10 **A.** I would think I would have done, yes.
 11 **Q.** If you turn to page 2, and look at the last full
 12 paragraph, the one that says "Shell recommends", do you
 13 have that?
 14 **A.** Yes, I have.
 15 **Q.** Could you just read that paragraph to yourself.
 16 (Pause)
 17 So that suggests that there were some problems, but
 18 in the main differentials were being maintained?
 19 **A.** Yes, Shell had chosen to go that route on their premium
 20 price policy, yes.
 21 **Q.** Right. So then if you go to the next page -- this is
 22 confidential -- it's the page stamped "210" in the
 23 bottom right-hand corner.
 24 **A.** Okay.
 25 **Q.** There is a heading by the first holepunch -- as this is

1 apparently confidential I won't read it out. Could you
 2 look at the first line under the heading. It's the
 3 heading by the first holepunch, and it's just the first
 4 line.
 5 **A.** I think I know where you mean, yes.
 6 **Q.** If you go to the page after that, you have another bit
 7 that -- I think the part I want to refer to is not
 8 confidential, but we have a heading "Objectives", and
 9 number 6 is to bring Shell recommended prices in line
 10 with ITL required differentials. Then if you go down to
 11 number 5, which is also not confidential, this is
 12 a proposal, part of the ITL strategy to devise and
 13 propose a Shell price file that automatically changes
 14 the Shell recommended and maximum prices once each
 15 manufacturer RRP has been altered. And the report
 16 states:
 17 "This will ensure that ITL target differentials are
 18 maintained in the Shell price file across all
 19 manufacturer brands."
 20 Then if you go to the stamped page 213, we have
 21 a report that you comment on in your witness statement,
 22 which is a merchandising report, and that has a column
 23 headed "Differential errors". I think that column is
 24 unconfidential, but the rest of the columns with figures
 25 in are confidential, but I am not going to look at

1 those.
 2 So what we see here is a report that had been drawn
 3 up at this stage setting out differential errors that
 4 had been identified, and covering brands that are both
 5 ITL brands and Gallaher brands at least, possibly also
 6 there are some Rothman brands in there as well.
 7 So isn't the position that, even at this stage, ITL
 8 was proceeding on the basis that Shell did have the
 9 ability to control shelf prices to some extent, and what
 10 you were in fact envisaging was devising a method of
 11 making that control more effective so as to ensure that
 12 differentials across all manufacturers' brands would be
 13 respected?
 14 **A.** I think what Breda is proposing is to produce
 15 a spreadsheet, basic spreadsheet, which would then
 16 produce, if the input was the RRP of a product, Shell
 17 would then input whatever their premium was against
 18 their recommended retail price, and their maximum price,
 19 and that would generate a suggested price for the sites
 20 to follow. That's all it's suggesting, all it's
 21 proposing. And the fact, as you said, there are Embassy
 22 No 1, for example, 26 of the sites visited, our
 23 differentials that we were hoping to achieve were not
 24 happening, were not being achieved.
 25 **Q.** But this is a situation, you will accept, in which Shell

1 is looking to the shelf prices at the sites after,
 2 because we are now in 2002, this is after the transition
 3 to the RBA has taken place. All the sites are now
 4 independent contractor sites. But you are still looking
 5 at shelf prices, you are still monitoring shelf prices,
 6 and you have recognised that differentials are not
 7 maintained always, but you are envisaging setting up
 8 a system that will improve the system, aren't you?
 9 **A.** I would disagree. The system we are suggesting, and
 10 I don't know whether it happened or it didn't happen, is
 11 for Shell head office price file that's then sent to
 12 sites to have the influence over. We are not suggesting
 13 Breda could control the individual Shell shelf price in
 14 all the sites. We are looking to see if there are any
 15 errors in the Shell price files produced by head office,
 16 and that's what she is referring to by producing a price
 17 file with RRP plus whatever Shell wanted to be.
 18 **Q.** Isn't she and the rest of ITL working on the basis that
 19 what appears in the Shell price files ought to appear on
 20 the shelves in the independent contractor site?
 21 **A.** Well, no, the same document you are referring to, it
 22 says in there that the agents make the ultimate decision
 23 in terms of pricing. That's page 1, document 44.
 24 **Q.** During this period, when we have got the move to the
 25 independent contractors, you are still paying bonuses

1 and so forth to Shell in order to achieve particular
 2 shelf price levels?
 3 **A.** We are, when we did the tactical promotion on Small
 4 Classic Filter, we did offer tactical bonuses to achieve
 5 a shelf price, which was highlighted in a shelf talker
 6 on the shelf. I don't know what the price was, it could
 7 be X, Y, Z. On the ongoing business, we weren't looking
 8 to achieve specific prices in the site, and that was
 9 recognised on page 1 of the document that you are
 10 referring to.
 11 **DR SCOTT:** Mr Culham, the summary here -- the Shell Select
 12 summary -- is not, it seems to me, concerned with
 13 absolute prices, but it is concerned with differentials.
 14 And what it does suggest is that out of 188 stores, in
 15 many more cases than not the differentials are being
 16 maintained, in other words the figures in the
 17 differential errors are, I mean, the maximum is 43 out
 18 of 188.
 19 **A.** Can I just say one thing. If we use the Embassy No 1 as
 20 an example, it's showing 26 where Embassy No 1 was
 21 closer to Benson & Hedges than 3p, but where Embassy
 22 No 1 was, for example, 10p below it doesn't appear. So
 23 the number -- I don't know how many it was, but it could
 24 be 26, we were not achieving our differentials in, but
 25 it could be another one site or I don't know how many

1 where we were getting better than our differentials.
 2 **DR SCOTT:** Yes, we are conscious that you were happy if you
 3 got better --
 4 **A.** So we didn't see it as an error if we were treated
 5 better. We only highlighted in this document where our
 6 brands were within less than 3 -- sorry, careful. Where
 7 at least the 3p was not happening, but if it had been 4p
 8 we wouldn't consider that an error, we would be very
 9 happy with it.
 10 **THE CHAIRMAN:** So that wouldn't appear amongst the 26?
 11 **A.** No, it wouldn't, no.
 12 **MR LASOK:** How do we know that?
 13 **A.** Because that's the way the system was set up.
 14 **Q.** That's what you say.
 15 **A.** I can assure everyone in court that's the way it was
 16 set up.
 17 **THE CHAIRMAN:** Is that a --
 18 **MR LASOK:** That's a convenient moment. Unfortunately I have
 19 probably another 20, 25 minutes of questions.
 20 **THE CHAIRMAN:** We will come back then at ten past 2, thank
 21 you.
 22 (1.12 pm)
 23 (The short adjournment)
 24 (2.10 pm)
 25 **MR LASOK:** Mr Culham, I wonder whether we could turn to

1 tab 40. This is the second agreement. Were you
 2 involved in the drafting of this?
 3 **A.** This was produced post my direct account management, but
 4 obviously Breda was working for me at the time, so
 5 I probably was involved in drafting but didn't draft it
 6 myself.
 7 **Q.** We don't have the pricing requirements attached to this,
 8 but am I right in thinking that the pricing requirements
 9 would have been of the same kind as we get in tab 46?
 10 If you go to tab 46 {D19/46}, you should have an email
 11 from Breda Canavan dated 14 May 2002, and the last two
 12 pages of it -- at least in my copy -- are a list of
 13 pricing requirements.
 14 **A.** I would expect they would be in line, but this -- you
 15 mean the document that's --
 16 **Q.** I am not asking you whether it was identical, but I am
 17 asking you whether it was the same kind of thing?
 18 **A.** The same kind of thing but the numbers would have been
 19 different.
 20 **Q.** Right. So broadly speaking, as far as the second
 21 trading agreement is concerned, it is the same kind of
 22 arrangement that we have under the first trading
 23 agreement?
 24 **A.** The pricing requirement sheet would have been similar to
 25 the first trading agreement, yes.

1 Q. Shell committed to maintaining the differentials?
 2 A. I think by the time the trading agreement 2 came into
 3 effect, most of the sites had moved to contractor
 4 operation, so their commitment was just to lay out the
 5 price file simul -- but not actually deliver at store
 6 level.
 7 Q. So you say that the commitment was merely to ensure that
 8 the prices in the price file complied with the ITL
 9 parities and differentials?
 10 A. Or better than, yes.
 11 Q. Or better than.
 12 A. That's why the compliance factor was taken out of this
 13 agreement, because we realised the agents were owning
 14 the stock themselves, Shell produced a two-price -- two
 15 prices for a product, so the Shell recommended retail
 16 price and the Shell maxima. But Shell didn't actually
 17 control what the sites actually sold them at.
 18 Q. So Shell wouldn't be at all interested in spending money
 19 on getting people to go around and check the Shell
 20 prices at the sites?
 21 A. I don't know what Shell spent their money on.
 22 Q. I am terribly sorry, I'm getting confused. You must
 23 forgive me, it's looking forward to the end of the day,
 24 I fear, and the prospect of the weekend.
 25 ITL would not have been interested in spending any

1 money on getting people to go around the independent
 2 contractor sites to check their shelf prices?
 3 A. We employed a salesforce which covered -- I don't know
 4 how many outlets, but that included the Shell Select
 5 sites. At this point I think they were our direct sales
 6 representatives and they would report on distribution,
 7 planogramming, availability of new products, and they
 8 would record pricing within the store.
 9 Q. Why would they do that?
 10 A. Why would you do what?
 11 Q. Why would they record pricing in the sites?
 12 A. Because we were aware that Shell set a maxima price and
 13 we would highlight prices to Shell where they were above
 14 a maxima, the maximum price and the Shell price file.
 15 Q. Why would you do that for Shell?
 16 A. Because if we thought our products were being priced
 17 higher than Shell wanted them to be, we might lose
 18 consumers.
 19 Q. So ITL was interested in the shelf prices?
 20 A. ITL did record the shelf prices at the Shell Select
 21 sites, yes.
 22 Q. And if ITL considered that the shelf prices were out of
 23 line, it would take up the matter with Shell in order to
 24 get them corrected?
 25 A. We would highlight them, and we would give our feedback

1 to Shell to say we -- if a price on the site was not in
 2 line with the shelf policy, and we would highlight that
 3 back to Shell head office, yes.
 4 DR SCOTT: Mr Culham, if you look at tab 40, I am a little
 5 confused by what you say, because it seems to say:
 6 "In return, the Shell UK setting out prices at
 7 company-owned sites ..."
 8 I accept that it says "price files" in the next
 9 paragraph, but setting out prices at company-owned sites
 10 seems to me to say setting out prices at company-owned
 11 sites and what you have just talked about is checking
 12 prices at company-owned sites.
 13 Do I have that wrong in some way?
 14 A. What was the intention of our agreement with Shell --
 15 DR SCOTT: No, I am asking you to look at the words in the
 16 agreement.
 17 A. Yes. The word --
 18 DR SCOTT: The words in the agreement seem to me to say
 19 "setting out prices at company-owned sites", and that
 20 seems to me to be a very clear expression, and it's not
 21 saying in return for Shell UK setting out prices in the
 22 price files that are mentioned in the next paragraph.
 23 A. The two are not linked, but because we were aware that
 24 Shell couldn't set -- guarantee the price at site level,
 25 that's why the compliance level was taken out of the

1 agreement. We were aware that the Shell agreement on
 2 how the sites were operated had changed, and that's why
 3 we took out the compliance level.
 4 If we put a proposal to Shell, offered them a small
 5 incentive to set their price files in line with our
 6 differentials, but we didn't monitor and say
 7 "10 per cent of your sites are wrong, you don't get the
 8 money".
 9 THE CHAIRMAN: Putting on one side whether the compliance
 10 percentage is there or not, what you are being asked
 11 about is the first line, what is understood by "setting
 12 out prices at company-owned sites", whereas now you are
 13 saying that the actual agreement was setting out prices
 14 in the price files.
 15 A. Yes. That's what it should have said, but it does say
 16 "Setting out price at company sites", I agree. "Setting
 17 out prices in the price file" is what it should have
 18 said.
 19 MR LASOK: The next point I wanted to go to is the second
 20 paragraph. We have "The price files have to be provided
 21 to ITL and there as corrected", but then we have this
 22 opportunity to respond clause:
 23 "ITL must be given the opportunity to respond to
 24 other manufacturers' price offers, but may choose not to
 25 respond."

1 That also featured in the first trading agreement at
 2 tab 27, which did concern shelf prices.
 3 **A.** I think the second agreement is just saying that if
 4 another manufacturer did a promotion we would have the
 5 opportunity to respond.
 6 **Q.** What was the point of responding to a promotion that
 7 could -- or rather, I'll take it in stages. Let's
 8 suppose that some other manufacturer has a promotion
 9 going with Shell, and as a result of that, shelf prices
 10 in the Shell sites for that rival manufacturer's product
 11 have gone down; what's the point of an opportunity to
 12 respond clause which just stops at the Shell price file
 13 and doesn't work through to the shelf price in the
 14 sites?
 15 **A.** Because the sites would be offered a promotion in the
 16 price file. So, for example, if we go back to that
 17 Small Classic example used earlier on, we proposed
 18 a promotion to Shell, and a small proportion of sites
 19 offered to take it up.
 20 **Q.** How small a proportion?
 21 **A.** That was confidential.
 22 **Q.** In which document?
 23 **A.** The one you referred me to this morning. I don't
 24 remember which document it was, it's one you took me to.
 25 **Q.** That's a slightly different point, I think.

109

1 Let's put it another way. What I am trying to get
 2 at is this: I would have said that the point about
 3 an opportunity to respond clause is that ITL wants to be
 4 competitive with the other rival brand in terms of the
 5 shelf price, not the price in the price file; would you
 6 agree with that?
 7 **A.** I wouldn't agree. What I would say is we would like it
 8 to happen at the shelf, that's obvious, because that's
 9 where the consumer buys the product. But all Shell
 10 could deliver was in the price file, and we couldn't
 11 negotiate directly with 600 sites, so we would put a
 12 proposal to Shell head office, some they would accept,
 13 some they would reject. That offer, if accepted, would
 14 be reflected in the price file and then some of the
 15 Shell sites would take up the offer and some wouldn't.
 16 **Q.** Could you go to tab 49, please, because this is
 17 an illustration of ITL invoking the right to respond
 18 clause. {D19/49}
 19 It's a letter dated 9 July 2002 from Breda Hughes to
 20 Mr Barry, and it starts off with the heading "Drum
 21 12.5", and then what you have is you see she says:
 22 "In line with the continuing Amber Leaf £2.09 PMP
 23 currently on sale within the Shell estate Imperial
 24 Tobacco would like to take this opportunity as part of
 25 the business agreement allowance to respond to the price

110

1 offer with a Drum 12.5 gram £2.09 price mark pack."
 2 Then she refers to the prices, talking about the
 3 Shell RRP and the maximum tiers. Then in the third
 4 paragraph of the letter she talks about the margins, and
 5 in the third line talks about the Shell profit margin
 6 being maintained in all sites.
 7 So doesn't this indicate that Shell's interest in
 8 the -- sorry, I keep on doing this, it's not a Freudian
 9 slip. ITL's interest in the opportunity to respond
 10 clause was to affect the shelf prices in the sites?
 11 **A.** The opportunity to respond clause was, if we saw
 12 a promotion being run by one of our competitors, to be
 13 allowed to put a proposal to Shell with one of our
 14 products, and that's what's happened with this. Drum
 15 was competing in the marketplace with Amber Leaf, Shell
 16 had accepted Amber Leaf price marked pack from Gallaher,
 17 and we put a proposal to Shell to say "Will you accept
 18 our price marked pack for Drum?"
 19 **Q.** So I think the answer is yes?
 20 **THE CHAIRMAN:** Well, clearly if there was a price marked
 21 pack then that was one way that you could ensure, so far
 22 as possible, that the shop didn't sell it at least above
 23 £2.09?
 24 **A.** They would not sell above 2.09, correct, yes.
 25 **MR LASOK:** I'm using this as an illustration of ITL

111

1 operating the opportunity to respond clause in
 2 a particular way, but I am putting to you that this
 3 shows that the function of the opportunity to respond
 4 clause from ITL's perspective was to achieve a result on
 5 the shelves at the sites.
 6 **A.** From this particular product, it did achieve that
 7 objective.
 8 **Q.** No, you haven't answered the question.
 9 **A.** This is a price marked pack, so obviously they will end
 10 up at the same price on the shelf, or lower if the
 11 retailer chose to do so. If it was a non-price marked
 12 pack then you could end up with a different position.
 13 **Q.** The question I am putting to you is not about price
 14 marked packs, it's about the role of the opportunity to
 15 respond clause from ITL's perspective. And I am putting
 16 to you that, from ITL's perspective, the role was to
 17 enable ITL to have an effect on the shelf prices at the
 18 sites; is that true or not true?
 19 **A.** In the case of Shell, on the price marked pack, yes,
 20 that's true, but if it wasn't a price marked pack, the
 21 answer is no.
 22 **Q.** No, I don't think you are answering the question. I am
 23 not talking about the actual effect in any given case.
 24 I am talking about the role or function of the
 25 opportunity to respond clause. Its role or function

112

1 from the point of view of ITL was to enable ITL to
 2 achieve a result on the shelves?
 3 **A.** It was for us to put a proposal to the -- sorry, the
 4 objective or the result was for us to put a proposal to
 5 retailers. Sometimes they would accept and sometimes
 6 they wouldn't accept. Am I --
 7 **THE CHAIRMAN:** The point is there is no value to this, to
 8 ITL, unless it affects the price at which the goods are
 9 actually offered to the consumer on the shelves. There
 10 is no value to ITL as such in having a particular price
 11 in the price file. It must have been your intention,
 12 it's being suggested, not just to have a price in the
 13 price file at a particular level, but the hope or
 14 expectation, however partial, was that that would then
 15 be reflected to some extent in the sites, in the shelf
 16 price in the sites.
 17 **A.** Some of the sites would hopefully accept the promotion
 18 and would reduce their shelf price accordingly, but some
 19 wouldn't.
 20 **MR LASOK:** Just to tie things up on that point, I'll put it
 21 to you that the second trading agreement which was
 22 entered into in relation to the period after the
 23 migration to the independent contractors had been
 24 completed, was done, was entered into by ITL with Shell
 25 in the expectation that ITL would achieve its objectives

113

1 to a greater or lesser extent at shelf price level?
 2 **A.** We would achieve, hopefully would achieve our objectives
 3 in some of the sites, but not all of them. So yes, the
 4 answer is yes, we would achieve it in some sites.
 5 **MR LASOK:** I want to move to a different topic --
 6 **THE CHAIRMAN:** Can I just ask you about that page, stamped
 7 161, in the third paragraph, the final sentence:
 8 "The bonus payment can be made directly off-invoice
 9 through Palmer & Harvey on the basis that only the Drum
 10 £2.09 price marked pack is made available to sites."
 11 Could you explain what that was?
 12 **A.** When we produced a price marked pack of a product, we
 13 would manufacture price marked packs, which was mainly
 14 aimed at the independent trade, and plain packs, ie the
 15 same product but without a price on, which then went to
 16 the multiple outlets. For example, any retailer, any
 17 supermarket, because invariably they would be selling
 18 below the recommended retail price, because the
 19 recommended retail price was usually what was printed on
 20 the pack.
 21 **THE CHAIRMAN:** But here it seems to be suggesting -- but
 22 I may be misinterpreting this -- that you are agreeing
 23 with Shell that actually what they will supply to the
 24 shops is a price marked pack, and that will be all that
 25 the sites can get so far as a Drum, whatever grams it

114

1 is.
 2 **A.** Yes, that will be -- from Palmer & Harvey, that will be
 3 the only pack of Drum that they could purchase. But
 4 some of the sites do purchase, or did purchase product
 5 elsewhere as well. What we are saying is for that
 6 source of supply we would like that to be the only
 7 packing they could achieve.
 8 **THE CHAIRMAN:** If that's the case, if what you are saying is
 9 that you are agreeing with Shell that for a period the
 10 only pack that they can acquire of Drum from
 11 Palmer & Harvey is a price marked pack, and I think you
 12 accepted that that would then mean that the site can't
 13 charge more than £2.09, does that mean that in this
 14 instance really you are not offering the choice, or
 15 Shell isn't offering the choice to the sites in the same
 16 way as with other promotions, because it's saying "This
 17 is what we are supplying to you, this price marked pack,
 18 because of the deal we have made with ITL"?
 19 **A.** The site would have effectively, in simplistic terms,
 20 three choices: to order the price marked pack stock from
 21 Palmer & Harvey, which would only be £2.09 -- they could
 22 sell it at £2.09 or below if they chose to do so, but I
 23 don't know if many did -- or they could stop stocking
 24 Drum for a while, or they could buy Drum plain packs
 25 from another wholesaler. So the sites had three

115

1 choices.
 2 **THE CHAIRMAN:** Yes, thank you.
 3 **MR LASOK:** Could you turn to tab 48, please. {D19/48}.
 4 This is a letter dated 28 June 2002 to Mr Barry. Could
 5 you read the letter to yourself, please, so that you
 6 know what it's all about.
 7 (Pause)
 8 **A.** Okay.
 9 **Q.** Do you remember the background to this letter?
 10 **A.** Yes, I do.
 11 **Q.** Am I right in thinking that this is an example of
 12 a number of letters that ITL sent round to retailers at
 13 this time in 2002 altering certain of the differentials,
 14 because at that stage ITL was not immediately responding
 15 to an MPI by other manufacturers?
 16 **A.** A letter similar to this did go to other retailers, yes.
 17 **Q.** This particular letter has revised price requirements,
 18 and the second page of the letter asks Shell to ensure
 19 that the differentials were maintained, and the
 20 differentials referred to are the ones in the new list
 21 of requirements.
 22 Now, this letter was sent out because ITL was
 23 concerned that if it didn't alter the pricing
 24 requirements, then retailers like Shell would change the
 25 price of the ITL brands in accordance with Shell's

116

1 pricing and differential requirements as a result of the
 2 Gallaher MPI; that's correct, isn't it?
 3 **A.** The letter was sent out to the trade because Gallaher
 4 did have an MPI in June, and the effect is asking the
 5 trade not to profiteer out of the fact we have not had
 6 a price increase but to keep our prices lower, because
 7 we hadn't planned to have an MPI at that time.
 8 **Q.** You could have done that by sending a letter in those
 9 terms. What ITL actually did was send out a letter
 10 altering the pricing requirements and asking the
 11 retailers like Shell to respect the new pricing
 12 requirements; isn't that so?
 13 **A.** Sorry, I apologise, can you repeat the question, sorry?
 14 **Q.** Yes. This was not a situation in which ITL wrote to the
 15 retailers and simply said "We note that there has been
 16 a Gallaher MPI, but we think that you shouldn't take
 17 advantage of the Gallaher MPI by increasing our prices".
 18 What ITL actually did was to replace the then existing
 19 price requirements by a new one which altered the
 20 differentials and achieved the same result in that way?
 21 **A.** Well, we could have simply written to all the retailers
 22 saying "We are not having an MPI, don't put our prices
 23 up". We actually gave them more details, just to say
 24 "If you don't put our prices up, this is what we would
 25 hope would be the revised differentials".

1 **Q.** Well, with respect, the letter doesn't say that. The
 2 letter on the first page emphasises in bold that there
 3 are no plans to increase the RRP's of ITL brands -- you
 4 don't need to worry about the other brand referred to --
 5 and then presents Shell with the new pricing
 6 differentials which are to be maintained henceforth.
 7 That's what the letter actually does.
 8 **A.** The effect is the same.
 9 **MR HOWARD:** I think Mr Lasok put to the witness the effect
 10 was the same, so I am not entirely sure what the point
 11 is that he is being asked to deal with.
 12 **THE CHAIRMAN:** He is not making any point, he is just asking
 13 the witness a question, which is: given the witness's
 14 first explanation as to what this letter meant, Mr Lasok
 15 pointed out, well, you could achieve that by just saying
 16 "We are not having an MPI, so please don't put our
 17 prices up". What he is trying to ask Mr Culham is: if
 18 that was the only purpose, why then did you go to the
 19 trouble of recalculating the differentials and attaching
 20 a schedule? I think Mr Culham did answer that, and
 21 I think Mr Lasok is just exploring with him the reason
 22 that he gave.
 23 **MR HOWARD:** Yes.
 24 **THE CHAIRMAN:** That's where I think we are at the moment.
 25 **MR HOWARD:** Okay.

1 **MR LASOK:** So the problem was, I put it to you, that if
 2 Shell hadn't sent this letter altering the
 3 differentials --
 4 **A.** ITL.
 5 **Q.** Sorry, I do apologise. If ITL had not sent this letter
 6 altering the differentials, ITL was concerned that
 7 otherwise the retailers like Shell would have altered
 8 the prices of the ITL products in accordance with the
 9 then prevailing ITL price requirements?
 10 **A.** It's been -- our intention was to hold the price of our
 11 brands down. In the past, when manufacturers have had
 12 a price increase, some retailers have increased all
 13 manufacturers' products at the same time. So we were
 14 highlighting this, that it's just saying "don't put our
 15 brands up". I think you are reading more into it.
 16 The revised pricing comments are just the effect of
 17 the manufacturers' price increase difference. We had
 18 had experience of, if -- just talking about the two main
 19 manufacturers, if we had a price increase within, say,
 20 two or three weeks of each other, some retailers
 21 historically had put them all up at the same time, made
 22 it easier for them, one price change on their system and
 23 they would take the profit from that decision. We were
 24 endeavouring to keep the prices down in their shops for
 25 our products.

1 **Q.** Do you know just how many of these letters went out?
 2 **A.** I couldn't answer that.
 3 **Q.** But you know they went out to a number of retailers?
 4 **A.** I know they went to a number of retailers. It could
 5 have been -- well, I don't know the number, so I am not
 6 going to speculate.
 7 **Q.** Do you know that all these letters communicated to the
 8 retailers altered price requirements?
 9 **A.** I don't know, because I've not seen the documents.
 10 **Q.** All right. I'll going back to the point I made earlier.
 11 If ITL's intention was simply to ask the retailers not
 12 to increase the price of its brands, why didn't ITL say
 13 that in these letters? What was the point about
 14 communicating a revised list of pricing requirements?
 15 **A.** The effect was the same. We could have said "Please
 16 don't put up all our prices because we're not having an
 17 MPI", we chose at the time to do a revised differential
 18 sheet. The effect is still the same. We wanted the
 19 retailers not to increase our price because we weren't
 20 having an MPI.
 21 **Q.** I fully accept that you didn't want the retailers to
 22 increase their prices, but I'm still trying to
 23 understand why you did it in this way, and the reason is
 24 because in a context in which you have signed up
 25 a retailer like Shell to comply with parities and

1 differential requirements, it's perfectly understandable
 2 why ITL would issue a letter like this, because the way
 3 to prevent the retailer from altering the ITL price as
 4 a result of the Gallaher MPI was to change the pricing
 5 requirements.
 6 You see, I am putting to you that's the reason why
 7 the letters were couched in this way.
 8 **A.** I go back to what I said earlier: we could have written
 9 to the retailers "We are not having an MPI, please don't
 10 put up our prices", we chose to do it that way. You
 11 know, this is ten years ago. I don't remember why that
 12 letter was worded the way it was.
 13 **THE CHAIRMAN:** Well, I think you've asked the same question
 14 a number of times now --
 15 **MR LASOK:** I think that's the answer, yes.
 16 **THE CHAIRMAN:** -- and he has given the same answer.
 17 **MR LASOK:** The answer is that the witness doesn't know why
 18 it was written in this way.
 19 Now, Mr Culham, if you go back to tab 32, {D19/32}
 20 we have here, firstly, towards the bottom of the page,
 21 an email from Mr Conrad of Shell sent to you, setting
 22 out a list of products that have a changed retail price
 23 following the Budget. You then, at the top of the page,
 24 send to Amanda Eager an email dated 9 March 2001,
 25 forwarding on to her the Shell price file and asking her

121

1 to check the differentials.
 2 That's correct, isn't it?
 3 **A.** Yes, it is.
 4 **Q.** Now, what I am interested in is the point that you make
 5 after you refer to checking the differentials, because
 6 you say that there are now two prices to show: the Shell
 7 retail price and the maximum allowed at the sites. If
 8 we turn over the page, we can see that there they are
 9 listed.
 10 Then you say:
 11 "Most should be at the Shell retail price, but there
 12 will be some at the maximum level."
 13 Am I right in thinking that in that sentence you are
 14 referring to the Shell sites, and what you mean is that
 15 most Shell sites should be at the Shell retail price,
 16 but there will be some sites at the maximum level?
 17 **A.** I believe that's the case, yes. Most -- this was at the
 18 time when the agent transition was in place, and I think
 19 this was the first time the maxima price had been
 20 brought into the Shell price file, which gave the agents
 21 the opportunity to set their own pricing.
 22 **Q.** Now, am I right in thinking that, if you go to tab 37
 23 {D19/37}, you have here a national accounts bulletin
 24 dated 30 October 2001, which was of course after you had
 25 ceased to be dealing directly with Shell. If you look

122

1 at the account profile, and move over to the right, if
 2 you look at the type in the second column from the left,
 3 we have "Select, Shell COS, Shell DOS", so there's three
 4 types there, but we are looking at Shell Select. If we
 5 go to the right, we see "Pricing", two tiers: Shell
 6 retail price, maximum price that can be charged.
 7 Am I right in thinking that was ITL's understanding
 8 of Shell's pricing once the price files had moved to
 9 showing two prices, that there were two tiers of prices,
 10 the Shell retail and the maximum?
 11 **A.** Shell did move to the two price points for different
 12 products, and we understood the Shell retail price to be
 13 the lower, and the maximum was the maximum that the
 14 sites could charge. So yes.
 15 **Q.** I think that if we go now to your witness statement, to
 16 paragraph 105, {C3/35} could you read 105 to yourself,
 17 please.
 18 (Pause)
 19 Have you read it?
 20 **A.** I've read it, yes.
 21 **Q.** I want to ask you about the first sentence, where you
 22 say that you were unaware of Gallaher's price
 23 differential or, indeed, that they had any. Was that
 24 simply your position?
 25 **A.** I was certainly unaware what the Gallaher pricing

123

1 strategy was.
 2 **Q.** But have you seen things like the document at tab 47?
 3 {D19/47}. I think we can take this fairly quickly. 47
 4 should have at the top an email from Daryl Barry dated
 5 16 May 2002. Do you have it?
 6 **A.** I've got the email, yes.
 7 **Q.** Then if you look below his email you see the previous
 8 email from Breda Hughes, and she says, just below the
 9 first holepunch:
 10 "As per telecon conversation on Friday, I have
 11 looked at differential errors only. I have done this
 12 across all companies."
 13 Did you ever see a document like that?
 14 **A.** Like what, sorry, the price file?
 15 **Q.** No, the email of this nature.
 16 **A.** I don't recollect. I may have done, I don't know.
 17 **Q.** Did you know that Breda Hughes was correcting
 18 differential errors by reference not only to ITL's
 19 differentials, but those of other companies?
 20 **A.** All she would be doing is looking at ours versus the
 21 recommended retail price, and whatever shelf policy
 22 Shell had told us they were following at the time.
 23 **Q.** What about tab 50? {D19/50} This is an email from
 24 Breda Hughes, 9 July 2002, and in the first two lines
 25 she says that she's responding to Daryl Barry, but she

124

1 says:
 2 "As per our telephone conversation this morning,
 3 I agree with Wes' recommendations for the price file."
 4 Wes is Wes Feeney from Gallaher. Did you know that
 5 this was going on?
 6 A. What, that she was communicating with Shell?
 7 Q. She was agreeing to recommendations made by Gallaher.
 8 A. She's agreed with that, but she has also put her own
 9 recommendations as well in the same email. So she
 10 said -- and Shell make the choice what to follow.
 11 Q. Did you see a document like this?
 12 A. I don't recollect it, no.
 13 Q. Did you know that this kind of thing was going on?
 14 A. Sorry, what kind of thing? The price file was sent
 15 through to Imperial by Shell, and our account manager
 16 has made comments on that price file and said "If that's
 17 what you want to do, that's okay" or "Here's my comments
 18 as well".
 19 **THE CHAIRMAN:** But here, what she seems to be recording is
 20 not that she is agreeing with recommendations by Shell,
 21 but that she is agreeing with recommendations made by
 22 Wes, who was a Gallaher person.
 23 A. Yes, I am aware of that. But I am also saying she is
 24 also offering her own alternative proposal as well.
 25 **THE CHAIRMAN:** What you are being asked is: were you aware

125

1 at the time that there were recommendations coming from
 2 Gallaher as to what should be on the price file?
 3 A. I don't believe so.
 4 **MR LASOK:** If you look at tab 57, {D19/57}, this of course
 5 is late in the day -- and I am referring to the document
 6 rather than the time of day today -- it's an internal
 7 ITL report about the Shell account dated February 2003.
 8 Do you think you would have seen this document?
 9 A. I probably did, yes.
 10 Q. Probably. If you go to page 4 and look at the first
 11 full paragraph, it's the one beginning "Shell
 12 recommends". Do you have that?
 13 A. I have, yes.
 14 Q. Could you read just that paragraph?
 15 (Pause)
 16 A. Okay.
 17 Q. You see that she refers to the fact that the Shell price
 18 file had been in a state of disrepair with many
 19 differentials out of order, but with the aid of both
 20 Gallaher and ITL that had been resolved and in the main,
 21 differentials between manufacturers' comparable brands
 22 were being maintained. Did you know of this event?
 23 A. I probably did read the document, and in the same
 24 document it says that the agents have the ultimate
 25 decision on pricing.

126

1 Q. But this, when you read this particular paragraph,
 2 I take it that it didn't cause you any surprise?
 3 A. I don't remember being surprised at it or taking it in
 4 that much at the time. I probably did read it at the
 5 time, but I don't recollect my thoughts or reaction at
 6 the time.
 7 Q. But if it was unexpected or surprising you think that
 8 you would have remembered?
 9 A. It's almost nine, ten years ago. I've seen -- I've said
 10 I probably did see the document. I am trying to explain
 11 that the agents actually set the price on the sites.
 12 This is only referring to the Shell price file, ie the
 13 recommendations to sites. But in the same document it
 14 clearly says that the agents choose --
 15 **THE CHAIRMAN:** That's not, Mr Culham, the point that
 16 Mr Lasok is trying to get you to focus on. The point he
 17 is trying to get you to focus on at the moment is about
 18 Gallaher, where it says, as I understand it, "with the
 19 aid of both Gallaher and ITL this has been resolved".
 20 So that indicates some kind of -- the author of this was
 21 aware that Gallaher was also interested in getting the
 22 differentials into line. So what Mr Lasok is trying to
 23 ask you is: if you read this, would this have triggered
 24 in your mind "Oh, Gallaher must have price differential
 25 strategies which, together with ours, are now being

127

1 resolved at Shell's sites"?
 2 A. That wasn't what went through my mind at the time.
 3 I accept, with the benefit of hindsight, reading it the
 4 way we are now, it doesn't read terribly well. But what
 5 I believe happened --
 6 **THE CHAIRMAN:** What you are saying is you don't recollect
 7 this triggering anything in your mind to do with
 8 Gallaher price differentials?
 9 A. No.
 10 **THE CHAIRMAN:** Okay.
 11 A. What I would say is the previous email we were looking
 12 at, when Gallaher were putting proposals to Shell, we
 13 were also putting proposals to Shell, and if Shell's
 14 policy at the time had been RRP plus X, that would have
 15 achieved our differential objectives, but I don't know
 16 the exact contents what Gallaher's were.
 17 **MR LASOK:** But you knew from a very early stage that Shell
 18 was sending price files to all the manufacturers?
 19 A. Did I? I don't know. What do you refer to?
 20 Q. Document 20. If you look at the first email, that's the
 21 one in the middle of the page, you can see that this is
 22 Mr Conrad, and he's emailing the retail prices to
 23 Gallaher, Rothmans and yourself?
 24 A. Yes, he has done. So, yes, I was aware.
 25 Q. So you knew that Shell was sending the retail price

128

1 lists to those three manufacturers, and you knew that
 2 in 2000?
 3 **A.** In the year 2000, I did know that Shell were sending
 4 their price file on this occasion, although I don't
 5 recollect it being very often. But on this occasion
 6 they certainly did.
 7 **DR SCOTT:** Staying at this end of the file, could you turn
 8 back for a moment to 32. You will see that in the email
 9 that you send to Amanda Eager, you say:
 10 "Please find attached the new price file for Shell.
 11 Please check the differentials and issue to salesforce
 12 and merchandisers as soon as possible."
 13 What was the point of sending this to the salesforce
 14 if your sole concern was with the price files?
 15 **A.** It was so that they were aware, as I think I mentioned
 16 earlier, that the Shell sites were selling a brand at
 17 considerably more than the RRP, because the salesforce
 18 were mainly calling on independent outlets, which at the
 19 time mainly sold at the recommended retail price.
 20 So if one of our brands had a price of £3 in
 21 95 per cent of a sales representative's call, and then
 22 they suddenly went to Shell and it was £5, they wouldn't
 23 even raise it with the agent because that's what Shell
 24 had recommended, because there would be no point them
 25 going to them and saying "Why aren't you selling at

129

1 recommended retail price?" So it's to stop them having
 2 the conversation with the agents over the absolute
 3 price. So if they knew the normal price was say --
 4 sorry, the recommended retail price was £3 and this
 5 document said Shell Select price is £4, they knew if it
 6 was priced at £4 not to try and persuade the retailer to
 7 bring it down to £3.
 8 **DR SCOTT:** What's being checked here, as I understand it,
 9 therefore, if they are not to worry about the absolute
 10 level, is the differentials; is that right?
 11 **A.** That's what Amanda is checking through, yes.
 12 **DR SCOTT:** Yes, but you're also sending this to the sales
 13 force so that these things can be looked at at the --
 14 **A.** So for example, if Benson & Hedges was £4, in the agent
 15 sites -- sorry, if the Benson & Hedges maximum price was
 16 £4, the maximum price for Embassy, our hope was that it
 17 would be 3.97, but they could go into a site and, for
 18 example, find Embassy No 1 at 3.97, but Benson & Hedges
 19 could still be at the Shell recommended price of 3.94.
 20 So our differentials may not happen because the sites
 21 chose to sell at the recommended retail price, the
 22 maximum price and somewhere in between. Some went below
 23 the recommended price, but not many. Not many sold
 24 below the recommended price.
 25 **DR SCOTT:** Thank you.

130

1 **MR LASOK:** Finally, if you would go back to your witness
 2 statement, please, and come back to paragraph 105, the
 3 last sentence, in my copy at any rate, is square
 4 bracketed with "Confidential".
 5 (Pause)
 6 So you deny that ITL took the action referred to in
 7 that paragraph. Is that limited to Shell?
 8 **A.** Sorry. I made a witness statement and this is part of
 9 Shell, so I'm ...
 10 **Q.** This is only concerning Shell. The statement that you
 11 have made here in that paragraph concerns --
 12 **A.** I thought you were --
 13 **Q.** No, I am asking you whether that statement concerns only
 14 ITL and Shell?
 15 **A.** That statement is made clearly with Shell. We wouldn't
 16 withhold any pricing differential money if a retailer
 17 chose to accept -- I am coming back in a couple
 18 of weeks' time, so another account, where, if there were
 19 money or bonuses linked to any differentials, if
 20 Gallaher or another manufacturer did a promotion and
 21 that meant that their brand was relatively cheaper than
 22 ours than we would have hoped, we did not withhold any
 23 money against any differential elements in any of the
 24 accounts I've dealt with in -- I started account
 25 managing in '86 and retired in 2009, so in 20-odd years

131

1 I don't recall ever withholding against anyone if the
 2 differentials being out of line was because of
 3 a promotion by a competitor.
 4 **Q.** Are you saying that bonuses were never withdrawn in
 5 order to restore parities?
 6 **A.** I think from -- if we do a tactical promotion, that
 7 would hopefully give us an advantage on a shelf price,
 8 and then when we decide to end the tactical promotion,
 9 that could lead back to our brands (a) going up in price
 10 and us stopping paying that tactical bonus. That is my
 11 only recollection which would fit that question.
 12 **Q.** This gets into another retailer. I think that if we
 13 work on the basis that this particular part of your
 14 evidence is limited to Shell, we won't today take that
 15 any further forward, but you don't say that any occasion
 16 arose in relation to Shell in which you needed to take
 17 such action?
 18 **A.** I can't recollect any occasion and, as I've said
 19 earlier, we were trying to build a relationship with
 20 Shell. So I come back to it, it was a relatively small
 21 amount of money we were paying against the amount of
 22 money we were investing in the account, therefore we
 23 wouldn't have taken it away.
 24 **MR LASOK:** I have no further questions. Thank you.
 25 **THE CHAIRMAN:** Mr Kennelly, do you have any questions?

132

1 **MR KENNELLY:** Yes, I have one question.
2 **THE CHAIRMAN:** Perhaps we should take a short break there
3 for the transcript writers.
4 **MR HOWARD:** I just wanted to ask a question, sorry, if we
5 are taking a break and looking at the time. Mr Goodall
6 is here, but it looks very unlikely -- and he is keen to
7 get back to work, as it were. So could we release him
8 for the afternoon?
9 **THE CHAIRMAN:** Yes, we will release Mr Goodall.
10 **MR HOWARD:** I am grateful.
11 **THE CHAIRMAN:** So we will come back at ten past 3, for
12 whatever questions you have and then re-examination.
13 Thank you.
14 (3.03 pm)
15 (A short break)
16 (3.10 pm)
17 Cross-examination by MR KENNELLY
18 **THE CHAIRMAN:** Yes, Mr Kennelly.
19 **MR KENNELLY:** Thank you.
20 Mr Culham, you said a moment ago in answer to
21 Mr Lasok that:
22 "Our differentials may not happen because the sites
23 [Shell sites] chose to sell at the RRP, the MRP and
24 somewhere in between. Some went below the RRP, but not
25 many."

133

1 Do you recall saying that?
2 **A.** I believe so, yes.
3 **Q.** That's because, as you knew, for sites under the RBA,
4 Shell's pricing policy --
5 **MR LASOK:** I am terribly sorry, there is a slight problem,
6 I think, where you have a witness and questions are
7 asked of him by a party that has the same interest as
8 the person calling the witness.
9 **THE CHAIRMAN:** Yes.
10 **MR LASOK:** And I know that normally in cross-examination one
11 can ask leading questions, but in this type of situation
12 I am afraid that there are good grounds for restricting
13 the questioning to non-leading questions.
14 **THE CHAIRMAN:** Yes. I think there is something in that,
15 Mr Kennelly. I think that the answers will have greater
16 usefulness as far as the Tribunal is concerned if they
17 are elicited without you leading the witness in that
18 manner.
19 **MR KENNELLY:** I understand, madam. I should say, of course,
20 Shell's interest is not exactly the same as ITL's.
21 **THE CHAIRMAN:** It's not exactly the same, but it is closer
22 than the OFT's interest.
23 **MR KENNELLY:** That is certainly true, yes.
24 That statement I've just put to you, quoting what
25 you have said to Mr Lasok?

134

1 **A.** I did make the statement. I can't say it's word for
2 word, but in those lines, yes.
3 **Q.** What was the relationship between what you saw there,
4 what you have described, and Shell's pricing policy?
5 **A.** Sorry, can I ask you --
6 **Q.** You said that on the ground you saw that -- this is with
7 sites under the RBA -- you saw the differentials, your
8 differentials, might not happen because the sites chose
9 to sell at the RRP, at the MRP and somewhere in between,
10 and sometimes they went below the RRP?
11 **A.** What the overall effect was that when our sales
12 representatives went into the sites, the differentials
13 that we were trying to achieve, for example, Embassy
14 No 1, 3p below Benson & Hedges, was not always achieved
15 and I couldn't give you numbers and say how many it was
16 not achieved in, but several -- many sites, the
17 differentials that Imperial were looking to achieve
18 didn't happen in Shell Select sites.
19 **Q.** My learned friend may say this is leading, but did you
20 see that as consistent with Shell's pricing policy or
21 contrary to Shell's policy?
22 **A.** I think Shell's --
23 **THE CHAIRMAN:** Just clarify who you mean by Shell?
24 **MR KENNELLY:** Shell's official pricing policy --
25 **A.** Shell explained to us -- I don't recollect who said it

135

1 when, but probably the end of 2000/2001, we were told
2 that Shell would provide a recommended retail price for
3 sites and a maximum shelf price, and I don't remember
4 exactly which date what came in. And we were aware that
5 that was all Shell could -- where our influence stopped
6 with Shell.
7 We were trying to influence the price file that
8 Shell head office would send out to sites, and we did
9 know in the normal course of business some sites sold at
10 recommended price. I think probably the majority did in
11 the early days, but when we had tactical promotions,
12 ie like with the Small Classic or Richmond, we would
13 then seek Shell's advice -- help to try and run the
14 promotion in the actual sites.
15 **THE CHAIRMAN:** Did you know, when you were dealing with
16 these trading agreements, about the arrangements, the
17 commission arrangements between the RBA contractors and
18 Shell?
19 **A.** Yeah. Yes, I was aware, and I don't know the figures,
20 because the figures were confidential, Shell never
21 shared them with us, but I am aware that Shell projected
22 the margin for a store, I am assuming by category. So,
23 for example, tobacco they might say "If you sell at the
24 Shell recommended price, the category would make
25 X per cent". If the stores -- and Shell would take, for

136

1 example, a proportion of that X figure.
 2 **THE CHAIRMAN:** As its royalty?
 3 **A.** As its royalty. If the sites sold above the Shell
 4 recommended price, I think the royalty paid to Shell
 5 head office was still the same figure. So, for example,
 6 if Shell would get 10p on a packet of cigarettes, if the
 7 site sold it below the recommended retail price Shell
 8 still took their 10p, and if they sold it at the maximum
 9 price, I think Shell got their 10p, but that's my
 10 understanding --
 11 **THE CHAIRMAN:** What we are looking at is your understanding
 12 at the time, yes.
 13 **MR KENNELLY:** I have nothing further.
 14 **THE CHAIRMAN:** Thank you.
 15 Yes, Mr Howard.
 16 Re-examination by MR HOWARD
 17 **MR HOWARD:** Just a few questions. Just on that point I want
 18 to be clear about your understanding.
 19 When the independent agents came in, we know then
 20 the price file changes and there is the Shell
 21 recommended price and the Shell maximum price. I think
 22 you were asked some questions by Mr Lasok which didn't,
 23 I think, put the matter entirely clearly, but the thrust
 24 I think of what he was saying to you was that there were
 25 two price points: the Shell recommended price and the

1 Shell maximum price. Just the two. At other stages in
 2 your evidence, you said that people were pricing both at
 3 the recommended price, at anywhere between the
 4 recommended price and the maximum price, and at the
 5 maximum.
 6 What I would like you to clarify for us is what your
 7 understanding was of what the independent agents were
 8 entitled to do in their pricing?
 9 **A.** The advice from Shell, the recommended price, was to
 10 give the agent the margin that Shell thought the agent
 11 should make. The influence Shell had was if a site was
 12 selling above the maximum price, we would contact Shell
 13 and ask them "This site is selling above the maximum
 14 price". But when they were between the two, I don't
 15 know what influence Shell had, but we had no influence,
 16 and there were examples -- not many, as I've said -- of
 17 sites selling below the rec price due to local
 18 competition, because if a Shell site was near an
 19 independent outlet that was selling RRP, sometimes you
 20 get garages opposite each other on a road, so some
 21 operators did choose to sell some products cheaper and
 22 put other products up to the maximum. I haven't got
 23 numbers, but that was the fact of what happened.
 24 **Q.** Yes. Just it be clear, my question is directed to
 25 understanding what you understood the agents were

1 entitled to do, and the question is: between the Shell
 2 recommended price and the maximum price, what were the
 3 agents entitled to do?
 4 **A.** They could sell between those prices at the price they
 5 chose.
 6 **Q.** Okay. Now, to move to a different topic, could you go
 7 back to tab 13 {D19/13}, which is the pre-buy agreement.
 8 I would just like you, if you can, to explain to us
 9 firstly what is ITL doing in this agreement? So look at
 10 it just firstly from ITL's side.
 11 **A.** We had announced a manufacturers' price increase and
 12 most retailers would like to order extra product from us
 13 before the wholesale price came up, so --
 14 **Q.** Just stop there so we can see. The MPI we can see from
 15 the letter is 21 August. Right?
 16 **A.** Yes.
 17 **Q.** Here we are on 3 August. So what are we looking at at
 18 this stage?
 19 **A.** We are offering Shell the opportunity to buy extra stock
 20 prior to the manufacturers' price increase three weeks
 21 later.
 22 **Q.** And --
 23 **A.** We would -- sorry.
 24 **Q.** At what price?
 25 **A.** At the pre-increased wholesale price, and we would offer

1 to store it for the retailer so they didn't have to
 2 guess their order requirements. We would actually keep
 3 it in our warehouse and they could draw it off as they
 4 wanted, because sometimes the brand mix of sales could
 5 change. So if they said "I want X of product Y", they
 6 may actually need differently when it comes to --
 7 **THE CHAIRMAN:** When they pre-bought in this way, did they
 8 pre-buy across the whole range of ITL products, or could
 9 they choose which ones they wanted to pre-buy?
 10 **A.** They could choose which to pre-buy, and that's why --
 11 they could choose what to buy. But because we used it
 12 as a cash value, they could then use that cash to
 13 effectively pre-buy what they wanted, because they
 14 weren't actually buying the product, they were only
 15 giving us some money. And after the manufacturers'
 16 price increase, they would draw down what they chose to
 17 pre-buy from their money. So if they chose to buy just
 18 Embassy No 1, for example, the stock would have lasted
 19 them weeks or months, but they bought across the range
 20 of our products from the money.
 21 **DR SCOTT:** Sorry, what do the words "normal order patterns
 22 will continue to be maintained during this period" mean?
 23 **A.** One would hope they would just order what they normally
 24 required, and that's why it came back to the buying
 25 a range, because what we didn't want them to do is say,

1 for example, just order Embassy No 1 and stop ordering
 2 all our other products. So it's to get a balance of
 3 what the consumers needed.
 4 We weren't actually controlling what they ordered,
 5 it was just hoping they would order products in a normal
 6 mix.
 7 **THE CHAIRMAN:** So with the pre-buying they would not say on
 8 3 August "All right, we want to pre-buy 5 million
 9 Embassy and 250,000 Woodbines", or whatever, they would
 10 just say "We are giving you £10 million", say, and then
 11 after 21 August, if they hadn't used up that
 12 £10 million, they could charge up against that money
 13 purchases at the pre-21 August price.
 14 **A.** That's correct, in the product mix that suited their
 15 business best based on consumer sales, because there was
 16 no point them buying, for example, 20 million Woodbines
 17 because it would probably last them 50 years.
 18 **MR HOWARD:** Sorry, was that --
 19 **DR SCOTT:** I note that 3 says:
 20 "Shell will continue to ensure the full availability
 21 of all products at all depots and stores."
 22 So you are in fact asking Shell to ensure that the
 23 patterns are such that they don't run out of --
 24 **A.** They don't run out of products, yes, but they could take
 25 the mix as they wanted, and when their money is used up,

141

1 they could then buy -- if they were running low on one
 2 brand they would then buy post-MPI the brand they were
 3 running low of. This was a process we used to stop them
 4 guessing what they needed. It was a way of making it
 5 easier for the retailers. It cost us money because we
 6 were storing the product, but it made it easier for the
 7 retailers because they could then effectively bank the
 8 money and then spend it how their business needed after
 9 the increase.
 10 **THE CHAIRMAN:** When you say it cost you, you were not then,
 11 as I understand it, earmarking certain boxes or crates
 12 in your warehouse for them between 3 and 21 August,
 13 because you didn't know who was going to buy it?
 14 **A.** No, but we had to keep the product on our -- to store
 15 it. So the storage costs of the product was borne by
 16 us, and the insurance risk was borne by us. Shell
 17 didn't buy the £10 million of product and then take the
 18 insurance risk on it.
 19 **THE CHAIRMAN:** But it's not -- what's the word when you have
 20 a whole shipload of grain and somebody buys some of it?
 21 It's not appropriated to the particular --
 22 **MR HOWARD:** These are not ascertained goods, is that the
 23 question, you mean?
 24 **THE CHAIRMAN:** Yes.
 25 **MR HOWARD:** Actually I think you may be wrong about that,

142

1 but I think the witness should explain.
 2 Let's try and elicit it in this way -- I don't think
 3 I am leading: are the goods, let's say they say they
 4 want £1 million of Embassy No 1, say, are those then
 5 segregated and allocated, appropriated to Shell so that
 6 title in those goods passes or anything of that sort?
 7 **A.** I won't go into title.
 8 **Q.** Forget title. Shell weren't in danger of going bust.
 9 **A.** If Shell had pre-purchased £10 million of product, we
 10 would put that £10 million of product somewhere and, for
 11 example, other retailers' £10 million, so we would keep
 12 £50 million, if it was five retailers at 10, separately
 13 to our normal product.
 14 **THE CHAIRMAN:** But I thought you said a moment ago that they
 15 didn't choose what cigarettes they wanted until after
 16 the MPI?
 17 **A.** Sorry, £10 million of value. But it wasn't all --
 18 because Shell was a relatively small retailer, if you
 19 aggregate all the money together we can say it will be,
 20 I don't know, a million Embassy, 2 million Lambert &
 21 Butler, but Shell couldn't get it down to their exact
 22 numbers. So it wasn't: this is a box of Embassy for
 23 Shell. It is: here is 10 pallets of Embassy and Shell's
 24 is in that.
 25 **THE CHAIRMAN:** I see.

143

1 **MR HOWARD:** So in fact it's an unascertained whole, and then
 2 at some point they can draw off. It's in fact like the
 3 cases with a cargo of oil which is sitting in the
 4 mothership and then you call it down, and there has been
 5 a case which lasted about a year in the Commercial Court
 6 as to whose oil it was. Metro, I think it was called.
 7 I am not sure any of this really matters in relation to
 8 what I wanted to ask.
 9 Essentially we have got to the point that you are
 10 selling them stock in a rather, perhaps, complicated
 11 way.
 12 Now, in terms of what it is you are looking to them
 13 to do, let's see if we can -- you can explain this to
 14 us. In terms of the selling prices that Shell are then
 15 going to have in their outlets in relation to this
 16 pre-buy stock, what are you trying to secure in relation
 17 to the selling prices?
 18 **A.** (a) that the price in the price file does not move up
 19 before the date of the manufacturer -- that's point one.
 20 So there was: we don't want Shell to increase the price
 21 file price of our products before 21 August, in this
 22 example. Secondly, to actually respect the
 23 differentials that we have after our competitor has had
 24 a price increase.
 25 **Q.** Yes, because we know in fact at this time there was a --

144

1 and it's 8 August -- Gallaher price increase. It's not
 2 in your letter, but we know from our schedule that we
 3 have that their price was ... so when we look at
 4 paragraph 2, just explain to us -- we can see in there
 5 that you are changing certain RRP's. Leave that on one
 6 side for a moment. In relation to the first sentence:
 7 "The current differentials against other
 8 manufacturers' products will be maintained."
 9 What was, therefore, that intended to get at?
 10 **A.** That they didn't increase our shelf -- sorry, the price
 11 file price over and above the increase that was in the
 12 manufacturers' price increase. So if the manufacturers'
 13 price increase was 5p, they would only increase by 5p,
 14 not 10p, for example.
 15 **Q.** Okay. Would you also look at tab 28, which deals with
 16 the other instance in this file? {D19/28}.
 17 We can see this is again pre-buy and we don't need
 18 you to explain again how pre-buy works. The second
 19 paragraph, first sentence: could you just again explain
 20 what's happening there?
 21 **A.** On this occasion Imperial Tobacco is having
 22 a manufacturers' price increase on 29 January. So we
 23 are aware that retailers would -- because the price is
 24 most -- the selling price up, and we are asking them to
 25 restore the differentials after Gallaher's have had

1 an MPI on 13 January -- 13 February, sorry, so we were
 2 aware that Gallaher brands, for example, if
 3 Benson & Hedges is normally 3p more than -- sorry,
 4 Embassy No 1 is 3p less than Benson & Hedges, if we have
 5 had a 6p MPI, then obviously Embassy No 1, for the
 6 intervening period, would be 3p more than
 7 Benson & Hedges. So we are just saying we know --
 8 effectively it's saying "We know the differentials that
 9 we would hope to achieve normally won't be achieved, but
 10 we hope they will be achieved after Gallaher's go up".
 11 **Q.** Okay. Now could we go to tab 24, I just want to get one
 12 thing clarified. {D19/24}. Tab 24 was the culmination
 13 of this correspondence about the Richmond arrangement.
 14 Could you then, just having reminded yourself of that,
 15 go to tab 29. {D19/29}. What we saw at tab 24, you
 16 were taken to various correspondence where essentially
 17 you were complaining that the price was at 3.56 and not
 18 3.55. We don't need to go into the detail, but you
 19 remember that.
 20 Now, here you say in this letter under
 21 "Richmond Kingsize" you refer back to all of that, and
 22 you say:
 23 "Since the price was lower in September, I offered
 24 to pay a 10p per outer retro allowance subject to your
 25 selling out price not being above £3.55."

1 Do you see that?
 2 **A.** Yes.
 3 **Q.** We saw the complaints when the price was at £3.56. What
 4 would have been your position, or your reaction, if you
 5 had found that they had priced at £3.54?
 6 **A.** Delighted.
 7 **Q.** Right. Good. Okay. Now, could you turn to tab 27
 8 {D19/27}, which is the agreement in '01, and I think you
 9 told us that you personally drafted this agreement; is
 10 that right?
 11 **A.** I believe I did, yes.
 12 **Q.** We have the other one at tab 40. Would this type of
 13 agreement, which you drafted -- it's a very, very short
 14 agreement -- did this go to the legal department?
 15 **A.** I don't believe it did, no.
 16 **Q.** Are you legally qualified?
 17 **A.** Absolutely not, no.
 18 **Q.** Right. Now, I want to ask you a question which arises
 19 I think out of something that Dr Scott was asking you,
 20 relating to the price requirements themselves.
 21 We can all see what's written down as plain as day,
 22 namely that they are expressed in this relative way at
 23 least such and such difference or something like that.
 24 I want to ask you: if we take Richmond, for instance, we
 25 see that Richmond is to be no more than the price of

1 Dorchester.
 2 Now, Richmond we know -- so, again, it's not
 3 controversial, my saying this -- was a brand that was
 4 only introduced, started as a brand, by Imperial I think
 5 in 1999?
 6 **A.** I believe it was, but I can't be certain.
 7 **Q.** We also know -- it's in the evidence already, and not
 8 controversial -- that Richmond grew from 1999 from
 9 a standing start, ie zero, to gain a market share of
 10 about 11 per cent over this period.
 11 Now, against that background, what I want to ask you
 12 is: what was your understanding in setting these
 13 differentials, in other words that Richmond must be at
 14 least no more than the price of Dorchester? What was it
 15 you understood you were trying to achieve?
 16 **A.** We were trying to achieve -- well, Dorchester was
 17 a brand that had been around for quite a while.
 18 Richmond was a new brand, and at the time of this price
 19 requirements both products had the same recommended
 20 retail price. So we were trying to achieve a position
 21 where Richmond was no more expensive on the shelf than
 22 the established Dorchester brand.
 23 **Q.** Right. If it was no more expensive, in terms of the
 24 attraction to the consumers, in other words if they are
 25 priced the same or Richmond is less, what did you

1 perceive as your competitive advantage, or not?
 2 **A.** We felt that if Richmond was no more expensive than
 3 Dorchester, consumers would go towards our product, and
 4 therefore pricing it attractively was there to --
 5 against Dorchester was our objective.
 6 **Q.** On the basis that the proof of the pudding is in the
 7 eating, what's your view of actually what happened?
 8 **A.** I can't speak for Dorchester now, because I am no
 9 longer --
 10 **Q.** No, but during this period, not today.
 11 **MR LASOK:** With all due respect, I am not sure that somebody
 12 who at the time was the national account manager for one
 13 or two retailers, or whatever it was, can express
 14 an opinion about market developments over the period of
 15 time we are looking at.
 16 **MR HOWARD:** I am asking his experience as national account
 17 manager in relation to the accounts with which he dealt,
 18 what his experience was.
 19 **THE CHAIRMAN:** Well, yes.
 20 Say if you weren't aware, but do you remember at the
 21 time being aware of how Richmond had fared, if that's
 22 a fair way of --
 23 **A.** Very much so. We would get at least monthly updates on
 24 how it was performing in the marketplace. And from some
 25 retailers I don't think Shell, but we were able to see

1 market share performance in retailers. So we could see
 2 how well the brand was performing. And it was after --
 3 the real growth came after September 2000. The first
 4 year it increased a bit, but then after 2000 the brand
 5 really took off.
 6 **MR HOWARD:** Very good. Let's ask you about something else.
 7 You were taken to tab 48, {D19/48} which was the
 8 letter about the June 2002 price increase, and you were
 9 asked quite a lot of questions about why this letter was
 10 written in the terms it was, although in fact you didn't
 11 write it. Leaving that on one side, before we consider
 12 that, I would like you then to turn back to tab 31,
 13 about which you were also asked some questions {D19/31}.
 14 At the foot of the letter in tab 31, it's 9 March,
 15 where you have "MPI support", and you refer to the
 16 fact -- I think you did write this letter -- that
 17 basically there is a 37p price increase per outer, and
 18 then you are going to pay what you call a retro of 37p
 19 per outer, in other words you have put the price up but
 20 you are going to keep it down by paying this bonus?
 21 **A.** Correct, yes.
 22 **Q.** Right. Can you explain -- let's take it in stages in
 23 the light of what Mr Lasok was asking you -- where you
 24 put up your price, as we see you were doing on 9 March,
 25 what was your requirement as to what Shell was to do to

1 Gallaher's price?
 2 **A.** There was no requirement on Shell to do anything with
 3 Gallaher price. I was talking about our products,
 4 Richmond, and seeking Shell's agreement to keep the
 5 price of Richmond lower than it would have been
 6 otherwise.
 7 **Q.** Why in March 2001 did you feel it was necessary, having
 8 announced a price increase, to actually effectively
 9 reverse it? Why were you doing that? What was the
 10 purpose in that?
 11 **A.** To keep Richmond competitively priced in the market.
 12 I don't remember the exact -- what was happening when,
 13 but it was to keep Richmond competitive in the
 14 marketplace.
 15 **THE CHAIRMAN:** Well, I can see that would be a reason why
 16 not to announce an MPI, but here is a very specific
 17 operation: that you announce an MPI and then you later
 18 on, some time later, presumably, decide you don't want
 19 to implement it in relation to this particular brand or
 20 maybe other brands. So was there anything --
 21 **MR HOWARD:** I think it's all about Richmond.
 22 **THE CHAIRMAN:** -- more than just not wanting to increase
 23 the price, which you could have achieved by not having
 24 an MPI? Do you see what I am asking?
 25 **A.** I can't recollect what was happening at the time.

1 Reading this letter, it would suggest that we never
 2 increased the price, ie it's not to bring it back down,
 3 it was -- we had an MPI in January, but I think the
 4 letter or the request was to not increase the price back
 5 in January, so Richmond never went up.
 6 **THE CHAIRMAN:** Yes, but you could have not announced
 7 an increase in price.
 8 **A.** Correct.
 9 **THE CHAIRMAN:** But you can't remember why, rather than not
 10 announcing an increase in price, you announced it and
 11 then withdrew it?
 12 **A.** I don't remember the reason why.
 13 **MR HOWARD:** Let's see if I can help you to help us. This is
 14 the 9 March letter dealing with the ITL price increase
 15 of 8 March. Let's take it in stages. When you have
 16 an MPI, explain to us, firstly, does that apply to
 17 specific retailers or across the market?
 18 **A.** It would apply across the whole market.
 19 **Q.** Right. Secondly, when you have an MPI -- well, you
 20 haven't got it in front of you, but we have the sheet
 21 that somebody else has helpfully prepared we know on
 22 8 March your MPI, which was as a result of a Budget
 23 announcement increasing the price of everything, which
 24 is what you would expect, the precise details don't
 25 matter. That's right, isn't it?

1 A. This is talking about the January MPI, not March.
 2 Q. Okay, that's helpful. Sorry, I have been misleading you
 3 and myself. The January MPI was just a pure MPI, which
 4 you have already told us would apply to all retailers?
 5 A. Correct, yes.
 6 Q. But the way in which we see these things being done --
 7 you tell me -- does one have an MPI which applies to
 8 everything you are doing, all cigarettes and cigars, or
 9 do you have MPIs that relate to discrete brands?
 10 A. As a general rule it would be across our product range,
 11 but at some MPIs some brands may not go up, and at other
 12 times brands might go up by differing amounts. Does
 13 that answer the question?
 14 Q. Yes. Here the 29 January one, for your note, applied in
 15 the case of cigarettes for all brands. So it was 5p per
 16 packet of 20 cigarettes. No doubt there is other
 17 information about packets of 10s and so on.
 18 Does that help you then understanding the context
 19 whereby, for Richmond, although there has been a price
 20 increase which was purporting to apply to all brands,
 21 you are then holding the price for Richmond?
 22 A. Well, we are holding it for competitive reasons. I
 23 don't recollect --
 24 Q. Just tell us what the competitive reasons would be?
 25 A. It could be Gallaher's have held the price of

153

1 Dorchester, it could be they could have reduced it.
 2 I don't remember what it was, but something would have
 3 happened in the marketplace that would encourage us to
 4 take action to not fully implement the MPI.
 5 Q. Okay. That's fine. Can we switch to --
 6 THE CHAIRMAN: Can I just ask this: I have been assuming,
 7 but perhaps this assumption is wrong, that the decision
 8 to hold the price by offering the support was taken at
 9 a later date than the decision to increase it. But
 10 perhaps, did it work differently in that you would
 11 generally announce an increase across all the brands,
 12 even though you might, at that time, know that certain
 13 brands you wanted to pick out are not increased and that
 14 you would generally do that by this means, or would you
 15 sometimes announce an MPI which said 5p on everything
 16 except Richmond or Embassy No 1?
 17 A. We have done both of those, plus also in this case,
 18 I don't remember the -- but we announced an MPI, which
 19 is usually about four weeks before the date of the MPI.
 20 But -- so we announce it, for example, middle of
 21 December, and then in the middle of January we might
 22 decide, hang on, we are not going to put Richmond up at
 23 the moment, therefore we offered to hold the price. So
 24 the intention was for Richmond to go up, but whatever
 25 the reason was, before the MPI we decided not to put

154

1 Richmond up, but I don't remember ...
 2 MR HOWARD: In that example, you announce an MPI and then
 3 decide in the case of Richmond you are going to want to
 4 hold it, what are the sort of reasons that make you want
 5 to hold Richmond? Why do you do that?
 6 A. It could be because (a) we want to grow the brand
 7 further. It could be Gallaher's have adjusted or not
 8 had an MPI or reduced the price of one of their brands,
 9 I don't know the exact reason.
 10 Q. All those things are talking about competitive
 11 situations?
 12 A. Yes.
 13 Q. Other than seeking to get a competitive advantage with
 14 Gallaher, other than that, is there any other reason?
 15 A. One other reason that was true at the time, we made
 16 a lot of price marked packs with independent trade, and
 17 that product, we make them several weeks in advance. So
 18 if all the independent trade still have price marked
 19 packs post the MPI, sometimes we would keep the plain
 20 packs down to make sure they were still competitive in
 21 the marketplace. But this exact -- I don't know what
 22 took place when.
 23 Q. Okay. You were asked some questions about tab 50,
 24 {D19/50}, which actually starts at tab 47, this is
 25 an episode when Breda commented on I think a price file

155

1 which appears to have been sent to Wes Feeney -- from
 2 whom we are not unfortunately going to hear -- but she
 3 commented on Wes' recommendations.
 4 What I just want to find out, I think it was being
 5 put to you that the fact that Breda saw Wes'
 6 recommendations somehow was inconsistent with your
 7 paragraph 105, when you said:
 8 "I was unaware of Gallaher's differential
 9 requirements or, indeed, whether they had any such
 10 requirements."
 11 I just wanted you to explain to us whether, from
 12 that document to which you were taken, and also tab 57,
 13 you in fact learned -- so far as you were concerned --
 14 what Gallaher's differential requirements were or
 15 whether they had any?
 16 A. As I've said, in all the time I was working with
 17 Imperial I never knew what Gallaher's differentials
 18 were. I was fully aware of what their recommended
 19 retail prices were. I was aware when they would do
 20 tactical promotions, if the price was highlighted in the
 21 reports that came back to me, but I was never aware what
 22 Gallaher's differentials were, if they had them.
 23 Q. Yes. On a similar note, Mr Lasok took you to tab 20 and
 24 said "Look, here we are, we see that you were sent
 25 a price list, a Shell price list which has Shell's

156

1 proposed RRP's for Gallaher products, ITL products and
 2 Rothmans products". From that price list, are you able
 3 to discern Gallaher's differential requirements or,
 4 indeed, whether they had any?
 5 **A.** Not at all. All we were doing was comparing that price
 6 file with the price -- the differential objectives we
 7 had.
 8 **Q.** Okay. Then absolutely finally, I promise, go back to
 9 tab 27 {D19/27}, which is the agreement. I think it was
 10 put to you by Mr Lasok that Shell were committing
 11 themselves to do this, and I think you at various stages
 12 have said that Shell had an incentive. What I would
 13 just like you to explain to us: we can see what the
 14 position is if Shell did set the selling prices at no
 15 worse than the relative RRP, then there would be
 16 an annual payment of [redacted].
 17 Assuming Shell did not do that, ie they chose to
 18 pursue an independent line, or just decided not to do
 19 this for some reason, what would your position then be?
 20 **A.** We would have still paid them the money. It was part of
 21 a -- it was a small investment of part of our business
 22 relationship with Shell, and I don't know how much we
 23 were spending with Shell, but it was, you know, a very
 24 small proportion of the money we were spending with
 25 Shell. And to fall out over -- [redacted] has been

1 mentioned, the value is less than, I think, [redacted]
 2 a site. It's so immaterial that it was -- we wouldn't
 3 fall out over it.
 4 **MR HOWARD:** Thank you very much indeed, Mr Culham. That's
 5 all I wanted to ask you.
 6 Questioned by THE TRIBUNAL
 7 **THE CHAIRMAN:** There was just one point I wanted to clarify.
 8 I hope it will not be controversial. Could you explain,
 9 you have referred to merchandisers and sales reps as ITL
 10 people who would go out to the shops, could you explain
 11 what the difference is between those two, and also are
 12 we right in thinking that you changed over from
 13 merchandisers to sales reps visiting the shops at some
 14 point, but I am not sure whether that was linked in some
 15 way to the roll-out of the RBAs?
 16 **A.** I think the easiest way to explain it -- and I can't say
 17 the policy now, but right up until I left, how we
 18 determined who called on the outlets was if the person
 19 at the site could make the final decision, it was an ITL
 20 sales representative's role, ie a full-time employee of
 21 Imperial that would call on all the independent outlets
 22 and calls where the person at the site would make the
 23 decision.
 24 If it was a head office-driven policy, strategy,
 25 then a merchandiser would call, because at the end of

1 the day, if something wasn't as Imperial Tobacco would
 2 like, the merchandiser couldn't say to a manager of,
 3 let's say Tesco's, "Change that", so therefore that was
 4 just fed back into an information. Whereas the sales
 5 representative called on the sites, and if they didn't
 6 like what was there, the sales representative could talk
 7 to the person at the site and say "Would you change?"
 8 At the end of the day, the agent decides, and that's the
 9 difference.
 10 So if the decision is made at head office, it was
 11 a merchandiser, and if the decision was ultimately at
 12 the site, store level, it was a sales representative.
 13 **THE CHAIRMAN:** Yes.
 14 **DR SCOTT:** I had a similar question relating to the role of
 15 the sales representatives. As I understood it, when we
 16 were discussing I think it was 19/49, what you explained
 17 was that if they did not want to have a price marked
 18 pack --
 19 **A.** Shall I --
 20 **DR SCOTT:** No, I don't think you need it. The contractors
 21 could purchase other than from P&H by going to another
 22 supplier or presumably from your sales representative?
 23 **A.** Yes, that's correct. That's how, during this period, we
 24 had a commercial dispute with Shell and they [redacted]
 [redacted] but still almost half

1 the sites continued to buy them from somewhere else.
 2 **DR SCOTT:** That was my understanding. So they would buy
 3 them from another wholesaler or direct from Shell?
 4 **A.** They could buy them from another wholesaler, from
 5 a Cash & Carry, off a sales representative, they could
 6 buy them -- they were free to buy them wherever they
 7 wanted.
 8 **DR SCOTT:** So far as you were concerned?
 9 **A.** As far as we were concerned, yes.
 10 **MR SUMMERS:** Mr Culham, do you remember who briefed you
 11 about the changing relationship with Shell and the
 12 introduction of the RBA?
 13 **A.** I honestly can't remember. Whether it was a sort of a
 14 mass presentation to suppliers or an individual
 15 one-to-one with the buyer, category manager at the time,
 16 I don't remember now.
 17 **MR SUMMERS:** You remember, however, that there was
 18 a presentation of some sort, which set out how the
 19 relationship would work --
 20 **A.** Yes.
 21 **MR SUMMERS:** -- and what the respective roles of the two
 22 parties would be, what the powers of Shell would be over
 23 their agents?
 24 **A.** It may have been a conversation, it may have been
 25 a presentation. As I say, I don't recollect exactly

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1 what was presented, but yes, I would have been -- it
 2 would have been explained to me how things were
 3 changing, yes.
 4 **MR SUMMERS:** Perhaps, say, three months later, as the
 5 arrangement rolled out and was implemented, did it
 6 actually roll out as planned? Did you get what it said
 7 on the tin at the presentation?
 8 **A.** I can't remember. Is there anything specific?
 9 **MR SUMMERS:** No, I was just wondering whether you recall
 10 thinking "I didn't think it was supposed to work like
 11 this"?
 12 **A.** I don't recollect thinking that, no. I think we were
 13 told that sort of they were moving from a direct
 14 operation, ie direct managers, to agents that Shell
 15 would suggest things to, but the agents -- and I don't
 16 recollect --
 17 **MR SUMMERS:** Had you, for instance, expected that Shell
 18 would have more power over their sites than they turned
 19 out to have?
 20 **A.** I think it would have been nice, but they certainly
 21 didn't have, and that's why I think in the first trading
 22 agreement we put in, which was just after the -- we
 23 still had a compliance -- was it 95 per cent compliance
 24 expectation? But during that year we just realised it
 25 wasn't going to happen. Therefore, I suppose we thought

161

1 it might offer more compliance, but that certainly
 2 didn't happen in reality.
 3 **MR SUMMERS:** Thank you very much.
 4 **THE CHAIRMAN:** Anything arising out of that?
 5 **MR HOWARD:** No. I know the time. There is a point we need
 6 to just discuss about Mr Culham's position, but it may
 7 be better if he withdraws.
 8 **THE CHAIRMAN:** Yes.
 9 Thank you very much, Mr Culham. That's your
 10 evidence in relation to this particular agreement, but
 11 I know that you are going to be coming back to talk to
 12 us about other agreements. But for the moment, then,
 13 you can leave the witness box. Thank you very much.
 14 Discussion re timetable
 15 **MR HOWARD:** It's nothing secret, he doesn't need to. It's
 16 really just about his position in the interim. It's
 17 obviously a slightly unusual position where somebody
 18 gives evidence and then is going to return. He is due
 19 to return on various dates, the latest of which I think
 20 is 1 November. He gives evidence about First Quench,
 21 Safeway and T&S.
 22 I spoke to Mr Lasok very briefly, and he said his
 23 view is that Mr Culham should be treated as if he is
 24 subject to the normal rules and in purdah, or whatever
 25 one wants to call it. I have a little bit of sympathy

162

1 with that, but on the other hand it puts us in
 2 an inconvenient position.
 3 What I would ask is that, having spoken to Ashursts
 4 just now about it, we should be at liberty via counsel
 5 to speak to Mr Culham insofar as we need to, for the
 6 purposes of essentially opening any of those appeals, to
 7 get clarification of what it is if we don't understand
 8 what he is saying or any other points on the documents.
 9 In other words, to limit the contact to that sort of
 10 dialogue rather than, as it were, a general review of
 11 his evidence.
 12 I hope the Tribunal and Mr Lasok would find that
 13 unobjectionable, otherwise we are put in a position of
 14 disadvantage as a result of the procedure of having him
 15 coming back on three successive occasions.
 16 **MR LASOK:** As the Tribunal will be aware, that's one of the
 17 reasons why we would have preferred it if Mr Culham had
 18 given all his evidence in one session: because of the
 19 overlap between the different agreements it's not really
 20 possible to segregate the evidence that he gives.
 21 Now, I had only heard my learned friend's proposal
 22 when he made it just now. At the moment, I think that
 23 I would have to maintain the position that in our
 24 submission, the normal rule ought to follow, which is
 25 that there is no discussion. If we were talking about

163

1 an ordinary case, that is what the position would be.
 2 If, however, the Tribunal is minded to go along with
 3 that suggestion, then I agree that any contact, the
 4 discussions would have to be with counsel, nobody other
 5 than counsel. But in addition to that, in our
 6 submission, the discussions would have to be limited to
 7 those that are necessary in order to deal with the
 8 particular aspect of the case that counsel have to deal
 9 with, and they should not be permitted to extend to
 10 an aspect of the case that is being dealt with already,
 11 and they should use their best endeavours, if this is
 12 permitted at all, to steer clear from things which will
 13 trespass into the material on which he has already given
 14 evidence.
 15 I think when one begins to see it in that light,
 16 which in our respectful submission is the sensible way
 17 of looking at it, there are clear difficulties. But
 18 it's really a matter for the Tribunal to decide.
 19 **THE CHAIRMAN:** Well, yes.
 20 Mr Howard, of course you understand very well what
 21 the mischief is that the purdah rule is aimed at
 22 avoiding, which is that when a witness is in the course
 23 of giving his evidence he shouldn't be given any nudges
 24 or winks or hints as to what his future evidence should
 25 be as regards the interpretation of certain documents or

164

1 how he should respond to certain questions.
 2 Now, you are well aware of that and certainly
 3 the Tribunal has every confidence that in any contact
 4 you and your junior counsel and Mr Brealey would have,
 5 you will be very careful not to trespass into that kind
 6 of area, particularly if you are having contact to
 7 discuss your opening, because in your opening in
 8 relation to Shell you did go through various documents
 9 and say "Well, this is what they mean" and that was one
 10 of the reasons why we decided the witnesses should leave
 11 the room.
 12 **MR HOWARD:** Can I be helpful and say my proposal is
 13 actually, and my intention is, to limit any contact, and
 14 it may be that there will not be any contact, and that
 15 I think would be preferable if we can avoid it. It's
 16 merely if it arises that we feel it's necessary in order
 17 to get a proper understanding of some position that we
 18 will do so, and we recognise it would be better if we
 19 can avoid it. So it's simply to have liberty, but
 20 I will certainly bear in mind those strictures and,
 21 frankly, it's better for Mr Culham's evidence not in any
 22 way to appear to be influenced by anything certainly
 23 that I would say or, indeed, perhaps Mr Brealey, who
 24 knows more about it.
 25 **THE CHAIRMAN:** Yes. Well, on that basis, then, yes, we are

1 happy for you to have the limited contact as you
 2 suggest.
 3 **DR SCOTT:** You can ask Mr Brealey first.
 4 **THE CHAIRMAN:** Someone has handed up this (indicated). So
 5 we meet again on Monday, when it will be Mr Goodall.
 6 **MR HOWARD:** We will have Ms Parker back for the first hour,
 7 then I will make a brief opening in respect of Co-op,
 8 and then we will have Mr Goodall.
 9 **THE CHAIRMAN:** Can everybody please ensure that their
 10 witnesses are aware that they should not be attending
 11 court during the time when they are not actually giving
 12 evidence.
 13 **MR HOWARD:** Absolutely.
 14 **THE CHAIRMAN:** What time are we meeting?
 15 **MR KENNELLY:** Madam, if it assists, Ms Parker can be here
 16 at 10.
 17 **THE CHAIRMAN:** Well, let's start, then, at 10 o'clock on
 18 Monday.
 19 Thank you very much. Thank you again, Mr Culham.
 20 We will meet again on Monday.
 21 (The witness withdrew)
 22 (4.07 pm)
 23 (The court adjourned until 10.00 am on
 24 Monday, 10 October 2011)
 25

INDEX	PAGE
MR KENNETH CULHAM (affirmed)	1
Examination-in-chief by MR HOWARD	1
Cross-examination by MR LASOK	3
Cross-examination by MR KENNELLY	133
Re-examination by MR HOWARD	137
Questioned by THE TRIBUNAL	158
Discussion re timetable	162