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IN THE COMPETITION
APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

11 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 12)

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

APPEARANCES

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

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

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

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

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

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

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1 Tuesday, 11 October 2011
 2 (10.00 am)
 3 MR MARTIN GOODALL (continued)
 4 Cross-examination by MR LASOK (continued)
 5 **THE CHAIRMAN:** Yes, good morning, everybody. Mr Lasok.
 6 **MR LASOK:** Good morning, Mr Goodall. When we finished
 7 yesterday afternoon, we were looking at the question
 8 whether or not the differential strategy was focused on
 9 achieving maxima or fixed differentials.
 10 Now, as far as I can see, ITL never told the Co-op
 11 that the strategy was to go for just maxima
 12 differentials. ITL told the Co-op that the strategy was
 13 to achieve the differentials that were in -- between
 14 competitor brands -- the RRP's. Is that your
 15 recollection?
 16 **A.** Yes.
 17 **Q.** So, as far as the Co-op was concerned, it was a case of
 18 achieving those differentials?
 19 **A.** Or better.
 20 **Q.** Why do you say "or better"?
 21 **A.** Because, as I said yesterday, the differential was the
 22 worst position we were looking for. Our belief was if
 23 we had a better competitive position, the brands would
 24 sell more than if we were at the RRP differentials.
 25 **Q.** So in discussions with the Co-op about your strategy,

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1 you would emphasise that you wanted better than the RRP
 2 differential?
 3 **A.** The aim was always to get the brands as competitively
 4 priced as possible.
 5 **Q.** And what do you mean by that?
 6 **A.** Where, if I could get the brand to be reduced in price,
 7 against the RRP differential, then the belief was the
 8 brand would grow volume and market share. The
 9 restricting factor was the margin expectation.
 10 **Q.** Right. Well, now, I would like you to get annex 15, if
 11 you have it, and turn to tab 8, please. {D15/8/105}.
 12 These are slides for a meeting between Imperial and the
 13 Co-op on June 6, 2001. Now, I think from your witness
 14 statement you say that you didn't draft the slides?
 15 **A.** No, I didn't.
 16 **Q.** Did you see them before the meeting?
 17 **A.** I can't recollect, I probably did.
 18 **Q.** As the NAM, you should have seen them?
 19 **A.** Yes.
 20 **Q.** If there was anything wrong or misleading in them, you
 21 would have corrected it, wouldn't you?
 22 **A.** Yes.
 23 **Q.** Right. Could you turn to page 105, please. We have the
 24 second bullet point, which is:
 25 "Pragmatic approach to pricing to achieve [RRP]

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1 differentials that exist between competitors' brands."
 2 This is under the heading "National Account Sales
 3 Strategy". What I find very puzzling is that if you
 4 wanted to get better than the RRP differentials, why
 5 does this bullet not say that?
 6 **A.** Because I think it's reflective of the point that we
 7 were discussing yesterday, where the differentials were
 8 our stated position, but the promotional periods always
 9 had an impact within the Co-op on their relativities.
 10 So I think the word "pragmatic" is meaning that we
 11 understood that the RRP differentials would be out of
 12 kilter in some instances because of the promotional
 13 calendar that the Co-op had at that time.
 14 **DR SCOTT:** Are you suggesting that the Co-op itself was
 15 running promotions without price support? Is that
 16 what's going on?
 17 **A.** I could never be sure. If a competitor's brand moved up
 18 or down, I would not be told that was because of either
 19 increased investment or a reduced margin from the
 20 retailer.
 21 As we discussed yesterday, I had full clarity on the
 22 margin for our products that were being sold, but I had
 23 no clarity or any certainty on the reasons why other
 24 brands would move. It could have been a Co-op
 25 originated activity, or it could have been supported by

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1 a manufacturer. Don't forget that BAT were also acting
 2 in this way, and the Co-op were active with their own
 3 brand, Windsor Blue.
 4 **DR SCOTT:** So these are all cases, as I understand it, when
 5 the differential was moving against you, so that in fact
 6 it wasn't at the parities and differentials, it was
 7 worse for you than parities and differentials? Or were
 8 there occasions when the Co-op on its own instance
 9 promoted your products without a bonus?
 10 **A.** They did that through the promotional calendar where --
 11 we were talking yesterday about point of sale material,
 12 so if they had a promotional period during a three-week
 13 period that they brought Embassy No 1 down, they would
 14 flatten the price so I would have a better differential
 15 against the competitor products. So there is a lot of
 16 activity going on, and I think that the differentials
 17 therefore were a structure that was never adhered to
 18 because of this promotional plan.
 19 **MR LASOK:** The question I want to put to you about this page
 20 is: do you agree that the words "pragmatic approach to
 21 pricing to achieve [RRP] differentials that exist
 22 between competitors' brands" reflect accurately the
 23 national account sales strategy?
 24 **A.** Yes, I think it does.
 25 **Q.** But the ordinary meaning of the words used indicates

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1 that the strategy is to achieve those differentials, not
 2 other differentials?
 3 **A.** The strategy, as we discussed quite a lot yesterday, was
 4 to try and achieve the RRP differentials, the position
 5 for the brands that we felt would help us grow our
 6 business, or better, if we had the occasion, and we used
 7 short-term promotional activity to try and encourage
 8 trial of product.
 9 **Q.** Why doesn't it say "achieve or better"?
 10 **A.** Well, I am unsure, I didn't write the presentation.
 11 **Q.** Don't you think that it would have been more accurate to
 12 say "achieve or better" if that was indeed the strategy
 13 at the time?
 14 **A.** I think that it would be more accurate. If I had put
 15 "to achieve or better" I think the outcome I would have
 16 then been asked is: okay, where is the investment, on
 17 which brand at which time? What we tended to do is deal
 18 with it on an occasion by occasion base. The strategy
 19 was to use RRP differentials as the skeleton to how we
 20 did business. If I was looking to grow share or defend
 21 share, then I might promote Lambert & Butler or
 22 a different brand at a different occasion in line with
 23 the strategy that we had at the time.
 24 **Q.** Does that mean that the strategy was indeed to achieve
 25 the differentials, save on those occasions in which ITL

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1 asked the Co-op to do something different?
 2 **A.** Yes.
 3 **Q.** Now, I want to move on to another topic. When you
 4 negotiated with the Co-op, you wanted to ensure that the
 5 Co-op understood that if it was to get the payments
 6 envisaged in the trading agreements, it had to comply
 7 with the disciplines set out in those agreements, and if
 8 it didn't, you reserved the right not to make the
 9 payments or to reduce them; that's correct, isn't it?
 10 **A.** It's correct that the business development plan was set
 11 up to try and move our business forward, and part of
 12 that was an ability to reduce payments if they didn't
 13 follow through with the agreements. In reality, I think
 14 it's fair to say that both the Co-op and I, although not
 15 stated, knew that [REDACTED]
 16 [REDACTED]
 17 [REDACTED] and I think some of the documents we have
 18 looked at yesterday showed how they slimmed the document
 19 down to just a line with a lump of money.
 20 So in reality, they saw this as [REDACTED]
 21 and there would always be occasion, whether it be a half
 22 year payment or a full year payment, whether there were
 23 other requirements in the business which would enable
 24 them to negotiate [REDACTED] and an example of
 25 that might be: we are coming to the end of a period

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1 where the payment is due to be paid and I have a new
 2 brand that I wish to have listed. It's very hard to get
 3 a retailer to list a brand where you are taking money
 4 off them for something else. So these things tend to
 5 roll into other debates, because their relationship with
 6 the retailer tends to be on a myriad of things, whether
 7 that be the distribution of a brand or the position of
 8 a brand or the point of sale material. So in the
 9 letter, the agreements were written as they were in
 10 isolation, in reality a retailer's relationship with
 11 a supplier is not in isolation, there is always a lever
 12 that can be used to ensure that payment is made.
 13 **Q.** I was just wondering about this. If you would go to
 14 your first witness statement, if you have it, it's in
 15 the other bundle -- you can close that one, we will
 16 probably come to annex 15 again. Your first witness
 17 statement is in core bundle 3 at tab 38. {C3/38/475}.
 18 The page is 475, if you are looking at the pagination in
 19 the bottom right-hand corner.
 20 **A.** Thank you.
 21 **Q.** 76 is under the heading "Trade development payments were
 22 [REDACTED] for pricing reasons". Could you read 76
 23 to yourself, please.
 24 (Pause)
 25 **A.** Okay.

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1 **Q.** Halfway through that paragraph, you say:
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 I see, I think that's confidential, I shouldn't have
 8 read that one out.
 9 What I was rather interested in, however, was the
 10 next sentence, because you say that the trade
 11 development -- well, I won't read that one out.
 12 **THE CHAIRMAN:** Well, is this confidential, do we need to be
 13 concerned about this?
 14 **MR HOWARD:** I can't imagine so.
 15 **THE CHAIRMAN:** Why don't you proceed until somebody jumps
 16 up.
 17 **MR LASOK:** If you never withdrew or reduced the trade
 18 development payments for price reasons, why could those
 19 payments have operated as an incentive to encourage the
 20 Co-op and its members to set their prices at or below
 21 the relative pricing maxima, as you state here?
 22 **A.** Because I think it's the broader strand of the
 23 relationship. I am unsure but my belief is that they
 24 looked at Imperial as overall cash generating
 25 manufacturer or supplier, so therefore when they looked

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1 at the end of the year they would look at the income
 2 they made from our products. Part of that would be, as
 3 we discussed earlier, off-invoice payments and the
 4 margin of the products, and part of that would be the
 5 general support that we gave through trade development
 6 plans. So I think that the challenge was always to help
 7 the Co-op understand the investment we were putting into
 8 their business as support of our brands. Their
 9 requirement was to earn more money every day, whether
 10 that be a discussion on margin, whether that be moving
 11 a price or whether that be increasing the trade
 12 development payments.

13 So without this additional fund, the whole RRP
 14 position was weakened because the value of our products
 15 to the retailer was lower. So it was part of
 16 a continual negotiation about the value that they got
 17 for the products that we supplied to them.

18 **Q.** So you were just in the habit of paying cash to the
 19 Co-op for no good reason?

20 **A.** For very good reason. The Co-op were the number two
 21 retailer for tobacco in the UK and had about 11 per cent
 22 of our business, they had a huge store estate that
 23 directly appealed to our smoker type, the position of
 24 the stores, we had a very high market share, and
 25 therefore they had a -- it was very important that we

1 had a good relationship with them. So I quite often
 2 made a payment although they hadn't achieved the
 3 disciplines that were set out in the very formal letter
 4 that we had agreed.

5 **Q.** But the point I am now going to put to you is that when
 6 you were in negotiations with the Co-op, you did not say
 7 to them that it was [REDACTED], you in fact did
 8 the opposite, you emphasised to them that the payment
 9 would be made only if they did comply with the
 10 disciplines in the trading agreement, including the
 11 pricing disciplines. Do you accept that or not?

12 **A.** Very much so.

13 **Q.** Yes, so that was what you were telling the Co-op?

14 **A.** I would very much like to have had value for the money
 15 that I was giving. Because I didn't achieve it, it
 16 might say more about my capabilities rather than
 17 anything else. But I was trying very hard to structure
 18 things in a way so that I could encourage the retailer
 19 to get the distribution of the brands as we required, to
 20 get the visibility in the right place, to make sure the
 21 point of sale material went up. Their ambition was to
 22 get more investment from us every occasion that we sat
 23 together.

24 **Q.** But the position, therefore, is this: you made it clear
 25 to the Co-op that if they were to get the payment, then

1 they had to comply with the terms of the trading
 2 agreement, including the pricing discipline, but at the
 3 end of the day you would make a pragmatic decision as to
 4 whether or not you would actually arrange for them to be
 5 paid?

6 **A.** No. The fundamental difference is that I had
 7 an ambition and an objective to achieve business
 8 development, they had an ambition and their desire to
 9 increase their margin and cash taken from Imperial
 10 products. I have to admit in most instances they won
 11 that battle rather than I did. I was trying very hard
 12 to find commercial benefits on distribution and on
 13 availability on shelf space or position as a national
 14 account manager should be trying to do, trying to sell
 15 more of our products and less of the competitors'.

16 What they were trying to do is say "Yes, Martin,
 17 that's fine, just give me the money" and quite often
 18 I lost that debate because of the position and the power
 19 of the retailer.

20 **Q.** I am trying to figure out which debate it was that you
 21 lost. Was it the debate about the terms of the
 22 agreement or was it simply that, at the end of the day,
 23 you made a pragmatic decision about the payment to be
 24 made under the agreement; which one was it?

25 **A.** I think that most of the payments were a compromise

1 between my ambition and objective and their delivering.
 2 As we said earlier, the RRP differentials in most
 3 instances were not followed because of the promotional
 4 calendar that was used. So if I had followed the letter
 5 that I had written, then I wouldn't be making a payment.
 6 [REDACTED] And I was making payments
 7 to the Co-op, and I would suggest it's because of the
 8 size and importance and the ongoing relationship that
 9 was required.

10 **Q.** So it was a case in which you would make a pragmatic
 11 decision as to whether or not they had done enough to --

12 **A.** I think I would make a commercial decision.

13 **Q.** You would make a commercial decision as to whether or
 14 not they had sufficiently complied with the agreement to
 15 justify making the payment to them?

16 **A.** Yes.

17 **DR SCOTT:** You have come back to the promotional calendar.
 18 My recollection from yesterday was that there was to be
 19 a promotion of one ITL cigarette brand and one other
 20 brand per promotional period?

21 **A.** It did change during the period that we are discussing,
 22 but there was a -- there was more, sometimes there was
 23 one cigarette brand, sometimes it was a roll-your-own
 24 brand or sometimes it was a cigar. So there was a range
 25 of short-term three-week promotions.

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1 **DR SCOTT:** Okay. Now, as we understand ITL's strategy,
 2 there was a range of pairings about which ITL cared,
 3 quite a number according to the evidence that we have
 4 received so far. Would I be right in thinking that in
 5 any one promotional period, most of those pairings would
 6 be unaffected by promotions if promotions were happening
 7 at the sort of rate that we discussed yesterday?
 8 **A.** I think the word "most" is not quite accurate. In
 9 a normal instance there would normally be a premium
 10 priced activity around Embassy or a relevant brand.
 11 There might be one at mid-price around Superkings or
 12 another varied brand. There might be a roll-your-own
 13 promotion, and there might be a cigar activity. Because
 14 I think the Co-op were trying to show promotional
 15 activity to different consumers who were buying
 16 different products. So I think across the range of the
 17 products that we had available within the Co-op there
 18 were quite a few activities targeted at different times
 19 of smokers and consumers. So I think it's unusual to
 20 see less than four, from memory, one of those might have
 21 been mine and one might have been a cigarette, I might
 22 have had another one on a roll-your-own, but there would
 23 be competitors' activity on different products. So
 24 I think that to say that most would be in line doesn't
 25 feel accurate.

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1 **DR SCOTT:** So what you are suggesting to us -- and we can
 2 ask the Co-op about this -- if most were not in line,
 3 then what you are suggesting is most were under
 4 promotion, most of the pairings were under promotion at
 5 any one time?
 6 **A.** I think my memory would be there would be approximately
 7 four different brands for the -- and my belief was the
 8 Co-op's aim as I have just stated was to try and offer
 9 an activity which linked to a price indicator, a shelf
 10 barker, to show that they were offering value as they
 11 would do throughout their store, whether it be on
 12 Coca-Cola or a different product. They were at that
 13 time treating tobacco in the same way.
 14 **DR SCOTT:** Thank you.
 15 **MR LASOK:** Now, Mr Goodall, I want to turn to a slightly
 16 different topic, and that concerns the monitoring of
 17 shelf prices in the Co-op stores.
 18 Now, this monitoring was carried out by ITL in order
 19 to verify a number of things, one of which was
 20 compliance by the Co-op with the disciplines in the
 21 trading agreements with the Co-op. Is that not so?
 22 **A.** No, that's not so.
 23 **Q.** Well, could you turn to annex 15 again, and to tab 3.
 24 {D15/3}. This is an email from you sent on 7 July 2000.
 25 Could you just tell us who are the people this email was

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1 sent to? I am not asking their names, because we have
 2 the names, but what role did they play?
 3 **A.** At that time they were multiple account executives who
 4 might have been called key account executives. But
 5 because of the structure of the Co-op, as we spoke
 6 earlier yesterday, you had CWS in Manchester who were
 7 running a buying operation for CRTG, and these
 8 individuals below were currently working for me and had
 9 a relationship with each society. So in Plymouth you
 10 would have David Headlam or one of those individuals
 11 would be managing the relationship with the ██████████
 12 society. You would have ██████████, you would have
 13 ██████████. So this was an internal email to
 14 the people who were helping me manage the Co-op
 15 business.
 16 **Q.** Could you just read the email, please.
 17 (Pause)
 18 If we look at this, it starts off in the first
 19 couple of lines referring to the fact that CWS have
 20 moved to a pricing structure with three price bands. Do
 21 you have that?
 22 **A.** Yes.
 23 **Q.** Then under the heading "Dianne", this was a section that
 24 was directed at Dianne Smith, was it?
 25 **A.** Yes.

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1 **Q.** You ask her to advise the supervisors in the teams that
 2 the price bands would change on Monday and to report
 3 prices as found. The prices as found are those in the
 4 stores?
 5 **A.** Yes.
 6 **Q.** Then under the heading "NAEs", and these are the people
 7 to whom the email was sent, what's NAE, is that national
 8 account executive?
 9 **A.** National account executive.
 10 **Q.** You ask them to contact their societies to understand
 11 how the price structure was being accepted, and you say
 12 you would like to support the move, but then you also
 13 say:
 14 "If each society goes its own way, then we have lost
 15 the central disciplines we have been trying to secure."
 16 Those were the disciplines contained in the trading
 17 agreements, weren't they?
 18 **A.** They were disciplines that the Co-op was trying to
 19 achieve through the CRTG movement. This was the real
 20 first instance of the CRTG setting out its new pricing
 21 scenarios for tobacco across each society. We -- as
 22 I mentioned in the note, we knew that they were moving
 23 to a new structure, we weren't aware of what it was, and
 24 we received information quite late. My concern was
 25 I wasn't sure whether ██████████ would, although

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1 at a board level had accepted the structure, at
 2 a operational level were willing to do so.
 3 So what I was trying to understand is whether the
 4 CRTG vision and direction, although being accepted by
 5 each society at a senior level, was actually being
 6 implemented at an operational level.
 7 **Q.** I wondered why in those circumstances you didn't say:
 8 "If each society goes its own way, then we have lost
 9 the central disciplines that the CRTG has been trying to
 10 secure."
 11 **A.** Well, I think the reason I wrote it in this way is
 12 because we were fundamentally working to try and help
 13 CRTG, and all of our negotiations were happening at CRTG
 14 head office, because the value to us of the Co-op
 15 movement was that they were being able to offer
 16 disciplines around distribution and availability and
 17 merchandising and promotion, and of course pricing,
 18 across a wider estate. So all of our focus was with
 19 Manchester. A lot of my -- a lot of other suppliers at
 20 that time were dealing with the Co-op individually, and
 21 CRTG and the direction of CRTG is to make Manchester
 22 responsible for the supplier contact. Not very long
 23 after this, most of these support people left and we
 24 just did the central discussion.
 25 So we are in a stage here where I am trying to

1 understand how the CRTG's brands are being delivered
 2 through the societies, and the confusion and the
 3 question I had in my mind was whether they were signing
 4 up in -- at a senior level to say yes, we were part of
 5 the team, and then operationally they were doing
 6 something different. And this is what I was trying to
 7 do.
 8 **Q.** Well, I am putting to you that the central disciplines
 9 referred to here are not the CRTG central disciplines,
 10 they are the central disciplines that ITL was trying to
 11 secure?
 12 **A.** I would disagree.
 13 **Q.** And they are the ones in the trading agreements?
 14 **A.** No, I disagree. This is about how effective CRTG would
 15 be in delivering to societies and societies delivering
 16 out to the retail stores and then to the smoker or the
 17 shopper the promotion that we were talking around.
 18 **Q.** I am going to ask you or rather I am going to repeat the
 19 question I put to you a moment ago: do you accept that
 20 shelf prices were monitored in order to verify
 21 compliance by the Co-op with the trading agreements?
 22 **A.** No, I accept that Co-op -- that we offered a monitoring
 23 service to measure their compliance to the CRTG matrix.
 24 **Q.** Right. Can you now turn to tab 20, please.
 25 **THE CHAIRMAN:** Can I just ask a question on that tab 3? It

1 says "please find attached the new CRTG promotion
 2 matrix", but the documents that seem to be behind that
 3 in the folder don't seem to be related to a promotion
 4 particularly, unless I am misreading them.
 5 **A.** This was their promotional matrix, it's not a very good
 6 example of one, because it doesn't -- if I could take
 7 you across the -- you have a section that is titled
 8 "Current Pricing" and you have one that is titled
 9 "Proposed Pricing". That would move forward to one that
 10 would say "Promotional Pricing" and that would list all
 11 the short-term abilities that they were doing.
 12 **THE CHAIRMAN:** You mean there is a column that hasn't come
 13 out on this matrix?
 14 **A.** Yes, if I could take you to tab 5, page 57, {D15/5/57},
 15 I think the photocopy has the complete matrix. So as we
 16 discussed yesterday, the left-hand side is the cost
 17 structure, the middle section is the normal Co-op
 18 pricing position, and then the right-hand side I think
 19 is -- you can just about read "Promotion Temporary
 20 Pricing".
 21 So on page 57 that shows in period 3 the brands that
 22 were on promotion and that had POS support, so that the
 23 society would know that there would be a pack of shelf
 24 highlighters for them, and it --
 25 **THE CHAIRMAN:** And that would be both ITL inspired

1 promotions and CRTG inspired promotions?
 2 **A.** Yes.
 3 **THE CHAIRMAN:** But it wouldn't, as I understand it, include
 4 Gallaher products.
 5 **A.** No, I am sure they had the equivalent, but I certainly
 6 never had the occasion to see.
 7 **THE CHAIRMAN:** Thank you.
 8 **MR LASOK:** Thank you. Could you turn to tab 20, please.
 9 **MR THOMPSON:** I do not want to interrupt, but I would
 10 just -- this table seems to be in a slightly different
 11 form and you will see it's a move from the four to the
 12 three tiers, so I think it's a slightly different type
 13 of matrix to the ones we have seen elsewhere. So I am
 14 not trying to give evidence, it's just I think it may be
 15 that's why it's not in the same form as the other ones,
 16 because of this particular problem that's addressed in
 17 the memo.
 18 **THE CHAIRMAN:** It is referred to in the letter as the new
 19 CRTG promotion matrix.
 20 **MR THOMPSON:** Yes.
 21 **THE CHAIRMAN:** Perhaps someone could check whether there is
 22 something that is missing.
 23 **DR SCOTT:** Yes. It confuses me a little because when you
 24 look at the normal pricing on the left-hand side on
 25 page 57 and the promotional pricing on the right-hand

1 side, a quick glance suggests to me that they are the
 2 same. Although it explains promotion on the right-hand
 3 side, it looks as though the promotion is exactly as you
 4 said, it's point of sale, it's not a different price,
 5 it's just the same price with point of sale material to
 6 draw attention to it.
 7 **A.** I think, if I could add a little bit of -- I think
 8 during this period, from 98 -- and I can't remember
 9 exactly when it happened, I mentioned yesterday that the
 10 Co-op took a decision to stop actively promoting
 11 tobacco. So therefore the price reductions that used to
 12 be offered through the matrix were, in the end, stopped,
 13 but the promotion was the shelf barker, so the highlight
 14 of the offered price rather than the reduction.
 15 So there is a little confusion there because at one
 16 time they did reduce price, and I think I explained as
 17 the lowest price would be relevant across every store
 18 type. Sometime during this period, and I can't remember
 19 exactly the date, they then moved to "okay, we won't
 20 reduce the price but we will highlight our normal
 21 selling price as an activity".
 22 **DR SCOTT:** Ah, that's a help. But what that implies, as
 23 I understand it, if they weren't reducing the prices,
 24 then the most that we discussed earlier on would at that
 25 stage have been true, most of the prices would have been

1 at the --
 2 **A.** It depends which period you are -- and I can't remember
 3 the exact time of the change from the activity that was
 4 a price reduction to the activity that was just a point
 5 of sale material.
 6 **DR SCOTT:** You took us to annex 5, and annex 5 appears to be
 7 an example of the prices remaining the same but point of
 8 sale material being introduced.
 9 **A.** I was only using it as an example of a full ...
 10 **DR SCOTT:** Okay. Thanks.
 11 **MR LASOK:** So could you turn to tab 20, please. Just read
 12 that to yourself. {D15/20}.
 13 (Pause)
 14 So you see, this is ITL informing the Co-op that the
 15 multiple trade representatives who would call on CRTG
 16 retail stores are there to record and report on retail
 17 price, range and point of sale compliance with the CRTG
 18 agreements?
 19 **A.** Yes, I understand the letter, the letter was drawn up
 20 after a conversation between Peter Newton and myself,
 21 because with some of the societies they wanted a letter
 22 of authority for us to visit. The last thing that
 23 Peter Newton wanted to do is write in a letter that the
 24 role of the multiple trade rep was to check on the
 25 society's compliance to CRTG's direction. It wouldn't

1 make their visit overly welcoming. So it's much more
 2 usual to shape the reason around Imperial's
 3 requirements. To have a rep who is an agency rep walk
 4 in with a letter that says "Peter Newton would like you
 5 to visit the store to check that you are doing what you
 6 should be doing from CRTG" would mean they would be
 7 thrown out of the store. So the structure of the letter
 8 was set up so that it was an Imperial person calling,
 9 looking at a range of Imperial activities with their
 10 authority.
 11 **Q.** So you are saying that this letter was written to
 12 deceive?
 13 **A.** No, it was written to allow the work to be achieved, it
 14 wasn't written with the aim of causing consternation
 15 with the operating managers of the retail estate.
 16 **Q.** Well, that's not the answer to my question. You see, as
 17 I understand your explanation, you are saying that this
 18 letter was written describing the role of the multiple
 19 trade representatives deliberately in an inaccurate way?
 20 **A.** I can't agree with "inaccurate". We were recording,
 21 reporting on retail price, on range and point of sale
 22 compliance, with the CRTG agreements. And the last
 23 point is, which was an issue at the time, was around
 24 exchange and damaged goods, because they had different
 25 systems, and that was causing confusion. But I think

1 the letter was structured in the way that would allow
 2 the merchandising teams to actually do the recording and
 3 calling without causing issues with the societies.
 4 **Q.** Sorry, can I get this clear in my own mind. You are now
 5 saying that this letter is true, and that the role of
 6 the multiple trade representatives who called on the
 7 retail stores was indeed to record and report on
 8 compliance with the CRTG agreements?
 9 **A.** With the CRTG agreements with the societies, yes.
 10 **Q.** Ah, well, it says here "the CRTG agreements between
 11 Imperial Tobacco and CRTG".
 12 **A.** But we were measuring the whole category.
 13 **Q.** No, it says here "compliance with the CRTG agreements
 14 between Imperial Tobacco and CRTG".
 15 **A.** I understand what it says, but the point I am making to
 16 you is that we were doing a broad range of store
 17 visiting; one, to look at our products and our
 18 availability and pricing, and two, to assist the Co-op
 19 because they didn't have this facility, as I discussed
 20 yesterday. They were unable to understand whether
 21 [redacted] at that time were following the matrix or
 22 whether [redacted] were putting up point of sale
 23 material.
 24 A prime example is that [redacted], because
 25 of a decision they made at a board level would not place

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1 point of sale material in any of their stores, but they
 2 were unsure whether that was working in [REDACTED] as
 3 well. So the information we were providing to them was
 4 generally on how their philosophy and matrix was being
 5 supported through the rest of the societies. As
 6 a manufacturer, if it only worked in CWS stores, it was
 7 much less valuable to me than if I had point of sale
 8 material across the whole estate.
 9 **Q.** Whatever help that you were giving the Co-op group,
 10 I think that you accept that these visits to the retail
 11 stores were intended, amongst other things, to ensure or
 12 at least to verify compliance with the agreements
 13 between ITL and CRTG?
 14 **A.** No, the biggest value for me here was giving the Co-op
 15 information that they couldn't get. I was adding value
 16 at a cost to myself that they couldn't get.
 17 **Q.** I wasn't ask you about the value of any one particular
 18 aspect of what was going on. I was asking you a very
 19 simple question, the answer to which is either yes or
 20 no. The question is: whatever were the other purposes
 21 of these calls on the retail stores, one of them was to
 22 record and report on retail price, range and point of
 23 sale compliance with the agreements between Imperial and
 24 CRTG; that is correct, isn't it?
 25 **A.** Yes.

1 **Q.** If we look at tab 21, {D15/21}, I think I drew your
 2 attention to this letter yesterday, we have -- this is
 3 your letter of 12 May 2003 to Mr Owen -- at the bottom
 4 you refer to the 2003 trading terms. Do you have that?
 5 **A.** Yes.
 6 **Q.** If you turn over to the next page, in the first full
 7 paragraph you refer to the fact that the elements behind
 8 the payment would need to be agreed, but you say they:
 9 "... must cover all the disciplines as covered in
 10 the 2002 agreement."
 11 So the disciplines that you are referring to there
 12 are the disciplines in the trading agreements, and what
 13 was happening was that the merchandisers were visiting
 14 the retailer stores in order to verify compliance with
 15 those disciplines; is that correct?
 16 **A.** No, I think you have picked up a letter that doesn't
 17 align to the conversation we are having. This was
 18 a discussion around improvement of terms that we spent
 19 a fair bit of time on yesterday, where we discussed
 20 Alldays being a premium price retailer and the Co-op
 21 being at that time a range of different prices, and this
 22 was a discussion and negotiation regarding their
 23 ambition to get more investment from Imperial Tobacco.
 24 What I was trying to do here is have this
 25 conversation around their pricing position and the

1 amount of volume that would be bonused off-invoice, but
 2 also I wanted to have a trade development plan that had
 3 the elements covered.
 4 This is not the same, this is about a negotiation
 5 over the value of their new business, combined business,
 6 to us overall, which is why in the confidential piece
 7 there is an increase in payment.
 8 **DR SCOTT:** Mr Goodall, I think you are beginning to lose me
 9 in relation to the connection between the strategy that
 10 ITL were seeking to achieve, the work that you were
 11 doing, and the work of the multiple trade
 12 representatives.
 13 As I understand it, it was very important at the
 14 strategic level in ITL, above you, even as we understand
 15 it up to board level, to achieve parities and
 16 differentials so that ITL was not disadvantaged against
 17 its competitors in general and against Gallaher in
 18 particular. Is that right?
 19 **A.** That's true.
 20 **DR SCOTT:** So part of your job in the national account team
 21 was to ensure that that strategy was implemented.
 22 **A.** Yes.
 23 **DR SCOTT:** And working with you, you had national account
 24 executives and multiple trade representatives and other
 25 people had similar teams?

1 **A.** Yes.
 2 **DR SCOTT:** Given the priority that your bosses were putting
 3 on these parities and differentials, what sort of
 4 priority would I, had I been your manager, have expected
 5 you to place on the multiple trade representatives in
 6 ensuring that you were delivering on ITL's business
 7 strategy?
 8 **A.** With regard to pricing, it would be the fourth priority.
 9 The first priority would be the distribution of the
 10 product. The second priority would be the availability
 11 of the product, so not only is it listed in the store
 12 but it's available to buy. The third one would be the
 13 visibility of the product at that time, so can a smoker
 14 see it. The fourth and final one would be the pricing
 15 of the product, because the pricing of the product is
 16 only important if you achieve the three elements.
 17 So the priority was always to try and ensure that
 18 the brands that we had agreed were available in store,
 19 were not only available but available when somebody
 20 wanted to buy them, so not in the store room, not in the
 21 cupboard underneath, but actually had been taken out and
 22 put on the shelf, which is a huge amount of work.
 23 A definition about what availability is is something
 24 that has always been a challenge. The Co-op would
 25 generally have limited store management or staff to

1 actually get -- they would have a very secure stock
 2 room, normally a cage that was locked and only one
 3 person would have a key. So quite often you would go
 4 into a store early in the morning, the manager hadn't
 5 arrived and the unit would be half empty. The product
 6 was in the store and not on the shelf. So the primary
 7 aim of the multiple account team at that time was trying
 8 to make sure that the product was available for the
 9 smoker to buy.
 10 Once it was available it was then making sure that
 11 it didn't keep running out of stock, so were they
 12 ordering enough through the systems that they used; was
 13 it positioned in line with the planograms that we had
 14 agreed, so it had a better chance of being purchased;
 15 and then finally, was the price of the promotion right?
 16 So it was the fourth element.
 17 **DR SCOTT:** But they would be checking that?
 18 **A.** Yes.
 19 **DR SCOTT:** Thank you.
 20 **MR LASOK:** Could I just take you up on that, just to see
 21 whether we need to be a bit accurate about the timing in
 22 relation to this. If you have 15 in front of you, and
 23 you go back to tab 4, you have there the 2000 trading
 24 agreement; right?
 25 **A.** Yes.

1 **Q.** In the second paragraph, which starts in the middle of
 2 the page, you have the four main objectives of the plan,
 3 and the first of these is pricing. And it's pricing in
 4 line with the agreed strategic price differentials,
 5 okay.
 6 **A.** Right.
 7 **Q.** If you go to the third page, and you look at the heading
 8 "Summary of Investment Available in 2000"; do you have
 9 that?
 10 **A.** Yes.
 11 **Q.** The biggest figure by far is for pricing. That's
 12 correct, isn't it?
 13 **A.** It is correct.
 14 **Q.** If you go to tab 7, we have the 2001 trading agreement.
 15 If we look at the four main objectives, in the second
 16 paragraph, the first one is pricing in line with the
 17 strategic price differentials, isn't it?
 18 **A.** It is.
 19 **Q.** If we go to the third page, and look at the heading
 20 "Summary of Investment Available 2001" --
 21 **A.** Yes.
 22 **Q.** -- what do we see there?
 23 **A.** A similar position to the last document we went to.
 24 **Q.** Yes.
 25 **A.** Can I add some clarity?

1 **Q.** No, not at this stage. If we go to tab 16 --
 2 **MR HOWARD:** I think the witness should be allowed to say
 3 what it is he wanted to say, with respect.
 4 **MR LASOK:** No, because it will be easier if we look at the
 5 next agreement.
 6 **MR HOWARD:** I still think the witness should be entitled to
 7 say what he wanted to say.
 8 **THE CHAIRMAN:** I think let Mr Lasok finish taking him to the
 9 documents, and he may want to make a compendious point
 10 about all of them.
 11 **MR HOWARD:** I think Mr Goodall should then be reminded there
 12 was something he wanted to say.
 13 **MR LASOK:** We are not worried about that.
 14 If you look at tab 16, {D15/16} these are 2002
 15 terms, and if we look at Mr Owen's summary on the first
 16 page, pricing and promotion are now third place, and
 17 more money is spent on range and display; right?
 18 **A.** Mm.
 19 **Q.** If you go to the start of the terms, on the third page,
 20 we have pricing and promotion is the third element;
 21 right?
 22 **A.** Yes.
 23 **Q.** So the point is simply this -- I think I should draw
 24 your attention to the figures in the last page.
 25 **A.** Yes.

1 **Q.** Is the position actually this: prior to the 2002 trading
 2 agreement terms, the first objective was pricing, that
 3 was the most important objective, and that received the
 4 highest payment, but views within ITL changed, and when
 5 we get to the 2002 one, when we get to the 2002
 6 agreement, then other objectives are given a higher
 7 priority than had been the case previously?
 8 **A.** I don't agree, and the reason I don't agree is, I would
 9 like to explain.
 10 **Q.** Certainly.
 11 **A.** I listed the importance of listing and availability, and
 12 you will note through none of the business development
 13 agreements is there mention of listing of products.
 14 These were outside the agreement.
 15 So the investment of a new brand and the negotiation
 16 about where would that brand be listed, where would it
 17 be -- which planograms would it be listed on and how
 18 many stores was a separate negotiation. So the listing
 19 of the product, the availability of the product, was
 20 done as a one-off depending on the activity we -- or the
 21 brand we were launching, and that was normally a very
 22 challenging negotiation, depending on our ambition for
 23 the brand. The Co-op could offer a one store listing or
 24 a 100 per cent listing. It could offer a listing on a
 25 unit, it is normally by unit size. So they had

1 a range -- they tend to planogram by unit size, so
 2 a 1 metre fixture would have one plan, and a 1.5 metre
 3 fixture would have another plan.
 4 We had an ambition for a new brand such as Richmond,
 5 then our ambition would be trying to get the brand
 6 positioned --
 7 **THE CHAIRMAN:** So is your evidence then that the reason why
 8 the priorities in these agreements he's been shown are
 9 different from the priorities that you mentioned,
 10 I think, in answer to Dr Scott is that the other
 11 priority matters were dealt with in different places not
 12 included in these agreements?
 13 **A.** That's the point I was trying to make.
 14 **DR SCOTT:** And roughly how many new products did ITL
 15 introduce in the period between 2000 and 2003?
 16 **A.** I would be guessing. At least two new products a year.
 17 So -- and that's a guess. I am not dealing with a fact.
 18 But there was always activity with a new brand that
 19 would sit over and above, and that's why the
 20 distribution, the range and the availability was covered
 21 in that element, and that common things were picked up
 22 in the trade development plan.
 23 **DR SCOTT:** So roughly eight new products during this period?
 24 **A.** I feel a little unsure, because I don't have the data in
 25 front of me, it's something we could get, but I'll just

1 give an opinion rather than factual.
 2 **DR SCOTT:** Okay.
 3 **A.** The point I would make is that we have to be careful
 4 that we understand that a product might be a range of
 5 different SKUs, so we might launch, you know, a Lambert
 6 & Butler, but it might have five different SKUs, so that
 7 the debate then was where that fits within each unit
 8 type or region.
 9 **MR LASOK:** But the fact remains that new listings were
 10 relatively rare?
 11 **A.** I can't -- they weren't relative -- as a national
 12 account manager trying to get the brands listed, they
 13 seemed very common and very complex.
 14 **Q.** I think Mr Owen says they were relatively rare.
 15 **A.** Mr Owen?
 16 **Q.** Yes.
 17 **A.** I can't agree.
 18 **Q.** All right, so you disagree, and you say that listings --
 19 how many of them were there, I think, during this
 20 period?
 21 **A.** We were just -- what I would prefer to do is find the
 22 actual detail. I've made a guess at eight. Eight
 23 different products. I could be right or wrong.
 24 **Q.** But listing wasn't regarded as sufficiently important to
 25 include in the general trading agreements for the

1 periods that we are looking at?
 2 **A.** I am not sure how you would have included it, so I would
 3 at the start of the year, I wouldn't have a knowledge of
 4 what we were intending to do during the year, therefore
 5 I am not sure how I could actively write it within an
 6 agreement.
 7 **Q.** So it wasn't in the trading agreements, and when we look
 8 at the trading agreements, we see that throughout the
 9 period in terms of money, compliance with the strategic
 10 pricing differentials is the most important factor, in
 11 all the agreements that we have looked at; correct?
 12 **A.** Yes.
 13 **Q.** Yes, and in the first agreements it's the first
 14 objective, and in the last agreement it becomes the
 15 third, but financially it's still the most important?
 16 **A.** And I think we spent a fair bit of time yesterday
 17 talking about the structure of the agreement and the
 18 actual payment that happened. But yes, you are correct.
 19 **Q.** I think we have been slightly taken off a track that
 20 I had previously been pursuing, because I think that
 21 I had asked you previously to look at tab 21, and on the
 22 second page we were looking at your use of the word
 23 "disciplines" to refer to the matters covered by the
 24 2002 agreement. I wanted to take you back now to tab 3,
 25 and to your use of the word "disciplines" again at the

1 bottom of the page. Do you have tab 3? {D15/3}
 2 **A.** I am nearly there.
 3 **Q.** At the bottom of the page. (Pause). I am reverting to
 4 a question I put to you a little while ago this morning,
 5 that when you refer in this email to "disciplines" you
 6 are also alluding to ITL's desire to get the whole of
 7 the Co-operative group complying at site level with the
 8 disciplines in the trading agreement?
 9 **A.** Our overall aim was to achieve the RRP differentials,
 10 the disciplines that we had within the trading agreement
 11 should have taken our business forward. But I keep
 12 emphasising the point that the focus here was around the
 13 CRTG strategy that they were trying to implement through
 14 their societies. I invested my time developing
 15 relationships with Manchester. If that strategy didn't
 16 work, then I put our business in a weaker position,
 17 because I would stop discussing business opportunities
 18 at a society level. So my concern was that if the CRTG
 19 wasn't offering the structure that it said it was
 20 offering, then we had taken a commercial step back, and
 21 that was a big concern to me.
 22 **Q.** I think we just have to differ on that point.
 23 I would like to move on now to what I think will be
 24 the last topic, and that concerns the checking of the
 25 price matrices. Now, ITL checked the price matrices

1 amongst other things to ensure that the shelf prices set
 2 out in the matrices corresponded to what ITL had agreed
 3 with the Co-op. Is that not so?
 4 **A.** That's not so.
 5 **Q.** That's not so?
 6 **A.** Apart from one occasion.
 7 **Q.** Which occasion was that?
 8 **A.** That would be if we were doing a short-term promotion
 9 when we would agree a reduction in retail price and we
 10 would check that the price that was in the matrix was
 11 correctly transferred from the discussion into the
 12 promotion matrix.
 13 **Q.** Could you look at tab 12, please. {D15/12}. This is
 14 an email from you to Mr Newton, and it appears to have
 15 been sent on 15 January 2002. What had happened was
 16 that it appears from the bottom of the page, well, the
 17 middle of the page has the original message. Mr Newton
 18 had sent to you the period 2 pricing file, that would be
 19 period 2, 2002. He asks you to check and confirm
 20 acceptance of those terms. Then you noted a number of
 21 things. I just wanted to look at the first item that
 22 you noted, which is:
 23 "Regal Filter has returned to the same price as
 24 Regal KS, not 2p below as we agreed."
 25 Isn't that an instance of you looking at the price

1 file to see whether or not the shelf prices corresponded
 2 to what ITL had agreed with the Co-op?
 3 **A.** This was an indication where Regal Filter, which is
 4 a filter product rather than Kingsize, was naturally at
 5 RRP lower than Regal Kingsize, and it's an interesting
 6 point and one that I brought up yesterday. Regal Filter
 7 being a very strong brand in Northern Ireland but not
 8 really selling in the rest of the UK. The Co-op's
 9 opinion of Regal Filter was that it was a non-focus
 10 brand. Imperial's view of the brand was that it was
 11 a focus brand in Northern Ireland because it was the
 12 number three brand.
 13 I was unable to convince the Co-op that they should
 14 be concerned about the Regal Filter price, and had
 15 actually moved it up. What I was doing is pointing out
 16 that it was not in line with the rest of their pricing
 17 in relation to RRP. And I think that that point was one
 18 that continued for many months, and I was unsuccessful,
 19 because they didn't understand the value of the brand
 20 within their Northern Ireland stores, and I think they
 21 had only 27 at the time. I could be wrong. But it was
 22 a very regional product.
 23 **DR SCOTT:** So, as I understand it, your concern was that the
 24 CRTG disciplines, which you have talked about, were so
 25 strongly being supported in Northern Ireland that you

1 were being disadvantaged in relation to the
 2 differentials?
 3 **A.** The stores in Northern Ireland were all owned by CWS,
 4 and CWS stores followed the pricing matrix perfectly.
 5 **DR SCOTT:** Right. So your concern here is that they are
 6 following the discipline, but the internal discipline,
 7 therefore not the discipline in the trading agreement?
 8 **A.** My concern here was that we had positioned the brand
 9 with an RRP cheaper than Regal Kingsize, because it was
 10 a smaller product and it was an old fashioned product,
 11 and we believed at that price the brand would continue
 12 to sell efficiently and effectively. In
 13 Northern Ireland it was very important to us because it
 14 was number three within the market. The Co-op's view,
 15 I assume, was that Regal Filter nationally was a very
 16 small brand, its retail price didn't really matter. We
 17 felt and I felt that Regal Filter to be working well in
 18 the market should be 2p less than Regal Kingsize. They
 19 didn't agree. So I was looking at a differential
 20 between the parent brand, Regal Kingsize, and one of its
 21 sub-brands, Regal Filter, where most people would expect
 22 it to be cheaper because it was a smaller product.
 23 **MR LASOK:** The question I put to you was: did ITL check the
 24 price matrices in order to ensure that shelf prices
 25 complied with what ITL had agreed with the Co-op?

1 I think that your answer to that question is yes?
 2 **A.** No, my answer is no.
 3 **Q.** Well, you have just given an explanation of this
 4 document that shows that this is an instance of ITL
 5 checking the price matrix in order to see whether or not
 6 the shelf price corresponded to what had been agreed
 7 between ITL and the Co-op.
 8 **MR HOWARD:** I think Mr Lasok needs to establish, bearing in
 9 mind we are talking about two Imperial brands, what it
 10 is he is saying has been agreed.
 11 **THE CHAIRMAN:** I think where we got to yesterday was that
 12 what was agreed was that they would abide by the
 13 relative published RRP's. As I understood Mr Goodall's
 14 evidence, there wasn't a schedule attached to the
 15 agreement. So I think what we are exploring is perhaps
 16 we --
 17 **MR HOWARD:** I think my point is they are two different
 18 things.
 19 **THE CHAIRMAN:** I understand whether --
 20 **MR HOWARD:** The RRP differentials vis-a-vis Gallaher, this
 21 is actually an internal Imperial RRP matter.
 22 **THE CHAIRMAN:** Yes. Perhaps we could ask you that question.
 23 Going back to what we were talking about yesterday, when
 24 you said there was not a schedule attached to the
 25 agreement because the agreement related to the RRP's, and

1 then we were talking about relative RRP's between ITL
 2 products and Gallaher products, but was there also
 3 an element that it was relative RRP's within ITL's stable
 4 of products?
 5 **A.** Yes. They were very important, because we positioned
 6 brands having researched them to hopefully encourage
 7 them to grow. So, as I discussed earlier, a penny would
 8 make a difference. To have Regal Filter in this
 9 instance as expensive as Regal Kingsize might allow
 10 a competitor's product to take the sales away from
 11 Regal Filter.
 12 **THE CHAIRMAN:** So would this be fair: to say that this is
 13 an instance where you are checking the price file
 14 against ITL's RRP's and notifying the Co-op of
 15 an instance where they don't match, albeit that this is
 16 in relation to two Imperial brands rather than
 17 an Imperial and Gallaher brand?
 18 **A.** Yes, I think that's -- if I can be allowed, if I draw
 19 you down to the point below, the point that Peter Newton
 20 was making here "please check and confirm acceptance of
 21 these terms", this document controlled their buying
 22 price for each period. It was sent to me to ensure
 23 there weren't mistakes in that, and if you look at the
 24 line below Regal Filter, Raffles 10s cost is 6p out, as
 25 the bulk drop discount has not been added. A very

1 simple line. What that would have meant is that every
 2 one of the Co-op invoices would have had an error on
 3 them, because the net price that they were receiving
 4 would be different than their systems net price. So
 5 this document was very important to ensure that we were
 6 aligning our net cost in both systems, and a mistake
 7 here could be incredibly expensive and time consuming,
 8 and it was quite often once a year where the Co-op would
 9 assign a department to go through all of the investments
 10 that we had made in this matrix and cross-reference the
 11 invoices that had been sent to them, and we would quite
 12 often get a whole raft of requests or enquiries for
 13 money where their systems weren't aligned. So this was
 14 the cornerstone of what we did.
 15 **MR LASOK:** Yes, but going back to Regal Filter, we know that
 16 there was no promotion going on at this time, because if
 17 you turn to tab 12(b), and go to the third page, in my
 18 copy the part of the left-hand side has gone, the first
 19 item is "SSY filter" which I suspect is Embassy Filter?
 20 **A.** Yes.
 21 **Q.** If you go down to the ninth item, you have "AL Kingsize
 22 20s", and that would be Regal Kingsize 20s?
 23 **A.** Yes.
 24 **Q.** You can see that there is no entry in the columns
 25 dealing with with promotions, and you have the third

1 down below that is the, in my copy it looks like a half
 2 of a G and an AL filter. If you again follow across,
 3 there is no promotional pricing going on.
 4 **DR SCOTT:** There is something a bit weird here, I think the
 5 20 and the 10s have got turned round, judging by the
 6 fact that the 20s --
 7 **MR LASOK:** Well, if you look at the size, which is the
 8 second -- the first column down is the product
 9 description, and then you have the size, which are --
 10 **DR SCOTT:** That's the case, I see. I understand.
 11 **MR LASOK:** Then the case is ten. So actually what I've
 12 drawn your attention to are the Regal Kingsize and the
 13 Regal Filter 20s, case size ten, and the prices are the
 14 same.
 15 **THE CHAIRMAN:** The prices of what are the same?
 16 **MR LASOK:** If you look the last three columns before you get
 17 to the "Promotion/Temporary Pricing" columns. The last
 18 three are RSP [redacted], RSP [redacted] and RSP [redacted]. I think the [redacted]
 19 [redacted] for some reason are ...
 20 **THE CHAIRMAN:** The last one is not the same, is it?
 21 **MR LASOK:** Yes, but the other two are in line. The main
 22 point is that two of the columns, the prices are the
 23 same, it's not a promotion that's responsible for this.
 24 So when we get back to the document, the email referring
 25 to Regal Filter, and I am going to put this question

1 again: you would agree with me, wouldn't you, that ITL
 2 did check the price matrices sent to it by the Co-op in
 3 order to see, amongst other things, whether or not shelf
 4 prices corresponded to what had been agreed between ITL
 5 and Co-op?
 6 **A.** I was checking every one of these columns for accuracy.
 7 I was very unhappy that I felt that the Co-op was not
 8 supporting Regal Filter --
 9 **THE CHAIRMAN:** We are not talking about Regal particularly.
 10 Just answer the question that you are being asked. When
 11 you were checking these price matrices, was one of the
 12 things that you were checking whether the proposed shelf
 13 prices were consistent with the trading agreement
 14 differentials?
 15 **A.** I was checking that they were less than RRP. So if
 16 that's the measure, then yes, I was.
 17 **MR LASOK:** I don't think I can take that any further. Well,
 18 RRP's or differentials?
 19 **THE CHAIRMAN:** Well, there are no Gallaher products here.
 20 **A.** I don't have any differentials, all I have is the very
 21 important cost structure and I have the reduction
 22 against RRP.
 23 **DR SCOTT:** If we look at the ordinary against the filter,
 24 there is an RRP differential -- I think I am allowed to
 25 say this, aren't I? -- between 4.34 and 4.31 in the MRP

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1 column. So that suggests an RRP differential of 3p;
 2 yes?
 3 **A.** Yes.
 4 **DR SCOTT:** When I go across and compare the 4.21 and the
 5 4.21 or the 4.23 and the 4.23, I don't see
 6 a differential, though if I go to the column which is
 7 very difficult to read, I think the differential at the
 8 RSP is there between 4.30 and 4.27?
 9 **A.** The one thing that, I apologise, I don't know is because
 10 they only had a small number of stores, all of the
 11 stores might have been in one of the price bands, so my
 12 frustration was they seemed to be making -- wanting to
 13 make a larger margin on one of the products in line
 14 with -- sort of out of kilter with Regal Kingsize.
 15 **DR SCOTT:** I think we understand that -- Mr Thompson, am
 16 I allowed to talk about how they approached pricing in
 17 the more convenience end of the market?
 18 **MR THOMPSON:** I think you mean naming particular
 19 comparators?
 20 **DR SCOTT:** Well, not in naming particular comparators,
 21 because as I understand it, when you got to the
 22 convenience end, they were concerned about their margin
 23 rather more than about comparators.
 24 **MR THOMPSON:** Well, I think the issue that was confidential
 25 was the specific identity of the comparators. But the

1 fact that there were comparators I think is something
 2 that's known to Mr Goodall and is perhaps not a great
 3 secret, I think it's the identity that's the concern.
 4 **DR SCOTT:** Okay.
 5 At the RSP level, they appear to be more concerned
 6 about margins, so that they are prepared to discount
 7 at a lower level. Does that make sense?
 8 **A.** Yes. In my mind, as I described in my witness
 9 statement, the first price column is for full trolley
 10 shopping. The second one I would see as small trolley,
 11 you know, average spend, and the last column would be
 12 convenience, where the market seems to accept
 13 convenience comes at a price. That was my general
 14 philosophy.
 15 **MR LASOK:** On the face of it, what's happened here is that
 16 there was an RRP differential between filter and
 17 Kingsize. But your email refers to a different
 18 differential that had been agreed between ITL and the
 19 Co-op.
 20 **A.** Sorry, which tab am I --
 21 **Q.** Well, 12(b) is the tab which has the --
 22 **A.** The email?
 23 **Q.** -- price matrix for period 2, 2002, and has set out the
 24 RRP.
 25 **A.** And the email is under tab, sorry?

1 **Q.** Sorry, the email is tab 12. {D15/12}. If we look at
 2 the agreement that's recorded here, or rather it's the
 3 fact that there had been an agreement previously, you
 4 refer to a different differential, it's not the same as
 5 the RRP differential?
 6 **A.** And I can't explain that.
 7 **Q.** Right. Well, is the explanation that, from time to
 8 time, ITL and the Co-op agreed particular differentials
 9 for particular brands? This is an instance of
 10 a particular differential between two variants of an ITL
 11 brand, but does it not indicate that from time to time
 12 you would agree differentials for brands that you felt
 13 it was appropriate to have a particular differential on?
 14 **A.** No, I think it is just that I made a mistake, that
 15 I have written down something that wasn't right, I've
 16 made an error. Regal Filter is not a brand that I would
 17 spend an inordinate amount of time sorting or thinking
 18 about, apart from Northern Ireland.
 19 **Q.** Okay. Let's, I think, go quickly to a couple of things
 20 that we need to wrap up on. It's also the case, isn't
 21 it, that ITL would warn the Co-op if its pricing was
 22 getting out of line with the rest of the market?
 23 **A.** As part of the relationship with the Co-op, my role was
 24 to try and ensure that the Co-op was selling as many
 25 Imperial products as possible. So if the information

1 was in the public domain, then I would share that with
 2 them.
 3 **Q.** So, for example, if we go to tab 6, this is an email
 4 from you to Mr Newton, {D15/6}, and in that email you
 5 express concern that the Co-op will move a long way from
 6 the market price?
 7 **A.** Yes.
 8 **Q.** Which, you said, will remain at the prices that you set
 9 out there?
 10 **A.** Yes.
 11 **Q.** So you were looking forward into the future, and warning
 12 the Co-op that its prices were out of line with
 13 developments in the future?
 14 **A.** No, I wasn't looking to the future, I was looking into
 15 the amount of price marked pack that the distributive
 16 trader had at the time, that was being sold through the
 17 independent business, and the Co-op, as they do, had
 18 achieved their prices to increase their margin, and
 19 I was just making them aware that their competitive set
 20 of retail stores, which a lot of them were independents,
 21 had a better price than the Co-op had. And part of my
 22 responsibility, I felt, was to make them aware of that.
 23 **Q.** Yes, and you had a fairly good idea about the Co-op's
 24 pricing strategy, that is to say where it was
 25 positioning itself in the market, in terms of its

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1 pricing?
 2 **A.** Its pricing strategy was always in flux, that
 3 I struggled to keep up with, but I knew that if they had
 4 moved their price on Richmond, they would be out of
 5 kilter with their competitive set. And I was trying to
 6 be helpful.
 7 **Q.** Right. Could you look at tab 11, please. {D15/11/207}.
 8 This is the report that you drew up in January 2002
 9 concerning the Co-op. Do you have it?
 10 **A.** I have.
 11 **Q.** Could you turn to the fourth page, please. If you look
 12 in the middle of the page, you have a paragraph
 13 beginning "Although central buying is promoted"; do you
 14 have that?
 15 **A.** On 207?
 16 **Q.** Yes, 207, the middle of the page.
 17 **A.** Yes.
 18 **Q.** Could you read the second sentence, please.
 19 (Pause)
 20 So you had a fairly good idea of what the Co-op's
 21 pricing strategy was?
 22 **A.** I had a fairly good idea.
 23 **Q.** Yes, and you don't say here that "CWS Retail's pricing
 24 strategy is in flux all the time and I don't know what
 25 it is"?

1 **A.** No, but it's very easy to simplify the pricing strategy
 2 by aligning to ██████████ had plenty of
 3 different pricing scenarios. Market town, I knew that
 4 they had a market town store type, I wasn't sure who
 5 their target store base were, who their competitive
 6 store base were. I have made the assumption that the
 7 convenience stores were against the independents because
 8 if you walked around the cities and towns you would see
 9 them next door to an independent store.
 10 So I built the knowledge that I had, but it was very
 11 difficult for me to be precise about what they were
 12 doing, and I don't think they would wish to share that
 13 with me.
 14 **Q.** And the extensive monitoring of shelf prices at retail
 15 stores would have given you a lot of information that
 16 would enable you to figure out where they were pricing?
 17 **A.** I would know the actuals, whether that showed a strategy
 18 would be a completely different question.
 19 **Q.** Somebody in ITL could compare it across the board,
 20 couldn't they?
 21 **A.** I don't think so, not very easily when you have the CRTG
 22 agreement, you have societies, as we spoke about
 23 earlier, in a multiple account brief, or yesterday,
 24 which had different societies having different
 25 positions, one 2p more, one only following price band█.

1 They all had -- you had a mixture of different societies
 2 doing different things. It was the most complex to try
 3 and understand.
 4 **Q.** You would take the price matrix and you compare it with
 5 the information that you have from other accounts?
 6 **A.** But, as I've just suggested, the price matrix was not
 7 being used by all of the societies in the same way.
 8 **Q.** Even if you were doing it at price matrix level that
 9 would give you an indication of what their policy was,
 10 wouldn't it?
 11 **A.** Against RRP?
 12 **Q.** No, as across, by comparing the Co-op with other
 13 retailers?
 14 **A.** I didn't compare the Co-op directly with other
 15 retailers.
 16 **Q.** And nobody in ITL did?
 17 **A.** I don't know.
 18 **MR LASOK:** No further questions.
 19 **THE CHAIRMAN:** Shall we take a short mid-morning break there
 20 before you ask your questions, Mr Thompson? We will
 21 come back at 20 to 12.
 22 (11.30 am)
 23 (A short break)
 24 (11.45 am)
 25 Cross-examination by MR THOMPSON

1 **MR THOMPSON:** Good morning, Mr Goodall. I am tempted to say
 2 welcome back to the real world. I would like to ask you
 3 some straightforward questions, to which I believe there
 4 should be some straightforward answers in the real world
 5 that you were operating in, and under three broad
 6 topics. First of all, price checking and retail price
 7 monitoring, then the role of central buying by CRTG, and
 8 then thirdly competitors' pricing strategies.
 9 So, first of all, in relation to price checking and
 10 retail price monitoring, as I understand it your
 11 evidence is that you checked the price matrices sent to
 12 you, and you monitored retail prices in store for three
 13 broad reasons, but you also monitored other things such
 14 as range and distribution, I think you have said this
 15 morning. The reasons I would like to put to you, first
 16 of all, you monitored retail prices to ensure that they
 17 were below RRP's where an off-invoice discount was being
 18 given; is that correct?
 19 **A.** That's correct.
 20 **Q.** Secondly, to ensure that retail pricing reflected any
 21 promotional funding that ITL was providing to CRTG
 22 members; is that right?
 23 **A.** That's correct.
 24 **Q.** Then thirdly, and this is obviously the most
 25 controversial area in this hearing, I think you said

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1 that you monitor compliance with your preferred
 2 differential strategy based on relative MRPs with major
 3 competing brands; I think that's the gist of what you
 4 are saying, is that right?
 5 **A.** Yes.
 6 **Q.** And an example was Embassy against B&H Silk Cut, and we
 7 have checked that, and I think at the time the
 8 differential was 3p, and there is a document where
 9 someone obviously has been monitoring that; that's
 10 correct, is it?
 11 **A.** Yes.
 12 **Q.** Your concern, as I understand it, in each case was that
 13 CGL's pricing was at least as good as your strategic
 14 position; is that right? So if I could just clarify,
 15 that CGL was pricing at or below either the RRP or the
 16 promotional price or the relevant differential; is that
 17 correct?
 18 **A.** That's correct.
 19 **Q.** You had no concern --
 20 **MR LASOK:** Can I interrupt? There is a problem about
 21 leading questions. I have mentioned this before.
 22 **THE CHAIRMAN:** Well, it's a balance between leading
 23 questions and the time taken to get to a point. Perhaps
 24 you can bear that in mind when you get to areas which
 25 are likely to be controversial.

1 **MR THOMPSON:** Yes. I am seeking to clarify what I think the
 2 evidence is.
 3 I think your evidence was that you had no concern to
 4 ensure that Gallaher's prices were the same as the
 5 relevant P or D, although I think you said that
 6 realistically that was the best you could achieve, given
 7 the CGL's position; is that correct?
 8 **A.** I was trying at all instances to make our brands more
 9 likely to be purchased than my competitors'. One of
 10 those avenues was pricing, a better position, the other
 11 avenues were distribution, availability, and promotional
 12 support. It was a package.
 13 **Q.** Can we now look at two examples, first of all bundle 15,
 14 tab 6. {D15/6}. Can you clarify what your concern was
 15 here?
 16 **A.** This is the email with Richmond?
 17 **Q.** Yes.
 18 **A.** My concerns were that the Co-op had taken a decision to
 19 move the Richmond family, which was an important family
 20 for us at the time, growing share, away from
 21 a competitive position in the marketplace. I was
 22 informing them that there were lower prices through
 23 a price marked pack mechanism being used in the
 24 independent trade.
 25 **Q.** Those lower prices, were they ITL prices or were they

1 competing prices?
 2 **A.** They were ITL prices because they were price marked
 3 packs, so they were a product that we were supplying
 4 into the independent trade, and the price was indicated
 5 on the product.
 6 **Q.** So were you concerned in making this comment about
 7 Gallaher and Rothmans prices?
 8 **A.** No.
 9 **Q.** Can we now look at 15/13. I don't know if you remember
 10 this letter, I don't know if you have read it recently.
 11 If not, then you should perhaps read it through. you say
 12 at the beginning and the end you are very concerned,
 13 I think it's just to see what it is you were concerned
 14 about.
 15 **A.** I'll read it. (Pause).
 16 My concern here was that the CRTG matrix that they
 17 were operating was not being implemented in the
 18 societies.
 19 **Q.** So when you refer to the left of the matrix, what are
 20 you referring to?
 21 **A.** I am referring to the standard price element with the
 22 net costs, not the promotion price element.
 23 **Q.** So when you refer to the promoted prices, what are you
 24 referring to?
 25 **A.** Normally to the right of the matrix.

1 **Q.** I think that there is a matrix behind, and without going
 2 to the detail, are you saying that the prices are in the
 3 left-hand columns not those set out in the right-hand
 4 columns. For example, if you turn on to the second
 5 page, you should see Superkings and the whole Superkings
 6 family promoted; is that right?
 7 **A.** This is Superkings getting a short-term tactical support
 8 from ourselves, and I was looking to see those actual
 9 prices within the stores.
 10 **Q.** Then when you turn to the next page, you will see
 11 Lambert & Butler, Richmond, and again you have
 12 a left-hand and a right-hand?
 13 **A.** Because you will notice on the right-hand side under the
 14 column "Additional Retro", that was an additional
 15 investment behind each brand to achieve a specific
 16 price.
 17 **Q.** I do not want to lead, but as I understand it your
 18 concern was that the stores were reflecting the normal
 19 prices, whereas you were paying the promotional discount
 20 to the Co-op; is that the basic concern?
 21 **A.** My concern is I wasn't getting the promotion price,
 22 although I was paying for the promotion price.
 23 **Q.** Again, were you concerned about competing Gallaher or
 24 Rothmans brands in making these comments?
 25 **A.** No.

1 Q. Can we now turn to central buying by CRTG. I believe
 2 you may actually have been present in court during
 3 Mr Lasok's opening, or at least some of it, I don't know
 4 whether you were or not, but I think you were at some
 5 point?
 6 A. I was on Wednesday afternoon.
 7 Q. I don't know if you recall, but at some points, and it
 8 came up in his cross-examination, he suggested that the
 9 retailers were compliant instruments of the
 10 manufacturers, whereas I understand your evidence that
 11 the retailers generally were powerful and that CRTG in
 12 particular was a powerful buyer because it controlled
 13 2,500 outlets throughout the country, and ITL had
 14 a strong presence in the Co-op; is that right?
 15 A. I think the balance of power was certainly in the CRTG's
 16 hands rather than mine.
 17 Q. I think you also said it was difficult to negotiate
 18 centrally with CRTG because of the wide range of its
 19 members and stores; is that right?
 20 A. Yes.
 21 Q. Can I now ask you to look at 15/11. {D15/11/204}. You
 22 had been asked to look at a few gobbets, but can you
 23 look at the beginning where you say that:
 24 "Co-op Limited is the biggest consumer co-operative
 25 in the world."

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1 I understand that's alleged to be confidential.
 2 I can't think it's particularly confidential, unless
 3 Mr Howard objects.
 4 At the bottom of the page, there is a reference to
 5 the CWS/CRS merger in April 2000. Do you see that?
 6 A. Yes.
 7 Q. At the top of 205, you will see there is a comment made
 8 about the effect of this merger, and I think effectively
 9 on the market power of CRTG. Do you see that?
 10 A. Yes.
 11 Q. Then there is "United Co-op joins CRTG" further down.
 12 Do you see that?
 13 Then at the top of page 207, {D15/11/207}, if you
 14 turn over, there are five bullet points, and then under
 15 that it says:
 16 "With CRS joining CRTG in June 1999, the CWS buying
 17 function now buy for almost 2,000 stores; this is equal
 18 to 90 per cent of the Co-op food buying in the UK.
 19 CWS Retail see CRTG as a great success as the group's
 20 growth in retail sales since 1993 is 174 per cent and
 21 now offers the Co-op national centralised buying for the
 22 first time."
 23 What I want to ask you is: did these commercial
 24 developments alter the position in negotiations between
 25 yourself and CRTG, and if so, how?

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1 A. Before 1998 the Co-op movement, in my opinion, was
 2 fragmented, with each society having its own purchasing
 3 operation, head office operation, although a Co-op in
 4 title operated in very different ways, and in my opinion
 5 the Co-op societies were struggling to compete with the
 6 national retailers of that time and I think that the
 7 creation of CRTG was only capable of happening when CWS,
 8 who were the largest -- and who were originally called
 9 Co-op Wholesale Society, and CRS, who were a competing
 10 society, joined together.
 11 That fragmentation allowed other retailers to become
 12 prevalent with a much more organised structure. So this
 13 new CRTG, the Co-operative Retail Trading Group, started
 14 to give a national shape and the points on page 207 were
 15 a fundamental change. So the society had all of its
 16 buying being done in one location. The core range it
 17 was signing the societies up was mandatory rather than
 18 being negotiated by individual societies. The promotion
 19 programme that we spent an awful lot of time talking
 20 about through the promotional calendar was not optional,
 21 it was mandatory. And the promotion price that CWS set
 22 through CRTG was the position they wanted to be
 23 accepted.
 24 The last point was fundamental for a supplier or
 25 a manufacturer, that they were looking to stop

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1 individual societies having contact with people such as
 2 myself. They wanted everything to be done through
 3 a large, single trading group. So it had a fundamental
 4 impact.
 5 Q. Yes. We are going to hear witnesses from the Co-op,
 6 Mr Goulthorp and Mr Owen, and they were the people who
 7 negotiated centrally from 2002 onwards; that's correct,
 8 isn't it?
 9 A. Yes.
 10 Q. And before that, I think we will see that Mr Newton was
 11 involved in the discussions for the 2000 and 2001
 12 agreements?
 13 A. That's not quite correct. Mr Newton was the day-to-day
 14 contact, so he would be the buyer responsible for
 15 day-to-day business, and the Co-op had a line of
 16 command, it was -- where Peter Newton would have a boss
 17 and then you would have Mike Goulthorp further up the
 18 chain, the bigger the discussion, the more important,
 19 the more involved they would be.
 20 Q. Thank you. There is just one minor discrepancy in your
 21 evidence that I think should be corrected. You remember
 22 you were taken to Mr Goulthorp's letter in July 2000?
 23 A. Yes.
 24 Q. I think you made reference to Alldays. If we could just
 25 look at Mr Goulthorp's letter, first of all, which you

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1 will find at tab 17.
 2 **A.** Yes.
 3 **Q.** You will see the date is July 2002. If you turn back to
 4 tab 14, you will find a letter from yourself to Mr Owen
 5 referring to a meeting, I think, between yourself and
 6 Mr Batty and Mr Owen; is that correct?
 7 **A.** Yes.
 8 **Q.** If we now turn forward to tab 21, it's almost a year
 9 later, 12 May 2003, {D15/21}, you will see that there is
 10 a reference to -- it's another letter to Mr Owen from
 11 yourself, and it starts:
 12 "Although we have had a series of meetings and
 13 telephone conversations regarding your Alldays
 14 acquisition, in my mind your future strategy with the
 15 Alldays estate is still unclear."
 16 I think in your evidence you had in mind that
 17 Alldays was going on in 2002, whereas it's clear from
 18 this that in fact Alldays was in 2003; is that correct?
 19 **A.** I am not sure, I know some of these conversations went
 20 on over an intensive period, so my belief, my
 21 understanding was that it was in reference to Alldays,
 22 but I am --
 23 **THE CHAIRMAN:** What, the July 2002 letter?
 24 **A.** 2002. That's the way I remember the conversation, and
 25 in 2003 I think we were still talking about the element,

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1 which was the off-invoice dealing that was being done
 2 through the Co-op, but only 5 per cent for Alldays.
 3 **MR THOMPSON:** Yes. I think our evidence will be that
 4 centralised negotiations started in 2002, and Alldays
 5 was in 2003, and it's a long time ago, I don't think it
 6 makes any difference, I just wanted to give Mr Goodall
 7 a chance to correct his evidence, if that's what he
 8 thought on reflection, but if he can't remember, it
 9 doesn't matter.
 10 **THE CHAIRMAN:** He didn't say he can't remember, he said --
 11 you still think that this July 2002 letter is referring
 12 to Alldays?
 13 **A.** My recollection is.
 14 **THE CHAIRMAN:** Yes.
 15 **MR THOMPSON:** I am grateful.
 16 Can I just ask three questions arising out of this:
 17 what did the CRTG group, in your experience, want to
 18 achieve in its negotiations, under three headings: first
 19 of all the level of central financial support, what was
 20 CRTG trying to achieve?
 21 **A.** Increased investment.
 22 **Q.** So far as the obligations accepted on behalf of CRTG
 23 members, what was CRTG trying to achieve?
 24 **A.** They were trying to achieve, as -- if I can take you
 25 back to my business plan, I've lost the tab,

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1 I apologise. Which number was it? It's tab 11,
 2 page 207. {D15/11/507}. What the Co-op were trying to
 3 do and offer to a tobacco manufacturer was that they
 4 would have a core range, they would have a promotional
 5 programme, they would have a structure for retail
 6 prices, and that was the core that the CRTG group were
 7 offering.
 8 **Q.** Then finally, what did they want to achieve in terms of
 9 promotional support? Not necessarily under the trading
 10 agreements, but generally?
 11 **A.** Generally retailers are looking for more monies, more
 12 investment, whether that's day-to-day margin, whether
 13 that's promotional support, whether that's listing fees.
 14 It's making the Imperial range as profitable as
 15 possible.
 16 **Q.** Can I take you to 15/22. I think Mr Lasok showed you
 17 15/21 as an example of your, I think, power against the
 18 retailers. Can we look at 15/22, {D15/22} which is
 19 Mr Owen's response. I don't know if you remember this
 20 document, but it's particularly the paragraph starting
 21 "Finally" towards the bottom.
 22 (Pause)
 23 What did you understand by the sentence beginning
 24 "To be fair"?
 25 **A.** I understand it to be, "If you take away our off-invoice

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1 support, we will move our retail prices up".
 2 **Q.** Thank you. Can you turn to the next tab, this is your
 3 response. You make some comments about Alldays, and
 4 then there is a paragraph with "Confidential, Co-op"
 5 against it, and I don't know whether the numbers are
 6 actually shown but I am sure they are familiar to you.
 7 I think Mr Lasok made some point that there was
 8 reference to all the disciplines in your initial letter.
 9 I don't think there is any such reference there, is
 10 there?
 11 **A.** The reference "I will confirm the actual split" is in
 12 the letter.
 13 **Q.** Yes. Then finally there is the response from Mr Owen at
 14 tab 24, {D15/24} and the first element, branded element,
 15 it's four equal instalments of [redacted] presumably to
 16 be paid quarterly?
 17 **A.** Yes.
 18 **Q.** Is that type of negotiation what you would say where you
 19 lost the debate because you had to put up money and take
 20 what you could get; is that what you had in mind?
 21 **A.** I think the difficulty with a large retailer is that
 22 fundamentally I don't sell tobacco products, I supply
 23 tobacco products, the retailer decides which product it
 24 will sell, at which price, to whom. So the retailer has
 25 the ultimate bargaining, negotiating power, and

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1 I honestly felt that the Co-op weren't concerned whether
 2 they sold our products or a competitor's products, so my
 3 position was one to always try and move our business
 4 forward; very challenging.
 5 **Q.** The final question in this area: you have said it was
 6 difficult to negotiate with CGL in respect of the
 7 trading agreements generally, were there any such
 8 difficulties about the payment of centralised funding in
 9 relation to the trading agreements?
 10 **A.** Sorry?
 11 **Q.** Did you have difficulties about payment of your side of
 12 the bargain, as it were, under the trading agreements?
 13 Were there difficult discussions about that?
 14 **A.** We -- I would always try to start a conversation to make
 15 the payments [REDACTED]
 16 [REDACTED]
 17 **Q.** [REDACTED]
 18 **A.** [REDACTED]
 19 **Q.** Then finally can I ask you about competitors' pricing
 20 strategies. We know that MPIs were generally published
 21 several weeks in advance, both the list price increases
 22 and the new MRPs; that's right, isn't it?
 23 **A.** Yes.
 24 **Q.** Apart from this, did ITL know in advance of the future
 25 pricing of its competitors?

1 **THE CHAIRMAN:** Well, ask him whether he knew, I don't think
 2 he can answer for the whole of ITL.
 3 **MR THOMPSON:** I am sorry.
 4 Did you, as far as you know, know of the future
 5 pricing intentions of your competitors?
 6 **A.** No.
 7 **Q.** Did you know what the specific strategic goals of your
 8 competitors were?
 9 **A.** I assumed it was market share, I didn't know the brand
 10 specifics.
 11 **Q.** You were taken to a price matrix at 15/12, we looked at
 12 in some detail the regional matrix, which is 15/12 and
 13 then 15/12(a) -- sorry, 15/12(b). A pricing matrix such
 14 as this, did it enable you to check the internal
 15 consistency of CGL's pricing of ITL products?
 16 **A.** Yes.
 17 **Q.** Did the checking of these matrices enable you to
 18 discover the future pricing intentions or the strategic
 19 goals of ITL's competitors?
 20 **A.** No.
 21 **MR THOMPSON:** No further questions.
 22 Questioned by THE TRIBUNAL
 23 **THE CHAIRMAN:** Roughly how far in advance did you get this
 24 matrix? This one we are looking at is the period 2,
 25 2002, so that's the end of January, beginning of

1 February?
 2 **A.** There was a complete promotional calendar that told me
 3 when I would receive the matrix for the next promotional
 4 period, and I can't specifically remember how long
 5 I would have it beforehand.
 6 **THE CHAIRMAN:** Well, was it two days or a month or six
 7 months?
 8 **A.** I would expect it to be two or three weeks, apart from
 9 obviously a Budget, where the prices were changing
 10 quickly, or an MPI. But there was a calendar that set
 11 out when the promotion was -- or when the whole activity
 12 was agreed and when it was in store.
 13 **THE CHAIRMAN:** Thank you.
 14 Mr Howard, any re-examination?
 15 Re-examination by MR HOWARD
 16 **MR HOWARD:** Just a few questions, if I may.
 17 Mr Goodall, if you turn back to 15/4, {D15/4}, which
 18 is the first trading agreement, in answer to Mr Thompson
 19 earlier this afternoon you said that the retailer
 20 decides which product it sells at which price and to
 21 whom. Do you remember you said that? Now, we see in
 22 this agreement -- and the same is true in the subsequent
 23 agreements -- that various sums of money are set out.
 24 Can you firstly tell me: those sums of money that
 25 you were paying to Co-op under these agreements, were

1 they the subject of negotiation?
 2 **A.** Yes.
 3 **Q.** Right. Between you and who?
 4 **A.** Between myself and the Co-op contact.
 5 **Q.** Right. Now, if we go back a step. You explain to us
 6 that this was setting out your objectives, and we see in
 7 that agreement it says that:
 8 "The achievement of these specific objectives will
 9 result in incentive payments being made to CRTG under
 10 the overall heading of 'Performance Award Payments'.
 11 At the moment I am not asking you about what
 12 actually happened and the extent to which CRTG actually
 13 performed, I just want to focus on what you intended to
 14 mean by the words "incentive payments"?
 15 **A.** I was trying to build a relationship with the Co-op
 16 where the investment we were making, whether that be by
 17 product or through this business development plan, was
 18 sufficient for them to work and support our Imperial
 19 products.
 20 **Q.** If we focus for a moment on -- you have been asked a lot
 21 of questions and you have given evidence about the
 22 agreed strategic pricing differential, and we have your
 23 evidence very clearly that there was no piece of paper
 24 that set them out but you have told the Chairman and
 25 Mr Lasok that it was by reference to the RRP

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1 differentials.
 2 Now, what I just want to get clear is a couple of
 3 things: one of the things you have said, I think
 4 repeatedly, is that you were concerned to ensure that
 5 Imperial's products were not disadvantaged vis-a-vis the
 6 competitor. I would just like you to explain to us what
 7 you mean by "not disadvantaged"?
 8 **A.** I was looking to ensure that the Imperial brands were
 9 priced at a position that was no worse than the RRP
 10 relative position.
 11 **Q.** Right. Now, I want to break out the discussion that you
 12 had with Mr Lasok into two different situations.
 13 Mr Lasok was asking you a question where he said "Let's
 14 suppose that at the moment the price of Richmond and
 15 Dorchester is £3.44" and then he went on to discuss what
 16 happens when you have a price promotion. I want to ask
 17 you about something slightly different to that, which is
 18 before you get to the price of £3.44. Take the
 19 situation, you set the RRP of -- when I say "you",
 20 Imperial set their RRP and publish it for Richmond, and
 21 let's say that is £3.44, and Gallaher set their RRP --
 22 which you can see in the market, because they publish
 23 it -- at also £3.44.
 24 Now, you publish your wholesale price, which is the
 25 list price; correct?

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1 **A.** Yes.
 2 **Q.** I think we have been told, and again I'll lead because
 3 it's simply not controversial, that off the wholesale
 4 price there are various discounts which are things like
 5 bulk discounts which are, I think, common in the trade;
 6 is that right?
 7 **A.** Our price list is our general terms of trade.
 8 **Q.** Yes, and -- right. Now, the wholesale price actually
 9 payable, if we take Co-op, by Co-op for let's say
 10 Richmond depends upon the list price, the particular
 11 discounts that they get for bulk purchasing, a further
 12 discount, as I understand it, for selling below RRP, and
 13 then also any further sums that are payable under the
 14 trading agreement; is that right?
 15 **A.** There is an additional element, which is when a brand is
 16 being launched the negotiation around the listing by
 17 a retailer of that brand would be about a listing fee by
 18 SKU or by range, but also a negotiation over the
 19 retailer's margin expectation for that product.
 20 **Q.** Right.
 21 **A.** Once that had been agreed, that tended to be set for
 22 that period.
 23 **Q.** Right. As I understand it -- you tell us -- if we take,
 24 say, Richmond or Dorchester, would you actually know
 25 what the wholesale price of Dorchester was to the Co-op?

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1 **A.** I would know what the price list price was, I wouldn't
 2 know what the net Co-op price was.
 3 **Q.** No. Now, taking account of the various discounts that
 4 you are giving to achieve a net wholesale price of
 5 Richmond, what are you trying to achieve in relation to
 6 the wholesale price of Richmond as compared to the
 7 wholesale price payable by Co-op in respect of
 8 Dorchester?
 9 **A.** I don't think I have a relationship, I don't understand
 10 the differing positions, what I am trying to achieve is
 11 a shelf price that is no worse, and to be honest, I am
 12 trying to reduce the Co-op's margin to a level that is
 13 acceptable to get the brand listed and add the
 14 differentials. So I am trying to be as cost-effective
 15 as I can be, so I am balancing the achievement of the
 16 availability and listing of the product against the
 17 ongoing cost paying too much margin, which means the
 18 Co-op are making a greater margin on the product. So
 19 it's a balance.
 20 **Q.** Yes. We have seen that you use this word "incentive".
 21 Let's assume that, although you can see the RRP of
 22 Gallaher's product, Dorchester, is the same as yours,
 23 that the discounts that Gallaher is able to offer are
 24 such that they are able to reduce the net wholesale
 25 price of Dorchester below the net wholesale price of

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1 Richmond.
 2 **A.** Mm.
 3 **Q.** What, in that event, would you expect Co-op to have done
 4 vis-a-vis the pricing?
 5 **A.** They would have left our brand out of kilter with the
 6 RRP differential.
 7 **Q.** And why would they do that?
 8 **A.** Because they had a margin expectation for the brand that
 9 was driving the price, it would then be left in the
 10 retail store, I would pick it up, and if I wanted to
 11 reposition it, I would invest more money.
 12 **THE CHAIRMAN:** Sorry, I think there was a step there perhaps
 13 you assumed, but let me just clarify: if Gallaher were
 14 able to reduce the wholesale price of Dorchester, you
 15 said the differentials would get out of kilter; is that
 16 because you assume that the Co-op would have reduced the
 17 retail shelf price of Dorchester?
 18 **A.** I had made an assumption that my competitor would only
 19 offer an additional margin enhancement for a discount in
 20 retail price.
 21 **THE CHAIRMAN:** So if Gallaher were reducing their wholesale
 22 price, they are likely to make it a condition that the
 23 retail price also drops?
 24 **A.** I couldn't comment for Gallaher, but I would assume --
 25 **THE CHAIRMAN:** No, but what you would expect.

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1 A. -- I would assume so.
 2 **MR HOWARD:** So I think you have given clear evidence about
 3 that.
 4 **DR SCOTT:** Mr Howard, while we are on this tab, which is
 5 tab 4.
 6 **MR HOWARD:** Yes.
 7 **DR SCOTT:** You mentioned the words "no worse", and we
 8 understand your evidence in relation to that. If you
 9 look at the letter on the first page, both in the bullet
 10 "priced at all times in line with the agreed strategic
 11 price differentials", and "pricing strategy, priced at
 12 all times in line with the agreed strategic pricing
 13 differentials", if I received that letter, I would read
 14 that as "pricing at all times in line with the agreed
 15 strategic pricing differentials".
 16 Are you suggesting to us that Mr Newton would have
 17 had a different understanding to the understanding that
 18 somebody like me would have approaching it?
 19 **A.** I think his understanding would be that our RR
 20 differentials were our base position, and he would then
 21 expect us to support his business through additional
 22 activity. If --
 23 **DR SCOTT:** Right, so bonusing.
 24 **A.** If I had been unsuccessful in the negotiation and paid
 25 much more than our competitor, then our price would come

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1 down lower again, but that was obviously an ongoing
 2 investment. I am not sure how else to write it, because
 3 if I had written I wanted a positive position, that
 4 would have been --
 5 **DR SCOTT:** He would want money.
 6 **A.** He would want money, so you are sort of damned if you do
 7 and damned if you don't, because you want to set
 8 a skeleton that aligns to RRP, which is how we worked,
 9 but the opportunity to promote proactively to grow
 10 market share.
 11 **MR HOWARD:** If I can follow up on that, because I think --
 12 let's see where we get to. Let's just take it in
 13 stages.
 14 You have told us on a number of occasions that what
 15 you wanted was the price of the Imperial brand to at
 16 least reflect the differential in the RRP. Just
 17 explain to us first: what was your reasoning to want to
 18 at least reflect the RRP differentials?
 19 **A.** Because the belief we had as a business is that each
 20 brand, through the research we have done, would perform
 21 at a better rate with the relationship to a competitor
 22 product.
 23 **Q.** Right. Sorry, go ahead.
 24 **A.** Just so, it was to grow volume for those particular
 25 brands.

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1 **Q.** Right. Now, let's take the situation where the brand
 2 Richmond, the RRP is the same. To what extent would
 3 your commercial purpose be achieved if Co-op, instead of
 4 pricing Richmond and Dorchester the same, priced
 5 Richmond 1p below Dorchester?
 6 **A.** I would be very pleased and I would expect the brand to
 7 perform very well.
 8 **Q.** Right. Now, in your discussions with Co-op, can you
 9 tell us to what extent you understand it would have been
 10 apparent to Co-op that, as far as you were concerned,
 11 pricing either at the differentials or at a greater
 12 differential, would suit your purpose?
 13 **A.** I think that it was common sense to the retailer and to
 14 all tobacco manufacturers that to grow share in
 15 a category where promotion was very difficult, price was
 16 one of the proactive tools that we were using. The
 17 Co-op was very aware that I was looking to grow share,
 18 not only for my business but for me personally, I wanted
 19 to be seen as being successful. So the more
 20 advantageous our range was, if it was in better
 21 distribution, I think sometimes we forget the importance
 22 of the distribution, the impact that has.
 23 **THE CHAIRMAN:** Yes, but just to -- sorry, had you finished
 24 with that point?
 25 **MR HOWARD:** Go ahead.

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1 **THE CHAIRMAN:** I think your evidence is it would have been
 2 understood, in your discussions with Co-op, that if they
 3 wanted to reduce the price of Richmond below Dorchester,
 4 you are saying they would have understood that was fine
 5 with you. But what was your mutual understanding as to
 6 how likely that was to happen that they would, off their
 7 own bat, reduce the price of Richmond below the price of
 8 Dorchester without some money coming to them from ITL?
 9 **A.** I think in likelihood it happened twice a year, around
 10 price structure changes, when the Budget happened or
 11 an MPI happened. Depending on the margin that they
 12 wanted to make by product, there was a chance that the
 13 brands could move to a better differential or a worse
 14 differential. I actually think the Co-op used that
 15 proactively to increase investment.
 16 For a scenario --
 17 **THE CHAIRMAN:** Increase investment by you, do you mean?
 18 **A.** By a manufacturer.
 19 **THE CHAIRMAN:** I am just thinking about, without any
 20 investment by the manufacturer, how likely do you think
 21 you and the Co-op understood that it was that they would
 22 give you a more favourable shelf price than the agreed
 23 differentials without money changing hands from you to
 24 them?
 25 **A.** I think it was likely not to favour my products but to

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1 unlock future investment on competitors' products. It
 2 was a negotiation tool. Because the price increases are
 3 maybe rounded up or down on a wholesale price, the
 4 margins moved. If they gave me a Richmond advantage for
 5 a period of time, without any additional support from
 6 myself, I would expect my competitors, having seen that
 7 in the stores, to come back and offer additional support
 8 to the competitor brands. So what they have managed to
 9 do, by positioning products in a certain way, is
 10 increase the overall category investment they were
 11 getting for tobacco.

12 **MR HOWARD:** Thank you, that's very helpful, because that
 13 leads on to the next point I wanted to ask you about.

14 You told us yesterday that -- I am just quoting one
 15 of your answers, I think to the Chairman -- the more
 16 confusion the Co-op can create between the
 17 manufacturers, the more investment they can get.
 18 I think leading on from what you have just said, can you
 19 explain to us how the Co-op can seek to create confusion
 20 and how they then seek to use that confusion to extract
 21 investment?

22 **A.** Any retailer is the only body that has all of the
 23 information, sat on their laptop or computer, they have
 24 all of the margins, all of the retail prices, all of the
 25 trading business support payments. They sit there with

1 a picture and can actually play different
 2 manufacturers -- and often would spend all their time
 3 playing manufacturers off against one another.
 4 A conversation might well be that, "The last product
 5 that we listed, Martin, in this category, the payment
 6 has increased by X, so if you wish to have a listing of
 7 a brand, the payment must be X plus". I had no way of
 8 knowing whether X was a real figure. So I was living in
 9 a fairly dark room, trying to achieve success with the
 10 Co-op, where they had all the knowledge. And I felt,
 11 and I thought it was healthy that they were using me
 12 sometimes and other times they would use BAT or they
 13 would use JTI, and they would favour us a little bit
 14 from a short term to get a response from our
 15 competitors, and I saw that as a classic --

16 **Q.** If we take, say, Richmond/Dorchester, if you see that
 17 Dorchester, in the Co-op stores, goes on at 2p below
 18 Richmond, how are you able to discern whether that is as
 19 a result of Gallaher funding it and paying Co-op 2p, or
 20 it's Co-op using its own initiative and trying to
 21 extract money from you? How can you tell?

22 **A.** I can't tell. In most instances the Co-op would tell me
 23 it was a supplier payment, because that would be seen as
 24 something I would need to react to, but I had no
 25 knowledge.

1 **Q.** If they tell you it's a supplier payment, would you
 2 actually have any basis, any way in which to verify
 3 that?

4 **A.** No.

5 **Q.** So if they do that, they reduce the price of Dorchester
 6 and then come to you and you go to them and you say
 7 "I see that", and they say it's a supplier payment,
 8 what's then your reaction? What can you do then if you
 9 don't want to be disadvantaged?

10 **A.** I have to increase my investment.

11 **THE CHAIRMAN:** I thought, when you gave your evidence
 12 yesterday, there was a third possibility: if you see the
 13 price of Dorchester on the shelf from your monitoring as
 14 2p less than Richmond, that might be because there has
 15 been a Gallaher promotional investment, it might be that
 16 the Co-op centrally has decided that that's what the
 17 price should be, or it might be that the unruly Co-op
 18 stores are doing their own thing as far as the pricing
 19 of Dorchester is concerned?

20 **A.** That's correct, and I think that the knowledge from
 21 looking at the retail prices and the propensity for
 22 price would give you an indication whether it was the
 23 vagaries of the Co-op or it was a change in position.

24 **THE CHAIRMAN:** What do you mean by the propensity for price?

25 **A.** If during three days we had visited 100 stores, if a new

1 price was available in 80 of those stores, then you
 2 would be led to believe that it was a change in price.
 3 If it was only available in five of the stores, and they
 4 were in societies we knew were a little cavalier, then
 5 perhaps it wouldn't have the same impact.

6 **MR HOWARD:** So as I understand it, I don't know whether or
 7 not this is true, but [REDACTED] or somewhere
 8 sounds as if they were slightly eccentric, so if you see
 9 the price in [REDACTED] 2p below, and it's only
 10 that store, that may lead to one conclusion; is that
 11 right?

12 **A.** Yes.

13 **Q.** But if you see it in a broader spread of the shops, so
 14 that Dorchester is 2p off, what then can you conclude?

15 **A.** To be honest, if I saw it in CWS stores, because I knew
 16 they were the company owned ones, I knew I had an issue,
 17 and then I would be -- I would go back to my business
 18 and explain that we were disadvantaged, did we wish to
 19 respond? And then I would, if I had the go-ahead, try
 20 and negotiate the differential.

21 **Q.** In the light of that discussion, can you explain to us
 22 the extent to which you understood your trading
 23 agreements that you drew up, can you explain the extent
 24 to which, as far as you were concerned, that stopped
 25 either the retailer, here Co-op, or Gallaher selling --

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1 sorry, can you explain to us firstly the extent to which
 2 you understood that your trading agreements prevented
 3 the retailers -- here Co-op -- pricing Gallaher's rival
 4 brands at a more favourable basis to the Imperial brand?
 5 **A.** They didn't stop them at all.
 6 **Q.** Was that your experience in fact or is that what you are
 7 saying you understand of the agreement?
 8 **A.** It's my experience in fact.
 9 **Q.** Right. In fact, can you tell us the extent to which, as
 10 far as you were aware, Gallaher stopped promoting its
 11 products?
 12 **A.** Sorry?
 13 **Q.** Can you tell us the extent, as a matter of fact, from
 14 your knowledge of dealing with Co-op and any other
 15 accounts, that Gallaher stopped trying to promote its
 16 products on price?
 17 **A.** No, I don't know.
 18 **Q.** Were you aware of anything?
 19 **A.** No.
 20 **Q.** No change.
 21 Now --
 22 **THE CHAIRMAN:** I thought, though, you said that at some
 23 point the Co-op decided it was not going to promote
 24 tobacco products on price any more, the most it was
 25 going to do were these point of sale things.

1 Once it had decided that, I would have thought that
 2 both the manufacturers would then stop offering them
 3 tactical bonuses because that wasn't going to be
 4 reflected in their retail price, or have I misunderstood
 5 that?
 6 **A.** I think I haven't been -- I need to be a little clearer,
 7 I apologise.
 8 **MR HOWARD:** I was going to ask about that, but please go
 9 ahead and explain that. It's a very important point
 10 that you should clarify, because I think there is some
 11 confusion.
 12 **A.** The discussion we were having was around the promotional
 13 calendar and the change in the promotional calendar that
 14 the Co-op took is it no longer reduced the price of
 15 cigarettes, it just advertised with a shelf barker.
 16 What we were doing and what my competitors were doing
 17 was still offering short-term bespoke activity to grow
 18 market share, and the Co-op accepted those, and was very
 19 keen, because we were funding -- if you think about the
 20 outcome, Imperial Tobacco were funding a more
 21 competitive retail price for Co-op, so that its
 22 customers would receive more value, although their
 23 margin expectation hadn't been reduced. So it was
 24 an Imperial promotion through Co-op stores. So the
 25 Co-op were very, very keen to -- it's like us funding

1 their promotional calendar.
 2 **THE CHAIRMAN:** So their ethical stance of not price
 3 promoting tobacco products didn't quite extend to
 4 declining tactical bonuses from ITL, it was more related
 5 to their own funded price promotions?
 6 **A.** Their ethical stance was --
 7 **THE CHAIRMAN:** That would be a slightly cynical way of
 8 expressing it.
 9 **MR HOWARD:** I think what it comes down, I think, as
 10 the Chairman is saying, their ethical stance was: "it's
 11 fine if Imperial promote, but I am aloof from these
 12 things and I am not tainted with this" is what it
 13 amounts to; is that right?
 14 **A.** Yes, I think they were keen not to publish a promotional
 15 calendar that was a Co-op calendar that had tobacco as
 16 an active promotional element, which is they wanted
 17 their cake and they managed to have their cake and eat
 18 it at the same time.
 19 **DR SCOTT:** So how, then, did you manage to get these
 20 promotions into their promotional calendar?
 21 **A.** The -- are we talking about the shelf barkers or the --
 22 **DR SCOTT:** The shelf barkers we have seen and we have seen
 23 the matrix with the point of sale material on, with the
 24 prices the same. So that we have seen. As we
 25 understand it, they produced this promotional calendar,

1 we have seen how they did that, if you as a manufacturer
 2 wanted to have a short-term pricing blitz, how did you
 3 get that into the Co-op promotional calendar?
 4 **A.** The clear answer is the people running the Co-op that
 5 I was dealing with were commercial people, who
 6 understood for the stores to be successful they needed
 7 a promotional mechanic, and us funding short-term
 8 promotions or my competitors was very useful for them.
 9 The ethical stance of the societies in my mind was much
 10 further up the supply chain, and much further -- wasn't
 11 really a commercial viewpoint, was very much an ethical
 12 corporate viewpoint. So the team I was dealing with
 13 were commercial retail operations guys who were trying
 14 to drive promotions that would bring shoppers and
 15 consumers into their stores rather than a competitor's
 16 store.
 17 **DR SCOTT:** So is this Mr Newton and Mr Owen?
 18 **A.** I would say that Mr Newton and Mr Owen were commercial
 19 animals, and I think Mr Messom and Mr Goulthorp were
 20 also commercial animals. The further you went up, the
 21 more ethical you became.
 22 **DR SCOTT:** So coming back to this question about how you got
 23 into the promotional calendar, does this mean that
 24 Mr Owen and Mr Newton were capable of getting something
 25 into the promotional calendar?

1 A. Yes. Yes, it was an agreement between Peter Newton and
 2 myself whether we had a brand listed, because his job
 3 was to grow his -- within an ethical organisation --
 4 tobacco performance.
 5 **MR HOWARD:** In simple terms, let's leave aside questions of
 6 whether or not it's cynical, the so-called ethical
 7 issue, did that in fact have any effect on the
 8 promotions that you or any of the competitors as far as
 9 you could see were running?
 10 A. No.
 11 Q. Now, I want to then ask you about something else. You
 12 were asked a lot of questions, I don't think we need to
 13 turn it up, about a reference in your statement to the
 14 effect of tactical bonuses causing a divergence from the
 15 differences.
 16 I just want you to explain this to us: you have
 17 already explained in your evidence that the objective
 18 and the incentive was to get Co-op to price at least in
 19 accordance with the differentials. Where there is
 20 a short-term promotion, so if we take Richmond and
 21 Dorchester -- I take that because simply we are all so
 22 familiar with it, and also we see the price war that was
 23 going on -- where the RRP's I think at most times were the
 24 same, where there is a short-term promotion, so let's
 25 say Gallaher had a short-term promotion on Dorchester,

1 so that they had managed to persuade Co-op to get it 5p
 2 below Richmond, where that was going on, to what extent
 3 then did your incentive arrangements under the trading
 4 agreements continue to apply?
 5 A. By the letter -- by the words in the letter, they
 6 shouldn't have, but I continued to pay the full amount.
 7 I never once reduced a business development payment to
 8 the Co-op because of pricing activity.
 9 Q. Yes. What my question was directed at: so where there
 10 was pricing activity, I think you said you shouldn't
 11 have paid but you did. I am not really worried about
 12 whether you did, but you explained to us now and other
 13 times that you shouldn't have paid. So I would just
 14 like you to explain to us, where there was this
 15 short-term promotion by one or other manufacturer,
 16 insofar as one then wanted to get a competitive position
 17 in the light of what had happened, so Gallaher has
 18 a price promotion reducing Dorchester, if you wanted to
 19 get into a competitive position, whether just above,
 20 just below or the same price, what would you have to do?
 21 A. I would have to go back to the Co-op and negotiate
 22 an activity. Because the promotional periods were set,
 23 I couldn't respond. They wouldn't respond during
 24 a promotional period because of the complexity of
 25 changing price, so I was, you know, three or four weeks

1 away from where I wanted to be.
 2 Q. Then I want to ask one final question on a different
 3 point. You were taken to a file that you hadn't seen
 4 before and asked some questions about it; it's file
 5 number 29, and tab 29. {D29/29}. If you have it, you
 6 were asked -- it's not your letter, not a letter I think
 7 you had even seen before. It was a letter from
 8 Mr Culham to Mr Fello of T&S, following this January
 9 MPI increase where the price of Richmond had gone up by
 10 5p, and across the tiers he was setting out what in the
 11 light of that the new price would be and you explained
 12 that you thought that was actually something quite
 13 simple and that all he is doing is adding 5p on.
 14 What I just wanted to ask you about was: the context
 15 in which Mr Lasok was asking you about this was saying
 16 well, it would be relatively easy, I think was the
 17 context, for Imperial to have set forward absolute
 18 maximum prices across all the tiers.
 19 I would just like you to explain to us, bearing in
 20 mind the number of products that you have and the number
 21 of tiers, the extent to which that, in your view, is
 22 feasible?
 23 A. I don't think it is feasible. I saw this letter, and
 24 I tried to describe it in a very simplistic way, because
 25 that's exactly as I saw it, which was just trying to be

1 helpful by just showing what an MPI increase would do to
 2 the pre MPI price. The complexity --
 3 **THE CHAIRMAN:** Is that the pre MPI retail price?
 4 A. Yes. Because one of the concerns you always have with
 5 a retailer is if you don't offer support/help, quite
 6 often they will come back to you and say "Well, you
 7 didn't -- we forgot, you didn't tell us".
 8 **THE CHAIRMAN:** Just to pick up on something that was in
 9 Mr Howard's question, which I had understood something
 10 different: when you offer this support after an MPI,
 11 suppose the MPI adds 5p onto the wholesale price, when
 12 you are showing what the retail price would be, by way
 13 of being helpful, do you add 5p onto the pre MPI retail
 14 price, or how else would you show that?
 15 A. The driver of the increase would be the RRP increase,
 16 and the wholesale price would increase relative to that
 17 RRP increase. So you would take your increase in RRP,
 18 you would take your VAT element out, then there would be
 19 a margin enhancement, so your wholesale price wouldn't
 20 move up by 5p, your wholesale price was an action of the
 21 margin position that would be given for the brand.
 22 **THE CHAIRMAN:** Yes, that was what I had understood, that
 23 it's not simply that you add the same amount onto the
 24 retail price as to the wholesale price, because what you
 25 are trying to keep constant is the margin, and that's

1 going to be different.
 2 **A.** And the margin changes depending on whether it's
 3 a Budget or an MPI, and it changes depending on how much
 4 margin we give as part of the MPI. So if we have an MPI
 5 for 5p, how much of that we take, and how much the
 6 retailer takes.
 7 **MR HOWARD:** So when one says there is 5p for 20 in the
 8 Richmond family MPI, is that a 5p RRP increase which you
 9 then have to work backwards to work out what share of
 10 that goes to the manufacturer?
 11 **A.** Yes.
 12 **MR HOWARD:** Okay. I have to say, I hadn't understood that
 13 until just now, so I am extremely grateful, and that
 14 makes things a lot clearer. I don't know if anybody
 15 else wants to ask a question?
 16 **DR SCOTT:** Yes. You are talking about how difficult it is
 17 because you have all these different products and all
 18 these different numbers in the matrix, but as
 19 I understand it, somebody has to work all this out, and
 20 in the case of the Co-op, a matrix was produced which
 21 had all these numbers in it, and which got you from
 22 a product, the case size, the various different
 23 discounts, the basic price and then the promotional bits
 24 and then the promotional price, across that matrix.
 25 **A.** Yes.

1 **DR SCOTT:** A price file which, as I understand it, was then
 2 sent to you for checking, so that somebody somewhere in
 3 the Co-op had to do the matrix, and then somebody
 4 somewhere in ITL had to check the matrix. So in each
 5 case, at least two people had to do the whole matrix; is
 6 that right?
 7 **A.** I think that the Co-op had to originate it, it was their
 8 document, and I think that the point that I haven't
 9 explained is that the matrix was important because it --
 10 I was never sure of their aspiration. If the Co-op were
 11 refitting stores, then their margin expectation from
 12 tobacco might change. They might need more money from
 13 some of their consistent categories to fund other
 14 activity. So the margin structure that they required
 15 from our products, I have no idea whether I was a good
 16 national account manager for the Co-op or a poor one,
 17 because I never knew whether they were making 2 per cent
 18 more on our brands than they were on competitors'
 19 brands.
 20 What I also didn't know was whether the Co-op had
 21 an overall margin expectation and whether that was
 22 moving by ethical means or by commercial means as they
 23 had stores to redevelop and spend money on.
 24 So the matrix, in my opinion, was an outcome of
 25 their requirements of the category.

1 **DR SCOTT:** So did you check the matrix or did somebody else
 2 check it?
 3 **A.** I had somebody in the office normally check it.
 4 **DR SCOTT:** So somebody else would check it. What, then,
 5 were they checking?
 6 **A.** As we have discussed before, they were checking that all
 7 the fundamentals were right, so the list price was
 8 right, that the discounts were right, if there was
 9 an off-invoice discount, that was correct, and the net
 10 price was right. There were occasions when a 3 had been
 11 put in instead of a 6, a simple mistake had great
 12 confusion within the Co-op structure.
 13 Then, as I suggested yesterday, if we were making
 14 a payment to being below RRP I was looking at the
 15 differentials, the manufacturers' retail price, as they
 16 called it, we would call it an RRP, and the shelf price.
 17 **DR SCOTT:** And in fact as I recall the document, you could
 18 actually see the margins because the margins were
 19 calculated both for the normal pricing and the
 20 promotional price, so you could actually see the
 21 margins.
 22 **A.** I could see my own margin, yes.
 23 **DR SCOTT:** Thank you.
 24 **THE CHAIRMAN:** I think the point about the price matrices,
 25 though, and their existence, is that it's true that you

1 have a lot of different SKUs but as far as the
 2 practicality of setting a maximum price for each SKU,
 3 are we talking not about creating a whole table from
 4 scratch, we would be talking about adding an extra
 5 column onto an existing table which someone in your team
 6 was already tasked with checking and working through?
 7 I think that might be the point.
 8 **A.** I think that the matrix gave the Co-op -- and let's not
 9 forget this is a Co-op matrix, this sets out Co-op
 10 pricing, what I was doing was checking that the
 11 invoicing pricing was right and also making sure that
 12 the discounts we were offering were being transferred
 13 forward. To suggest that I could offer them a specific
 14 maximum price for every one of my products within their
 15 stores, they would just not agree to. It was the
 16 pricing of their store whether it be £1 below RRP or £1
 17 below, was fundamental to their strategy.
 18 **THE CHAIRMAN:** So I think maybe it's that rather than the
 19 practicalities that's your answer on this maximum price
 20 point?
 21 **A.** Yes. If I can give a reason why it wouldn't work, if
 22 they had an alignment between -- let's just pick
 23 an organisation like Tesco, and they decided that they
 24 wanted to be aligned, so I gave them a maximum price,
 25 and they accepted it, then Tesco dropped their price,

1 they would be uncompetitive.
 2 **THE CHAIRMAN:** Well, they don't have to price at ... yes.
 3 **MR HOWARD:** I think, Madam Chairman, you said something
 4 which we didn't quite catch.
 5 **THE CHAIRMAN:** Yes. That wouldn't prevent them from pricing
 6 below the maximum in response to a Tesco reduction.
 7 **A.** Seeing how the matrix was used by the societies would
 8 make the compliance very, very difficult.
 9 **THE CHAIRMAN:** I see, yes.
 10 **MR HOWARD:** If we just turn up tab 2 in bundle 15, {D156/2},
 11 which is an example of one of the matrices, you only
 12 have to glance at it for a moment, you can see that --
 13 sorry. Put away that one away and go to 15, tab 2, just
 14 as an example.
 15 One can see that in respect of the pricing, the
 16 RSPs, that the margin, the percentage margin, differs
 17 both according to the product and the tier, doesn't it?
 18 **A.** Yes.
 19 **Q.** Whose decision is it as to what percentage margin Co-op
 20 is going to look for either on a particular product or
 21 in a particular tier?
 22 **A.** It's the Co-op's decision.
 23 **Q.** Right. Did you have any involvement in seeking to
 24 dictate to them what level of margin would be
 25 appropriate, either on a particular product or in

1 a particular tier?
 2 **A.** No, the only time I talked about margin with them was
 3 for a listing of a product, the initial entry of that
 4 product into their estate.
 5 **Q.** Right. And the context of that, that's a new product,
 6 is it?
 7 **A.** That's a new product.
 8 **Q.** What would the discussion be, what's an appropriate
 9 margin that you could try --
 10 **A.** The discussion would be the Co-op would ask me for X
 11 amount of money for listing and they would like a margin
 12 which was higher than other products that we were
 13 supplying, was the general stance.
 14 **Q.** In light of the fact that it's Co-op that sets its
 15 margin policy both in relation to individual products
 16 and across the tiers, in the light of that, can you
 17 explain the extent to which it is practical for you then
 18 to set an absolute maximum price by reference to every
 19 single product and every single tier?
 20 **A.** It's not practical.
 21 **Q.** Just tell us why?
 22 **A.** Because I am unaware of their margin expectation.
 23 **MR HOWARD:** Thank you very much indeed. I see that's
 24 a reasonably convenient time.
 25 **MR LASOK:** Madam, I wonder whether I can ask one question

1 that arises from the cross-examination?
 2 **THE CHAIRMAN:** Yes.
 3 Further cross-examination by MR LASOK
 4 **MR LASOK:** Mr Goodall, you have given evidence that the
 5 Co-op might seek to or did seek to play one manufacturer
 6 off against another by reducing the price of one
 7 manufacturer's tobacco products in order to get more
 8 money out of the second? You have said that?
 9 **A.** Yes.
 10 **Q.** Did it actually happen?
 11 **A.** Yes.
 12 **Q.** How could it have happened? How could it have happened,
 13 if the Co-op had made the ethical decision not to
 14 promote tobacco brands, it was only going to promote
 15 a brand if the promotion was manufacturer led?
 16 **A.** I think I tried to explain the difference between the
 17 commercial operating team within the Co-op and the
 18 ethical stance of the different boards and societies.
 19 The Co-op operating commerciality was looking to grow
 20 share and penetration, tobacco was part of that
 21 strategy, and it was a destination category, so they
 22 would, although they had an ethical head, would still
 23 want to grow tobacco sales. So yes, they would do it as
 24 a negotiation to ensure that manufacturers invested more
 25 money. It was a tactic that was used.

1 **Q.** And you say it was in fact used?
 2 **A.** Yes.
 3 **THE CHAIRMAN:** That they, of their own initiative, would
 4 reduce the price of, say, a Gallaher brand in order to
 5 tweak your tail, as it were, and then you would notice
 6 this and say, "Well, what's going on?" and they would
 7 hope then to use that to persuade you to make
 8 an investment in your brand?
 9 **A.** Yes, and I think I did add that it depended to happen
 10 around MPI and Budgets where the Budget increases are
 11 very complex because they are tax related, and quite
 12 often a manufacturer might round up a price or round
 13 down a wholesale price, so there were occasions when the
 14 retailer would take advantage of that.
 15 **THE CHAIRMAN:** Yes, thank you very much, Mr Goodall, that's
 16 your evidence completed. I am not sure whether
 17 Mr Goodall is one of those who is scheduled to come back
 18 at some time.
 19 **MR HOWARD:** He is not scheduled to come back, no.
 20 **THE CHAIRMAN:** I can release you, then, from the witness
 21 box, you will be no doubt relieved to here. After lunch
 22 it's Mr Goulthorp; is that right?
 23 (The witness withdrew)
 24 **MR THOMPSON:** Yes. I do not want to be at all difficult for
 25 Mr Lasok, given his timing, I think he hoped to get

1 through Mr Goulthorp and Mr Messom this afternoon. If
 2 that's feasible, then any opening remarks I might want
 3 to make would probably be best on Thursday, when he can
 4 read the transcript.
 5 **THE CHAIRMAN:** Yes.
 6 **MR THOMPSON:** The one thing I have done is prepared
 7 a chronology of the contacts and one or two extracts
 8 from the price matrices in relation to the principal
 9 brands that we have been talking about, so Dorchester,
 10 Richmond and Mayfair, and Amber Leaf, Drum and Samson,
 11 which I think feature prominently. I don't know whether
 12 it's helpful to hand them up now or whether I can deal
 13 with them on Thursday. Probably if I give them now that
 14 means Mr Lasok can have a look at them on the plane to
 15 Luxembourg.
 16 **THE CHAIRMAN:** Yes. We will meet again at 2 o'clock, thank
 17 you very much.
 18 (1.00 pm)
 19 (The short adjournment)
 20 (2.00 pm)
 21 **MR THOMPSON:** Madam, before I call Mr Goulthorp, can I just
 22 explain what documents have been handed in? Probably
 23 the easiest one is a letter headed "Gallaher", that's
 24 simply the covering letter for the draft agreement that
 25 appears at tab 21 of bundle 5. {D5/21}. In some ways

1 it would be simplest to put that at tab 21 of bundle 5,
 2 although it's technically a new document.
 3 **THE CHAIRMAN:** Do you mean annex 5?
 4 **MR THOMPSON:** Annex 5 to the SO, yes. It's simply that the
 5 draft agreement appears there, and this is the covering
 6 letter. It's referred to in the witness statement of
 7 Mr Owen.
 8 **DR SCOTT:** So this is the one which is marked "Draft"?
 9 **MR THOMPSON:** That's right. This is the covering letter
 10 that accompanied this draft.
 11 It may be the draft is in there again.
 12 **THE CHAIRMAN:** Annex ...
 13 **MR THOMPSON:** 21.
 14 **DR SCOTT:** We are going to have to be a little cautious,
 15 Mr Thompson, because I see that the copy you have handed
 16 up is not marked with the confidential markings that we
 17 have on the copy we already have.
 18 **MR THOMPSON:** Yes. I will be careful. We could simply have
 19 the two-page letter. It's simply that which is referred
 20 to in Mr Owen's --
 21 **DR SCOTT:** Would that be safer?
 22 (Pause)
 23 So if we take the letter off?
 24 **MR THOMPSON:** That would be fine, as far as I am concerned,
 25 I think. In fact there is more material. Actually it's

1 not exactly the same.
 2 **THE CHAIRMAN:** Let's just keep them both in.
 3 **MR THOMPSON:** I will bear that in mind in terms of
 4 confidential. The other documents, there are in fact
 5 four, if I just explain very briefly what they are. The
 6 first is a schedule of contacts, and that simply gives
 7 a chronology in relation to Gallaher and ITL. Then the
 8 other three are extracts from the Co-op pricing
 9 matrices, it's simply for convenience in relation to the
 10 brands with which we appear to be primarily concerned,
 11 that's Richmond Superkings, Richmond Kingsize and Drum
 12 and the competing Gallaher brands, as we understand it
 13 from the OFT's case. That is simply data which we
 14 thought would be useful to the Tribunal in understanding
 15 this part of the case effectively as a sort of shortcut
 16 to having to turn to all the pricing matrices. So
 17 that's what it is. I assume that goes in the overflow
 18 bundle. I don't know whether it would be convenient to
 19 have it in a single tab or in four different tabs.
 20 Probably a single tab would be the most convenient.
 21 **THE CHAIRMAN:** Yes. Thank you.
 22 **MR THOMPSON:** With that interlude, I would like to call
 23 Mr Goulthorp.
 24 MR MICHAEL SIDNEY GOULTHORP (sworn)
 25 Examination-in-chief by MR THOMPSON

1 **MR THOMPSON:** Good afternoon, Mr Goulthorp.
 2 **A.** Good afternoon.
 3 **Q.** Could you tell the Tribunal your name and address,
 4 please?
 5 **A.** Yes, my name is Michael Sidney Goulthorp, my address has
 6 changed in terms of what's on the statement.
 7 **Q.** What is your current address?
 8 **A.** My current address is [redacted].
 9 **Q.** You should have bundle 7 in front of you, could you turn
 10 to tab 81 and 82, please. {C7/81}. At 81 you should see
 11 your first witness statement; is that right?
 12 **A.** That's correct, yes.
 13 **Q.** At 82 {C7/42} you should see your second witness
 14 statement?
 15 **A.** Yes.
 16 **Q.** If you turn to the back page of the one at 81, you will
 17 see a signature; is that your signature?
 18 **A.** It is indeed, yes.
 19 **Q.** And at the back of 82?
 20 **A.** Yes.
 21 **Q.** Are these your statements in this matter?
 22 **A.** They are indeed.
 23 **Q.** And are they true?
 24 **A.** They are indeed, yes.
 25 **MR THOMPSON:** I believe Mr Lasok will have some questions

1 for you.
 2 Cross-examination by MR LASOK
 3 **MR LASOK:** Mr Goulthorp, now, as I understand it from
 4 Mr Owen's -- I should apologise. Have you read the
 5 transcript of any day of these proceedings?
 6 **A.** No.
 7 **Q.** When was the last time that you read your witness
 8 statement?
 9 **A.** Probably yesterday morning.
 10 **Q.** Have you read the witness statements of your colleagues
 11 from the Co-op, Mr Owen and Mr Messom?
 12 **A.** I have indeed, yes.
 13 **Q.** As I understand it from Mr Owen's witness statement, he
 14 says that individual category buyers negotiated the
 15 trading agreements until late 2001, when the decision
 16 was made effectively to centralise negotiations. That
 17 would mean that the only trading agreements that you
 18 were involved in would have been the ITL, Imperial
 19 Tobacco, trading agreement in 2002 and negotiations or
 20 discussions about the Gallaher trading agreement that
 21 was to come into force at the end of the expiry of the
 22 Gallaher agreement made in 2000, that's to say
 23 negotiations about a second Gallaher agreement in 2003
 24 or thereabouts.
 25 Does that correspond to your recollection?

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1 **A.** Yes. We were involved in negotiating the top 90
 2 agreements with the suppliers around about integration
 3 and expansion of CRTG, was the reason behind it, not
 4 an actual centralisation of negotiation ongoing.
 5 **Q.** As I understand it from your witness statement, you were
 6 involved in these matters at a relatively high level,
 7 because in paragraph 3.1 of your witness statement, your
 8 first witness statement, in 3.1 you are referring to the
 9 situation in 2002. You say in the third line that you
 10 were involved in renegotiating the trading agreements,
 11 and in the next sentence you say that generally you
 12 would attend the first meeting with each supplier,
 13 outline what CGL's or CRTG's key objectives were and
 14 then Mark Owen and others would agree the details going
 15 forward.
 16 So do I take it that that's the only involvement
 17 that you have had in the matters at issue in the present
 18 case?
 19 **A.** Yes.
 20 **Q.** Now, in paragraph 3.2 you start off by referring to the
 21 tobacco trading agreements, and which ones are you
 22 referring to here?
 23 **A.** I would be referring to the ones that we were
 24 renegotiating with the expansion and the enlargement of
 25 CRTG through United Co-operatives coming in.

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1 **Q.** So that as far as 2002 is concerned, you are only
 2 looking at the negotiation of the 2002 ITL/Co-op trading
 3 agreement?
 4 **A.** Yes.
 5 **Q.** In the fourth line, you have a sentence that goes as
 6 follows:
 7 "However, at no point did CGL (on its own behalf or
 8 on behalf of CRTG members) agree to always price in line
 9 with the manufacturer's desired parity and
 10 differentials."
 11 Now, can I ask you: are you here talking about
 12 agreements made in 2002 and 2003?
 13 **A.** I'm -- in this particular instance, yes.
 14 **Q.** When you say "At no point did CGL agree to always
 15 price", I was a little puzzled about that, are you
 16 saying that CGL agreed to sometimes price in line, or to
 17 price in line in relation to some brands but not all, or
 18 do you mean something else?
 19 **A.** To my knowledge we never ever agreed to apply
 20 manufacturers' pricing requirements. We always followed
 21 from 2001 onwards our pricing policy, and that was
 22 important. So to my knowledge, we never ever agreed to
 23 follow any manufacturer's parity or differentials.
 24 **Q.** When you say "never ever", are you now talking about
 25 2000 and 2001?

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1 **A.** I am talking from, certainly to my knowledge, 2001
 2 onwards when we implemented our pricing policy, we never
 3 had an agreement with a supplier to match parities or
 4 differentials.
 5 **Q.** When in 2001 would that change have taken place?
 6 **A.** I think the change -- it wasn't a change, it was the
 7 implementation for the first time of a national pricing
 8 policy, rather than individual categories pricing up
 9 within their budget requirements.
 10 **Q.** I think Mr Messom suggests that the retail pricing
 11 policy was finalised in June 2001. Does that accord
 12 with your recollection?
 13 **A.** Yes, and prior to that it would be handled within the
 14 individual categories but David Messom, actually, along
 15 with a colleague, co-operative brand, put together that
 16 policy and it was stringently applied from that point
 17 onwards.
 18 **Q.** When you say in paragraph 3.2, at the sentence I was
 19 reading: "however, at no point did CGL" and so forth,
 20 you are really meaning: "however, at no point after
 21 June 2001"?
 22 **A.** I have no knowledge whatsoever that we would have agreed
 23 anyway prior to that date on any supplier agreement that
 24 would link us to parities or differentials.
 25 **Q.** If you move further down that paragraph, you have

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1 a sentence that starts off "as far as I am aware"; do
 2 you have that?
 3 **A.** We are still on 3.2? Yes.
 4 **Q.** Yes.
 5 **A.** (Pause). I'm struggling to find that.
 6 **Q.** It's the fifth line from the bottom.
 7 **A.** Yeah.
 8 **Q.** Where you say:
 9 "As far as I am aware, the pricing data bears this
 10 out, there was in fact limited compliance with parity
 11 and differentials."
 12 You say there was in fact limited compliance with
 13 parity and differentials; are you just repeating
 14 something that somebody has told you about the pricing
 15 data, or have you looked at the pricing data yourself,
 16 or are you saying this because you have some other
 17 source of evidence?
 18 **A.** I'm saying there that I am not aware that we had any
 19 compliance pricing on differentials or parity. That's
 20 what I am saying.
 21 **Q.** But if it was all dealt with by Mr Newton, the buyer,
 22 you might not have heard about this at all?
 23 **A.** I would go back to the fact that we did monitor quite
 24 aggressively our pricing policy right the way down to
 25 the category level, and it was reviewed on a weekly

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1 basis in terms of the various requirements of matching
 2 our competitive sets in superstores, supermarkets and
 3 convenience stores. That in itself would pull out any
 4 issues concerning being adrift on price, in terms of who
 5 we were matching at the time, and I personally attended
 6 those meetings on a weekly basis, where we would review
 7 those with marketing and operations, and also
 8 David Messom did a separate meeting on the same -- in
 9 the same discipline of actually ensuring that we were
 10 keeping to our pricing policy.
 11 So those would be the areas that would flag up any
 12 discrepancies at category level.
 13 **Q.** You see, both in this case and -- that's to say the
 14 Co-op's case -- in relation to other retailers, we have
 15 contemporaneous documents that indicate that Gallaher
 16 and ITL would take steps to ensure that the retailers'
 17 pricing levels were in line with the market or with
 18 their competitors, in some instances we have documents
 19 that indicate --
 20 **MR THOMPSON:** I don't think it's really a fair line of
 21 questioning without actually looking at something that
 22 bears this proposition out.
 23 **THE CHAIRMAN:** Well, let's see where we get to.
 24 **MR LASOK:** The Tribunal has seen these documents, and if
 25 I say something that's inaccurate, then I'll be pulled

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1 up short on it.
 2 **MR THOMPSON:** Sorry, that's why I did stand up because we
 3 haven't seen any such documents.
 4 **MR LASOK:** We have.
 5 **THE CHAIRMAN:** I am not sure he finished his sentence.
 6 Describe the documents again that you are saying we have
 7 seen.
 8 **MR LASOK:** Documents in which Gallaher and ITL point out to
 9 a retailer that its pricing may be out of line with the
 10 market, and in some instances you have a table in which
 11 you have a number of specific retailers whose prices are
 12 compared with the retailer in question. I am not saying
 13 that a document of that nature is in the file relating
 14 to the Co-op. The point I am putting to the witness is
 15 something, in fact, that I think Mr Goodall accepts,
 16 which is that ITL -- and we also have a Gallaher
 17 document on this, concerning the Co-op -- did draw the
 18 Co-op's attention, as it did in the case of other
 19 retailers, to general price levels in the market.
 20 So that was the preamble to what I was going to say.
 21 So that is the kind of background. And hence, if, as
 22 a result of those efforts by the manufacturers, the
 23 Co-op pricing was in line with your overall strategy,
 24 then you wouldn't come to hear about compliance by the
 25 Co-op with ITL's or Gallaher's strategic pricing

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1 differentials, would you?
 2 **A.** We would be applying our pricing policy irrespective of
 3 whether -- and a lot of suppliers would always bring to
 4 our attention their pricing positioning, it was not
 5 unknown for that to take place. But we would apply
 6 religiously our pricing policy, and it didn't matter to
 7 us whatever a supplier said or indicated what their
 8 pricing brands were compared to other brands or in other
 9 retailers. We ignored those and stuck to our pricing
 10 policy of matching, following our agreed competitive set
 11 across our price bands.
 12 **Q.** Now, the policy of following the agreed competitive sets
 13 across the price bands only came in, I think, in
 14 June 2001?
 15 **A.** As a national policy, yes. Prior to that we had it
 16 within each category. That is true.
 17 **THE CHAIRMAN:** What do you mean, category of store or
 18 category of product?
 19 **A.** Category of product, Madam Chairman. We would have each
 20 category with a category team and management, who would
 21 actually implement and manage the pricing and ranging of
 22 that category in line with the budget requirements of
 23 the business.
 24 **MR LASOK:** But you would only hear about what was going on,
 25 or rather what Mr Newton was doing, if there was

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1 an issue about it?
 2 **A.** Yeah, that's a fair comment, but we did particularly put
 3 a lot of emphasis on our pricing, it was very, very
 4 important to us and we spent a lot of time on it, and at
 5 quite an eye level, and if a category was found to be
 6 consistently out in terms of not applying that policy,
 7 we would take action and override the category team, and
 8 that was paramount in what we were doing.
 9 **Q.** Now --
 10 **DR SCOTT:** Sorry. Can I just ask one question? You
 11 mentioned a budget, and what that suggests is that you
 12 had to watch the margin as well as watching the
 13 comparisons with your competitor set. Is that right?
 14 **A.** Yes. I mean it was a combination of the balance between
 15 sales volume, cash margin and percentage margin, it was
 16 important in getting that balance right. It was vital,
 17 particularly in an area like tobacco where there wasn't
 18 much percentage margin, and was critical to footfall and
 19 driving sales, particularly in the convenience market.
 20 **MR LASOK:** Now, going back to paragraph 3.2 of your witness
 21 statement, could you look at the last sentence, please?
 22 **A.** Yes.
 23 **Q.** You say there that:
 24 "Regardless of levels of compliance, however, CGL
 25 would expect any agreed payment under the trading

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1 agreements to be made in full."
 2 Does that refer to the position in -- we are looking
 3 here at tobacco agreements, not other agreements -- 2002
 4 and 2003?
 5 **A.** Yes.
 6 **Q.** And not 2000 and 2001?
 7 **A.** It would -- well, it was always -- we always expected
 8 our agreements to be delivered. We -- in fact, we
 9 never -- I don't know of any supplier agreement that
 10 wasn't delivered in terms of the money and bonuses that
 11 we had negotiated, irrespective of whether we hadn't
 12 made compliance in terms of the numbers of promotions
 13 being carried out or in terms of the pricing,
 14 recommended retails and so on. We never ever had
 15 a supplier, and not to my knowledge anyway, the tobacco
 16 suppliers not paying the money, whether we failed in
 17 promotional activity totally or indeed on some of the
 18 CRTG members pricing above recommended retails.
 19 **Q.** But what was the reason for that? Was it because, in
 20 your experience, in 2002/2003 the tobacco manufacturers
 21 simply made a commercial decision? Or was it your
 22 expectation that whatever the agreement said, you were
 23 entitled to a sum of money?
 24 **A.** It was the latter. Whatever the agreement said, we had
 25 signed up to a total pot of money, and how that was

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1 structured by the manufacturer in our instances didn't
 2 particularly matter to us. We were going to deliver
 3 what we agreed to deliver in terms of our policies, and
 4 we would expect the payment to come through at the end
 5 and irrespective of whether we had complied totally. In
 6 fact, in CRTG it was extremely difficult to guarantee
 7 100 per cent compliance of anything.
 8 **Q.** You see, our problem is we have no contemporary document
 9 in which you communicate that to either of the tobacco
 10 manufacturers. Did you communicate it to them?
 11 **A.** In document terms, no, I am certainly not aware of any
 12 documents that that is written down in and communicated
 13 in that way. I am absolutely certain that both
 14 Gallaher's and ITL understood the fact that we expected
 15 the payments to be made.
 16 **Q.** Let's move on now to the ITL/Co-op agreement that
 17 I think you were involved in. I wanted specifically to
 18 look, to start off with, at paragraph 4.2 in your
 19 witness statement. This is where you have referred to
 20 a letter dated 9 July 2002, and in the middle of
 21 paragraph 4.2, you say that the 9 July letter was
 22 intended to clarify what you understood was "our agreed
 23 position on pricing", under ITL's draft CRTG trading
 24 agreement 2002. So that's what I am going to focus on.
 25 **A.** Okay.

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1 **Q.** It's that agreement and also the 9 July 2002 letter. To
 2 that end, I wonder whether you could possibly look at
 3 annex 15, please, I think it may be scattered around in
 4 front of you. Could you go to tab 16, please. So if
 5 you have tab 16, I don't know, have you seen it
 6 recently? {D15/16}.
 7 **A.** I've seen it recently, yes.
 8 **Q.** You will see that it starts off with a letter dated
 9 5 July 2002, and that is a letter from Co-operative
 10 Retail, in fact it's signed by Mark Owen, and it's to
 11 Mr Martin Goodall of ITL. Under the heading "Year 2002
 12 Trading Terms", he confirms the agreement for 2002 and
 13 summarises the main elements. Right?
 14 Then if you look two pages further in, you have the
 15 CRTG trading agreement 2002, and in the middle of that
 16 page you have a bit about pricing and promotion where it
 17 refers to supporting differentials and point of sale
 18 material.
 19 Then if you go a couple of pages further on, you
 20 have a page with a heading in it "Pricing and
 21 Promotion". Do you have that page?
 22 **A.** I have indeed, yes.
 23 **Q.** I wonder whether you could read that page from the
 24 heading "Pricing and Promotion", it runs over until the
 25 next page, to the heading "Category Information".

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1 (Pause)
 2 A. Yes.
 3 Q. So at this stage, as I understand it, what we have here
 4 is the Co-op confirming its agreement with the terms
 5 which we can see set out here, including the bits about
 6 pricing and promotion?
 7 A. I think what Mark Owen is confirming in his -- in the
 8 letter is the basic trading terms and the total amounts
 9 of money that form that agreement.
 10 Q. Yes.
 11 A. I am not certain that the CRTG agreement with Imperial
 12 Tobacco would have been included with this letter.
 13 Q. We can check that, but thus far everybody has worked on
 14 the basis that this is the terms to which reference is
 15 made in Mr Owen's letter dated 5 July.
 16 A. Yes.
 17 Q. Right.
 18 A. It would be unusual for him to summarise it twice,
 19 I mean, having already got it in the Imperial Tobacco
 20 agreement here. Looking at his letter that he has sent
 21 out, it would suggest to me that he was in fact sending
 22 that out just confirming the total agreement and deal.
 23 Q. If you look on this page with "Pricing and Promotion" on
 24 it; do you have that?
 25 A. Back on the Imperial Tobacco one, yes?

1 Q. Yes.
 2 A. Yeah.
 3 Q. There is a paragraph that explains what that element of
 4 the agreement is about, and it refers to ensuring
 5 Imperial Tobacco products are priced in line with the
 6 industry agreed strategic pricing differentials across
 7 all segments of the tobacco category, and it then says:
 8 "A copy of the agreed differentials is attached."
 9 Did you see these terms before 5 July or after
 10 5 July?
 11 A. No.
 12 Q. Well, did you see them after 5 July?
 13 A. What I actually saw was the final -- the document that
 14 Mark Owen put together, the letter that he sent to
 15 Martin Goodall.
 16 Q. Right.
 17 A. Not the Imperial Tobacco agreement.
 18 Q. You hadn't seen this when you wrote your 9 July 2002
 19 letter?
 20 A. I saw -- had seen Martin -- Mark Owen's letter, not the
 21 Imperial agreement --
 22 Q. Okay, fine.
 23 A. -- which summarised the agreement. All I was interested
 24 in was the top line figures for range, implementation,
 25 display, pricing, promotion, and the total line at the

1 bottom in terms of what monies we were actually going to
 2 get, and my follow-up letter was clarifying that.
 3 Q. Okay. So could you keep a finger in the page which has
 4 the pricing and promotion bit on it, in it? So keep one
 5 finger on that so you don't lose it, not necessarily the
 6 right-hand finger, could be the left-hand finger, and
 7 move to tab 17. It's just because it might be useful to
 8 flick back to that page. {D15/17}.
 9 A. Yes.
 10 Q. Now, tab 17 ought to be a copy of the letter signed by
 11 you that went to Mr Batty and was dated 9 July?
 12 A. It is indeed.
 13 Q. Could you just re-read it, please?
 14 A. Yes. (Pause). Okay.
 15 Q. If you look at the second paragraph of that letter, the
 16 one that begins "In terms of the price differentials";
 17 right?
 18 A. Yes.
 19 Q. That refers to a price matrix which defined your
 20 strategic pricing position, and you say that that
 21 document, the price matrix, will recognise the need to
 22 maintain price differentials across the competing
 23 segments of the tobacco category; right?
 24 A. Yes.
 25 Q. If you flick back to the page with "Pricing and

1 Promotion" on it, that paragraph seems to pick up the
 2 wording of the first paragraph under the heading
 3 "Pricing and Promotion" because that paragraph, this is
 4 the one beginning "This element of the agreement",
 5 refers to pricing differentials across all segments of
 6 the tobacco category?
 7 A. Yeah.
 8 Q. Looks a bit like that, doesn't it?
 9 A. I think you have to take the context of why I sent this
 10 letter, whether it looks a bit like the Imperial Tobacco
 11 agreement or not.
 12 We had had quite difficult discussions with Imperial
 13 Tobacco about the new agreements. One of the problems
 14 we had at the time was the new members coming into CRTG
 15 were pricing above recommended retails in a lot of their
 16 stores, and United was quite a large society coming into
 17 CRTG at the time, and a very important one, because it
 18 had actually been a founding member of a competitor --
 19 competitive buying group within the Co-op movement, so
 20 it was important. And Imperial Tobacco had had major
 21 problems with the societies pricing way above
 22 recommended retails, and they were very, very concerned
 23 that, having negotiated a new deal at a higher level of
 24 support, that the income in societies would actually
 25 deliver in terms of maintaining retail prices nearer to

1 being on line with recommended retails or below. That
 2 was what was concerning them. And that was part of the
 3 reason of me writing to Roger Batty to try and give some
 4 comfort in terms of what we were doing to stop that
 5 happening, and to try and get some discipline into the
 6 CRTG pricing agreement, and it was as simple as that.
 7 **Q.** If you look at the third paragraph in your letter dated
 8 9 July, that says:
 9 "In addition, the price guidelines will ensure
 10 consistent price disciplines are applied by CRTG across
 11 the price bands currently operated."
 12 **A.** Yeah.
 13 **Q.** If you go back to the pricing and promotion bit and look
 14 at the second paragraph after the heading "Pricing and
 15 Promotion", it looks as though your letter is picking up
 16 that paragraph, because that paragraph says:
 17 "This payment is agreed to reward the consistent
 18 price disciplines offered by CRTG within the current
 19 three price bands currently operated."
 20 Looks like it, doesn't it?
 21 **A.** It does, but there were more than three price bands
 22 within CRTG.
 23 **Q.** Well, I think that we have documents which indicated
 24 that an earlier stage you had moved from four to three.
 25 **A.** Yeah --

1 **Q.** Are you referring to Alldays?
 2 **A.** I am referring to the fact that CRTG had guidelines on
 3 pricing and, just because we issued the pricing
 4 guidelines nationally, other societies within CRTG
 5 operated more than three price bands.
 6 **Q.** Okay. Now, if we go back to your letter of 9 July --
 7 **A.** Yeah.
 8 **Q.** -- in the fourth paragraph, you refer to the fact that
 9 the price matrix would recognise pricing opportunities,
 10 and you refer specifically to the convenience sector,
 11 and that it could result in certain retail prices moving
 12 closer or equal to the current manufacturer's retail
 13 price. I am actually more interested in the penultimate
 14 paragraph, which is the one by the second holepunch,
 15 beginning "Therefore, based on the above"; do you have
 16 that?
 17 **A.** Yes, I have.
 18 **Q.** Because that says:
 19 "Therefore, based on the above, which summarise the
 20 agreed positioning at our recent meetings, we are
 21 confident that we have satisfied the requirements to
 22 ensure the payment of the ongoing off-invoice support
 23 discounts and the negotiated central payments in respect
 24 of pricing and promotion."
 25 That looks as though you are saying to ITL, "Well,

1 we think that our position is that we have satisfied the
 2 requirements, compliance with which is necessary in
 3 order to get our payment under these terms", that's to
 4 say the terms of the 2002 agreement. That's what it
 5 looks like. Was that your meaning?
 6 **A.** No. What I actually meant, and this letter is clear, is
 7 taking you back to what I was describing earlier. In
 8 the discussions we had with Imperial, there was major
 9 concerns about the societies not consistently adhering
 10 to selling tobacco at recommended retails, and Imperial
 11 Tobacco were giving bonuses for that activity, and that
 12 was a major concern to them, particularly with a large
 13 society coming in the size of United, which was
 14 considerable.
 15 So what I was reaffirming there was is exactly that,
 16 that we intended to ensure that more of the convenience
 17 stores would move closer to recommended retails than
 18 they currently were, hence the reason we would then
 19 satisfy the concerns and been able, without difficulty,
 20 to take on the extra bonuses. It was an enlargement, it
 21 was a big society coming in, with several hundred
 22 stores. So that's what was the concern was about, and
 23 that's what I meant in the letter.
 24 **Q.** Could you turn to -- this is where a multiplicity of
 25 fingers may be required -- your witness statement,

1 please. I think the witness statement will be in
 2 a different file. I don't know whether it's the one to
 3 your right.
 4 **A.** Do I need to keep a finger in this one? (indicated).
 5 **Q.** It may be useful. It depends just how many fingers you
 6 have free.
 7 **A.** Okay. Right.
 8 **Q.** So could you go to paragraph 4.3 of your witness
 9 statement.
 10 **A.** Yes.
 11 **Q.** Just could you read that to yourself, please.
 12 (Pause)
 13 **A.** Yeah.
 14 **Q.** Because I was rather interested in the fact that, as you
 15 put it:
 16 "The letter was carefully crafted by Mark Owen and
 17 myself to provide some comfort to ITL on a number of
 18 issues of concern to them, particularly because we
 19 wanted to ensure, so far as possible, that ITL would pay
 20 us the negotiated payments under the trading agreement,
 21 but without making any actual concessions in terms of
 22 our own retail pricing."
 23 Now, the careful crafting, can you just explain to
 24 us how this letter was written? Were you presented by
 25 Mr Owen with a draft, you looked over it, and what did

1 you do? Did you sign it or did you make amendments to
 2 it? That's the kind of information I am looking for.
 3 **A.** It would have been in a draft form initially, then we
 4 would have -- we actually both -- I remember it well,
 5 really, we both went through it in some detail, and put
 6 it together, finely tuned it and got it back out to
 7 Roger Batty basically supporting the previous meetings
 8 we had had and the agreement we wanted to get in place.
 9 **Q.** Now, you see, I've already drawn your attention to the
 10 fact that the second and third paragraphs of your letter
 11 of 9 July are picking up wording in the terms of the ITL
 12 trading agreement, and I think you have said that at
 13 this stage, 9 July, you had never seen that document?
 14 **A.** No, I hadn't.
 15 **Q.** So is it the case that the second and the third
 16 paragraphs will be language that Mr Owen drafted?
 17 **A.** It could be. It could be, but I mean, the sort of
 18 language that's in here, the words we are using, are
 19 quite familiar words we would use in the category arena
 20 anyway. So there is nothing in here which would say
 21 "I wouldn't say it that way". It's some time ago, of
 22 course.
 23 **Q.** I appreciate it's some time ago, but we are looking at
 24 a situation in which, as I understand your evidence, it
 25 looks as though it's Mr Owen who has picked up the

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1 language from the trading agreement with ITL and
 2 incorporated it in the second and the third paragraphs
 3 here. You hadn't seen that document. What did you do?
 4 You just looked at the language that he put in here and
 5 you thought that the meaning was clear?
 6 **A.** I thought it was very clear in terms of what we were
 7 trying to get through to Imperial, which was about the
 8 fact that we were talking about our pricing policy as
 9 well, because I think it's important, that last
 10 paragraph in the witness statements as well, we are
 11 talking about ensuring we can not compromise our own
 12 pricing policy.
 13 **Q.** You see, I'll be blunt about this, I am an outsider in
 14 the sense that I am not an employee of ITL, I am not
 15 an employee of the Co-op, I wasn't involved in this
 16 correspondence. But when I look at the trading
 17 agreement with ITL and I look at your letter, and you
 18 tell me in your witness statement that your letter is
 19 talking about the agreement that had been struck with
 20 ITL, what I do, just reading the wording, is to
 21 interpret this letter as communicating to ITL the
 22 Co-op's adherence to the strategy, the pricing strategy,
 23 that ITL had outlined in the trading agreement. So that
 24 when we get to the penultimate paragraph, the one that
 25 goes "therefore, based on the above", that looks to me

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1 as though you are reassuring ITL that you are complying
 2 with their pricing policy set out in the trading
 3 agreement.
 4 Now, is that a correct reading of this letter?
 5 **A.** No, it's not a correct reading of this letter.
 6 **Q.** Well, why isn't it?
 7 **A.** Because I wrote the letter in its final -- in final
 8 delivery of it, and we would not agree to comply with
 9 Imperial Tobacco's pricing policy. We just wouldn't.
 10 I wouldn't, didn't, and it's as simple as that, really.
 11 **DR SCOTT:** Sorry. Can you explain how we read the words "we
 12 are confident that we have satisfied the requirements"?
 13 **A.** Yes. The requirements were relating to the fact that
 14 Imperial Tobacco were extremely worried about the fact
 15 that a large incoming society was coming into CRTG,
 16 a considerable number of stores, and was known prior to
 17 joining CRTG for selling tobacco way above the
 18 recommended retails. And Imperial Tobacco were very,
 19 very concerned that their bonus that they would be
 20 paying us would not be delivered by the incoming society
 21 correctly. That's where the fear was, and it was about
 22 the incoming society and its effect on CRTG that
 23 Imperial Tobacco wanted some reassurance.
 24 **DR SCOTT:** As we understand it, you had not at this stage
 25 read what the requirements were.

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1 **A.** In terms of the --
 2 **DR SCOTT:** Mr Owen had apparently read the requirements,
 3 and, as Mr Lasok has explained to you, he has reflected
 4 their wording earlier in the letter.
 5 **A.** But I was aware of the requirements because we had
 6 a meeting with Imperial, and it was at that meeting
 7 where Imperial Tobacco strongly stressed the issue of
 8 United coming in, and diluting the disciplines within
 9 CRTG, and it was from that meeting that we followed on
 10 and did the initial discussions, and this letter
 11 actually states: "Further to our recent integration
 12 negotiations ..." It was at that those integration
 13 negotiations that Imperial Tobacco really made the point
 14 on pricing way above recommended retails.
 15 **THE CHAIRMAN:** You say that by the time you wrote this
 16 letter you hadn't seen the terms of the agreement, but
 17 were you aware, either from your discussions with
 18 Mr Owen or your discussions in these meetings with ITL,
 19 that the terms of the agreement covered differentials
 20 between competing brands as well as reference points
 21 with RRP?
 22 **A.** The answer to that is we would not have implemented
 23 parities or differentials at all.
 24 **THE CHAIRMAN:** Well, that's not my question as to whether
 25 you would implement it. My question was: were you

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1 aware, when you wrote this letter to Mr Batty, that the
 2 agreement that had just been signed between the Co-op
 3 and the ITL dealt with brand parities and differentials
 4 between ITL and Gallaher brands?
 5 **A.** No.
 6 **THE CHAIRMAN:** You weren't aware that that was an aspect of
 7 the agreement at all?
 8 **A.** No. No.
 9 **DR SCOTT:** Mr Goulthorp, as I understand it, from
 10 a commercial point of view, you were very well aware
 11 that there are some consumers who are price sensitive,
 12 and your awareness of price sensitivity meant that you
 13 were aware of the need for the Co-op, in relation to
 14 such consumers, to be price sensitive as between Co-op
 15 pricing and the pricing of nearby competitor retailers.
 16 **A.** Yes.
 17 **DR SCOTT:** Okay. Within a Co-op store, how would you expect
 18 a price sensitive customer to choose between tobacco
 19 products where they are in the same part of the tobacco
 20 product range, Richmond and Dorchester for example, as
 21 between Richmond and Dorchester?
 22 **A.** With another competitor?
 23 **DR SCOTT:** Yes. I'm in one of your stores, I want to buy
 24 a cigarette, a pack of cigarettes. How am I going to
 25 make up my mind in the store as between Richmond and

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1 Dorchester?
 2 **A.** Well, first of all, usually --
 3 **DR SCOTT:** I am a price sensitive shopper, remember.
 4 **A.** Yes. Usually a smoker would follow his or her brand and
 5 would stay with it, very rare they swapped that brand,
 6 and they would be conscious of the pricing of those
 7 brands within the competitors within the area. They
 8 would know the price of those cigarettes, what the
 9 values were at the time. It would be very important to
 10 them. So on a high street which might have some CTNs,
 11 a couple of convenience stores or whatever, they would
 12 know exactly who was selling their brand at the cheapest
 13 price.
 14 **DR SCOTT:** So what you are suggesting is that customers are
 15 so loyal to their brand that it would be unnecessary for
 16 a manufacturer to have to worry about the absolute level
 17 of pricing or the differential level of pricing because
 18 the customer would come in and automatically choose
 19 their brand; do I have that right?
 20 **A.** Customers were very brand loyal in terms of tobacco.
 21 Very brand loyal.
 22 **DR SCOTT:** So would it have surprised you if, during the
 23 negotiations with ITL, ITL were concerned about the
 24 differential between their cigarettes and cigarettes
 25 sold on behalf of another manufacturer?

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1 **A.** It is not unusual at all for any brand manufacturer to
 2 be concerned or aware of their competitive brands'
 3 pricing. It was very common. I mean, any supplier
 4 coming into a category, whether it was soap powders or
 5 cans and packets, would be very conscious, very
 6 conscious indeed, that Coca-Cola was on at a price
 7 compared to Pepsi. So all manufacturers were always
 8 talking to us about their pricing positioning against
 9 their brand competitors, always. It was -- it went with
 10 the territory, but it didn't change our positioning in
 11 terms of how we priced. We priced our policy
 12 accordingly to the size of store and its location and
 13 the type of customer base we were trying to generate.
 14 **DR SCOTT:** So what you are saying to me is that you would
 15 understand it if somebody like Mr Batty, the national
 16 account controller at ITL, was concerned about the
 17 relative pricing between ITL tobacco products and those
 18 of his competitors?
 19 **A.** I would understand that, yeah.
 20 **DR SCOTT:** You would understand it?
 21 **A.** Yeah.
 22 **DR SCOTT:** So if you were Mr Batty receiving a letter like
 23 this, what would be in the front of your mind --
 24 Mr Batty's mind -- when you saw the words "price
 25 differentials"?

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1 **A.** He would in his mind be remembering the recent
 2 negotiations that took place, which was quite heated at
 3 the time, if I remember, about the fact -- and I go back
 4 to it, and I apologise for repeating it -- that we had
 5 this major issue of pricing in a lot of the societies
 6 above recommended retail, and he was paying money for
 7 that and not getting the required discipline. So that
 8 was what would exactly be in his mind about this letter,
 9 in my view.
 10 **DR SCOTT:** If I am Mr Batty for a moment and I am really
 11 concerned to build my market share, and I want you to
 12 put yourself back in the position of Mr Batty thinking
 13 about the price conscious customer coming into one of
 14 those newly arrived stores, they go into the store,
 15 there are two comparative cigarettes, Richmond and
 16 Dorchester we will say, yes, the prices are above RRP;
 17 what's worrying Mr Batty? Is it the fact that the
 18 prices are above RRP, or is he more worried in terms of
 19 market share about the fact that his ITL cigarette is
 20 being priced at a price above the Gallaher product?
 21 **A.** He could well be worried, but the fact he would know
 22 undoubtedly, knowing Roger Batty, certainly knew that we
 23 were adamant about our pricing policy, and he would know
 24 that our pricing policy would trump all other caveats
 25 that may be there. So he knew enough about the CRTG to

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1 understand that. So he would be worried about that,
 2 yes.
 3 **DR SCOTT:** So he would be worried about that, so in
 4 negotiating with you, would he be inclined to stress the
 5 need to ensure that his cigarettes were priced in a way
 6 that did not disadvantage him against Gallaher?
 7 **A.** I can't remember him doing that, and I've got to say it
 8 would be very, very difficult for us to deliver it
 9 anyway.
 10 **DR SCOTT:** So you would be surprised if Mr Owen had
 11 negotiated an agreement which looked as though ITL
 12 wanted that as a result?
 13 **A.** I would be extremely surprised.
 14 **DR SCOTT:** Thank you.
 15 **MR LASOK:** Mr Goulthorp, were you aware that the Co-op had
 16 agreed an extension of the Gallaher/Co-op trading
 17 agreement until 31 December 2003?
 18 **A.** I wasn't aware at the time, no.
 19 **Q.** But now you are aware that it had? Because I think the
 20 correspondence dealing with that is not correspondence
 21 that you were copied in on, at least?
 22 **A.** And Gallaher wasn't a large -- it wasn't as important to
 23 us as Imperial.
 24 **Q.** So the fact is that in 2003 or thereabouts, without your
 25 knowledge, the Co-op agreed to continue the operation of

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1 a trading agreement that had parity and differentials in
 2 it, that was the Gallaher agreement; in 2002, apparently
 3 without your knowledge, the Co-op entered into a trading
 4 agreement with ITL which also contained reference to
 5 ITL's strategic pricing differentials, and I put it like
 6 that because the document -- the agreement which is in
 7 the tab attached to Mr Owen's letter was not a document
 8 that you had seen. That's what happened. Then we get
 9 to --
 10 **MR THOMPSON:** I don't think this is a very fair way of
 11 putting it, without having cross-examined Mr Owen.
 12 **THE CHAIRMAN:** What we are trying to ascertain, which I am
 13 now rather confused about, is what Mr Goulthorp knew
 14 about the negotiations leading up to the signing of the
 15 agreement and the contents of the agreement that we have
 16 seen, and that's what I think we are trying to clarify.
 17 I am not clear whether, now, Mr Goulthorp, you are
 18 saying that Mr Owen was acting in breach of Co-op policy
 19 in entering into this agreement and purporting to sign
 20 the Co-op up to complying with ITL's pricing and
 21 differential requirements; is that what you are saying?
 22 **A.** No, I am not, Madam Chairman, I am still of the belief
 23 that we in fact did not sign up to an agreement which
 24 guaranteed parities or differentials.
 25 **THE CHAIRMAN:** Well, it's not whether it guaranteed them,

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1 it's whether by signing that agreement you led ITL to
 2 believe, however falsely, that you would try your best
 3 to achieve that in the stores, if I can put it like
 4 that.
 5 **A.** The answer to that is no. We wouldn't have tried to
 6 deliver that in the stores at all.
 7 **THE CHAIRMAN:** I am not looking at what you, in your own
 8 mind, were thinking. What I am asking is: what were you
 9 telling ITL that you would do?
 10 **A.** I think what I was telling ITL what we would do is
 11 exactly what I put in the letter, and that is we would
 12 deliver our pricing policy, we would endeavour to bring
 13 into line the other societies and eradicate the large
 14 proportion of above recommended retail pricing, and
 15 bring discipline into the CRTG that hadn't been there
 16 before. I think that's what I was agreeing to.
 17 **THE CHAIRMAN:** Do you say the purpose of this letter that
 18 you wrote was to make clear to Mr Batty that, whatever
 19 agreements you had signed, you were going to do your own
 20 thing as far as the pricing of ITL's products was
 21 concerned? That was the message you were trying to get
 22 across?
 23 **A.** Yes. Without being too aggressive in terms of how I was
 24 putting it, but that's exactly what the message was:
 25 look, Roger Batty, this is what we are going to do, yes

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1 we are going to try and help and assist in getting rid
 2 of the above recommended retail pricing, but in CRTG we
 3 are following our pricing policy, and that is it. And
 4 I felt that was sufficient on our behalf to ensure that
 5 the monies would be paid at the end of the year. And in
 6 fact they were.
 7 **MR LASOK:** Mr Goulthorp, can I ask you to look at the
 8 penultimate paragraph in your letter of 9 July. This is
 9 the one where you say in the second line that:
 10 "We are confident that we have satisfied the
 11 requirements to ensure the payment."
 12 I put it to you you simply weren't saying to
 13 Mr Batty that, irrespective of what the agreement said,
 14 you felt entitled to your payment; what you were doing
 15 was you were saying to Mr Batty "don't worry, we have
 16 signed up to these 2002 trading terms, and we are giving
 17 you information that should make you satisfied that we
 18 have fulfilled the requirements for receiving the
 19 payment". That's what that paragraph says, doesn't it?
 20 **A.** No. I go back to what I said. I believe it actually
 21 says what was discussed in detail at the previous
 22 negotiations, it actually says "We are going to put into
 23 CRTG an agreed pricing structure that will put more
 24 discipline into it and we will be able to ensure that
 25 stores will not be pricing above recommended retail as

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1 they have done in the past" and in my view that is
 2 sufficient for them to pay our agreed central payments.
 3 That's what it says.
 4 **THE CHAIRMAN:** When you say "recommended retails", do you
 5 mean what the Co-op recommended or what the
 6 manufacturers recommended?
 7 **A.** The manufacturers' recommended retails, where we had
 8 a number of societies that were pricing way above that
 9 and had done for some time.
 10 **MR LASOK:** I put it to you that actually this letter had two
 11 authors, there was Mr Owen and yourself. Mr Owen
 12 produced a draft. In that draft he set out certain
 13 things like the second and the third paragraph of the
 14 letter that related directly to the terms of the
 15 agreement that he had confirmed a few days earlier with
 16 ITL was the agreed position as between the Co-op and
 17 ITL. You looked over this draft and made certain
 18 amendments to it. It may be that now your recollection
 19 is that the letter is focused on one particular
 20 situation or aspect of the discussions at the time, but
 21 I put it to you that this letter covers a range of
 22 matters, some of which -- such as the second and third
 23 paragraphs -- are concerned with reassuring ITL that the
 24 Co-op was going to comply with the strategic pricing
 25 requirements agreed to by the Co-op with ITL, and the

1 penultimate paragraph of that letter unequivocally shows
 2 that you were communicating to ITL your performance and
 3 willingness to perform the agreement already entered
 4 into for the purpose of receiving the payment. That,
 5 I am putting to you, is what this letter says.
 6 Do you agree with it or not?
 7 **A.** I totally disagree.
 8 **MR LASOK:** I have no further questions.
 9 **THE CHAIRMAN:** Mr Howard, do you have any questions? No.
 10 (Pause)
 11 Questioned by THE TRIBUNAL
 12 **DR SCOTT:** Mr Goulthorp, could you take your witness
 13 statement and turn -- it is the first one -- to
 14 paragraph 4.8. You might like to read it. Okay?
 15 **A.** Yeah.
 16 **DR SCOTT:** I read that as saying that this letter was
 17 deliberately written to make it sufficiently clear that
 18 you would not agree to implement ITL's pricing strategy.
 19 Is that an accurate reading of that paragraph?
 20 **A.** It is.
 21 **DR SCOTT:** Can you explain to me how Mr Batty would read
 22 that clearly from your letter?
 23 **A.** I can't second-guess Roger Batty in that respect, but
 24 clearly he was at the initial negotiations, clearly he
 25 understood our positioning from that negotiation. He

1 would be totally aware that we would not dilute our
 2 pricing positioning in any way, shape or form.
 3 I think the letter really summarised some of the
 4 things, some of the actions we were going to do in terms
 5 of within CRTG, which would give him some comfort, and
 6 at the same time the above pricing on recommended
 7 retails.
 8 So I think he understood that, and we do make it
 9 clear in the letter, that, you know, we are implementing
 10 our pricing strategy. So he knew that. He knew that
 11 strategy in terms of what it outlined and where it took
 12 us. He wouldn't know which retailers we would be
 13 benchmarking and so on, but he would know the strategy.
 14 So I would think he would understand that from that
 15 letter that was all he was going to get.
 16 **DR SCOTT:** Sorry, what 4.8 says is "This letter was
 17 deliberately written to make that sufficiently clear"
 18 that you would not agree to implement ITL's pricing
 19 strategy.
 20 **A.** Yes.
 21 **DR SCOTT:** I appreciate that you had not seen the agreement,
 22 but do you think -- well, we will put it to Mr Owen
 23 whether he thinks the letter which he co-drafted with
 24 you does make that sufficiently clear, but you think
 25 that it does make it --

1 **A.** Yes, I do.
 2 **DR SCOTT:** Thank you.
 3 Re-examination by MR THOMPSON
 4 **MR THOMPSON:** Since we are on this, Mr Goulthorp, can we
 5 just look at 4.8 again. The sentence that you were just
 6 taken to, I think Dr Scott only read you the first part,
 7 you say:
 8 "... would not agree to implement ITL's pricing
 9 strategy, but would implement CGL's own strategy."
 10 So that's the point that's being made. When we look
 11 at the letter, if you have that --
 12 **A.** Yes.
 13 **Q.** -- is it the first paragraph that you had in mind there?
 14 **A.** Yes.
 15 **Q.** Or possibly the second --
 16 **A.** Both together.
 17 **Q.** -- and third, that you are putting together a price
 18 matrix for CRTG and the price disciplines are applied by
 19 CRTG?
 20 **A.** Yes.
 21 **Q.** Then in terms of the meeting that you referred to,
 22 I think there are meetings referred to in the
 23 penultimate paragraph and also in the first paragraph.
 24 Can we turn back to tab 14?
 25 **A.** We are in annex 15 still?

1 Q. It's in the same bundle as your letter. {D15/14}.

2 A. Yes.

3 Q. There is a letter from Mr Goodall to Mr Owen:

4 "Dear Mark, thank you for the opportunity last week

5 for Roger Batty and myself to present the trading

6 agreement for the CRTG group."

7 I had, because it was only addressed to Mr Owen and

8 it doesn't appear to be copied to you, rather assumed

9 that that was a meeting with Mr Owen; but do you think

10 you would have been present at such a meeting?

11 A. I couldn't say, really. The meeting that I had -- do

12 remember with Roger Batty didn't have Martin Goodall at

13 it, so whether I was at this meeting or not I can't

14 recall.

15 Q. Then if we turn forward to tab 18, we see in summary

16 what Mr Batty did understand. Do you infer anything

17 from the first sentence of that letter about what he

18 understood?

19 A. Newly defined pricing position.

20 Q. And whether it was yours or ITL's, do we infer anything?

21 A. I would say it was ours.

22 Q. Thank you.

23 If we go to a different subject, you were asked some

24 questions at the start about whether you could comment

25 on the position before 2002. Can you remind us when you

1 took up your position that you were in at the time of

2 the 2002 agreement?

3 A. It would probably ...

4 Q. I think it's in your witness statement, in fact.

5 A. It's 97, is it?

6 Q. I think that's what you say in your witness statement,

7 paragraph 1.2.

8 A. Yes.

9 Q. So do you have any reason to think that the stance in

10 relation to your pricing policy was fundamentally

11 different before 2002?

12 A. No.

13 Q. Was there greater or less control over CRTG pricing

14 before or after 2001?

15 A. There would be greater control.

16 Q. After or before?

17 A. After.

18 MR THOMPSON: No further questions.

19 THE CHAIRMAN: Well, thank you very much, Mr Goulthorp, that

20 completes your evidence. Thank you very much for coming

21 along.

22 A. Thank you.

23 (The witness withdrew)

24 THE CHAIRMAN: Mr Messom is next, is he?

25 MR THOMPSON: Mr Messom is here, yes. Should we take

1 a break and then see Mr Messom?

2 THE CHAIRMAN: Yes, that's a good idea. Let's come back,

3 then, at 3.25.

4 (3.15 pm)

5 (A short break)

6 (3.25 pm)

7 MR THOMPSON: I will call Mr Messom, if I may.

8 MR DAVID GEORGE MESSOM (sworn)

9 Examination-in-chief by MR THOMPSON

10 MR THOMPSON: Good afternoon, Mr Messom. Can you tell

11 the Tribunal your name and address, please?

12 A. David George Messom, [redacted].

13 Q. You should have a bundle 7 in front of you?

14 A. I have.

15 Q. If you turn to the back of it, you should find tabs 83

16 and 84. I hope you have seen those documents before,

17 they should be two witness statements, one dated

18 15 June 2010 and one 10 March 2011?

19 A. Yes, that's correct.

20 Q. Could you turn to the back of them, and you should find

21 a signature dated 15 June 2010 and another

22 10 March 2011.

23 A. That's correct.

24 Q. Are they your statements in this matter?

25 A. They are my statements.

1 Q. Is there anything you wish to clarify in them?

2 A. Yes, just one point: I am no longer the Director of

3 Trading at the Co-operative Group. I took early

4 retirement on 31 March this year.

5 Q. Otherwise, are these statements true?

6 A. They are.

7 MR THOMPSON: I believe Mr Lasok has some questions for you.

8 A. Thank you very much.

9 Cross-examination by MR LASOK

10 MR LASOK: Mr Messom, if you have your first witness

11 statement in front of you, as I understand it, from

12 paragraph 1.1, you were responsible, together with

13 a colleague, for devising CGL's retail pricing policy?

14 A. That is correct.

15 Q. That was the one, was it, that was finalised in

16 June 2001?

17 A. That is also correct.

18 Q. Before then, as I understand it, matters were dealt with

19 by the category buyers, were they?

20 A. Each category had their -- basically their own pricing

21 policy, yes. So there wasn't an overall pricing policy

22 for the Co-operative Group.

23 Q. So was the new pricing policy effective from June 2001?

24 I noticed in paragraph 2.3 of your witness statement you

25 say it was finalised in June 2001?

1 A. It was finalised and actioned in June 2001.
 2 Q. I think you set out the system that prevailed after
 3 June 2001 in paragraphs 2.4 effectively to 2.7; am
 4 I right?
 5 A. That is correct.
 6 Q. So after June 2001 we have the policy, and you have
 7 a summary of it in 2.4. In 2.5 we have the situation
 8 that it was the category buyers who were required to
 9 implement the policy, and it was, we see from 2.6, that
 10 their implementation was closely monitored, and in 2.7,
 11 in the last sentence, you say that if the pricing was
 12 out of line with CGL's own pricing policy, the category
 13 buyer would be required to provide an explanation, and
 14 if the issue persisted, the head of category buying
 15 would step in?
 16 A. That's correct.
 17 Q. That's correct?
 18 A. Yes, it is.
 19 Q. That is from June 2001?
 20 A. That is correct.
 21 Q. But you don't say in your witness statement that you had
 22 any involvement in the trading agreements made between
 23 the Co-op and ITL or Gallaher?
 24 A. That is also correct.
 25 Q. And you weren't involved in the day-to-day

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1 implementation of those trading agreements?
 2 A. That is correct.
 3 Q. Now, if you look at paragraph 2.1 --
 4 A. Yes.
 5 Q. -- in the second sentence, you say -- well, could you
 6 read the whole of 2.1?
 7 A. Yes, I can.
 8 Q. You don't have to read it out loud, just to refresh your
 9 memory.
 10 A. Okay. (Pause). Yes.
 11 Q. So basically you recite the allegation made by the OFT,
 12 and your comment is that that was certainly not
 13 something that CGL would have agreed to. As you weren't
 14 involved in the negotiation of the trading agreements or
 15 their implementation, you can't really say anything
 16 about this, can you?
 17 A. No. I would have seen the finalised agreements, but it
 18 is not something that we would have agreed to because
 19 the pricing policy was paramount.
 20 Q. I don't follow this. You see the agreements, but they
 21 are not something that you would have agreed to?
 22 A. We wouldn't follow those agreements, the pricing policy
 23 is what was paramount and that is the pricing that we
 24 would have actually put into practice in line with the
 25 pricing policy.

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1 Q. So, as I understand it, if we go to 2.10 --
 2 A. Yes.
 3 Q. -- and just look at the first two sentences. (Pause).
 4 The trading agreements that you are referring to in the
 5 second sentence, they are the agreements between
 6 Gallaher and the Co-op made in 2000, and the agreements
 7 between ITL and the Co-op made in 2000, 2001, 2002?
 8 A. Yes.
 9 Q. So that you accept that they all referred to parities
 10 and differentials, but you say that parity and
 11 differentials didn't determine CGL's retail prices?
 12 A. That is correct.
 13 THE CHAIRMAN: Could I just be clear, that when you refer to
 14 parity and differentials there, you are talking about
 15 a parity or differential between one manufacturer's
 16 brand and a different competing manufacturer's brand?
 17 A. Yes, we would have ignored any request from any
 18 manufacturer to have parities and differentials.
 19 THE CHAIRMAN: But where you say the trading agreements with
 20 tobacco manufacturers referred to parity and
 21 differentials, you mean that they referred to parity and
 22 differentials as between competing brands of cigarettes?
 23 A. Yes. But the pricing policy that we had was -- the
 24 price was the one that we adhered to, irrespective of
 25 what a manufacturer wishes to price their product at in

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1 any category.
 2 MR LASOK: If we focus for a minute on the ITL agreements,
 3 let's take as an example, perhaps if you could look at
 4 annex 15, and perhaps we will take as an example the one
 5 at tab 7. {D15/7}.
 6 A. Okay.
 7 Q. Have you seen this before? It should be a letter dated
 8 21 May 2001 from Imperial to Peter Newton.
 9 A. I can't recall whether I've seen it or not.
 10 Q. Well, I think you had told us earlier that you had seen
 11 the trading agreements. Would you have seen this kind
 12 of document at the time?
 13 A. All trading agreements after they have been negotiated
 14 I would have had sight of, and they would then have been
 15 passed on to our finance department who kept all the
 16 copies.
 17 Q. Can I just probe that for a bit. Does it mean that
 18 Mr Newton would receive this letter dated 21 May 2001,
 19 and then he would send a copy or perhaps the original,
 20 I don't know, to you; is that what would happen?
 21 A. No, it would be agreed with -- from him to his head of
 22 category, they would agree it, and then it would be
 23 passed in front of me at some point for either comment,
 24 but the deal would have been done between the category
 25 and the supplier, and I would have just seen a copy for

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1 courtesy's sake before it went to finance department.
 2 **Q.** How many agreements of this nature would be coming
 3 through your office, as it were?
 4 **A.** Hundreds.
 5 **Q.** Hundreds?
 6 **A.** Hundreds because --
 7 **Q.** Did you have any time to spend dwelling on the details
 8 of these agreements?
 9 **A.** No.
 10 **Q.** No?
 11 **A.** No.
 12 **Q.** Is it likely that you would have read this?
 13 **A.** Unlikely.
 14 **Q.** Unlikely. Now, if you turn to the second page, and look
 15 at the top line, it says:
 16 "A copy of the agreed differentials was attached."
 17 But you would have no recollection of seeing a copy?
 18 **A.** No.
 19 **Q.** If the copy had been sent to the Co-op separately,
 20 because in some instances in relation to other retailers
 21 ITL occasionally used to update the differentials, so
 22 the differential wasn't always attached to the trading
 23 agreement.
 24 Now, if ITL had, from time to time, sent a piece of
 25 paper with the agreed differentials on it, is that the

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1 kind of document that would come into your office?
 2 **A.** No.
 3 **Q.** Right. Now, if we go back to paragraph 2.5 of your
 4 witness statement, you have already set out in 2.4 what
 5 the general policy regarding pricing was, and then in
 6 2.5 you are dealing with the role of the category
 7 buyers, and later on -- as I've mentioned -- in 2.6 you
 8 talk about the monitoring, and in 2.7 you have issues
 9 being taken up eventually with the head of category
 10 buying.
 11 **A.** (Witness nods).
 12 **Q.** Are you aware of any issues being raised concerning
 13 tobacco pricing?
 14 **A.** None whatsoever.
 15 **Q.** Did you know that Gallaher and ITL would tell Mr Newton
 16 if they thought that the Co-op pricing was out of
 17 alignment with the market?
 18 **A.** Oh, I am sure that happens every day of the week still,
 19 buyers are constantly having suppliers ringing them to
 20 say "This product is out of line" and it's a normal
 21 day-to-day occurrence. It's the day-to-day occurrence
 22 that a buyer has.
 23 **Q.** If we go to 2.9, could you just read that to yourself,
 24 please.

(Pause)

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1 **A.** Yes.
 2 **Q.** This is all expressed in form Mr Newton would have. Are
 3 you just setting out in 2.9 what you think might or
 4 ought to have happened?
 5 **A.** This is what would have happened. All buyers were
 6 responsible for ensuring that the pricing policy was
 7 adhered to, and had the pricing been out of line for any
 8 length of time, say a week, then that would have been
 9 escalated and the buyer concerned would have been asked
 10 as to why the pricing policy had not been implemented.
 11 **THE CHAIRMAN:** By the pricing policy there, you mean what
 12 you have set out in 2.4?
 13 **A.** Yes, madam.
 14 **DR SCOTT:** We heard from Mr Goulthorp that you had two
 15 concerns, one was inter-retailer competitiveness, the
 16 other was margin.
 17 **A.** Yes.
 18 **DR SCOTT:** Can you explain a little bit about how you, as
 19 the person responsible for pricing policy, as
 20 I understand it --
 21 **A.** Yes.
 22 **DR SCOTT:** -- were addressing that balance, because
 23 presumably you had to make enough money to ...
 24 **A.** Yes. So we had to have the pricing policy absolutely in
 25 line with our competitive set that was set out in that

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1 pricing policy, and you are absolutely right, the buyer
 2 would be also responsible for achieving the budgeted
 3 margin on that particular category. And the buyer
 4 therefore would do his or her level best to achieve the
 5 margin by trying to get bonuses, off-invoice discounts,
 6 out of the manufacturers to try and improve our margin,
 7 even though it may only be by 0.1 of a per cent in
 8 tobacco because the margins were so small and tight,
 9 even 0.1 would make a considerable difference.
 10 So they would try and get, as you have probably seen
 11 from the price matrices, off-invoice bonuses and
 12 retrospective discounts all the time, and also bonuses
 13 for our promotional activity as well, when there was
 14 often sometimes an opportunity to increase the margin
 15 just slightly.
 16 **DR SCOTT:** Yes. We have seen the margins in the price
 17 matrix, yes. Thank you.
 18 **MR SUMMERS:** If you take a buyer like Peter Newton, and you
 19 talk about him going up the chain of command to explain
 20 his actions, if he adopts something exceptional, how far
 21 up the chain of command would he have to go?
 22 **A.** Normally up to his head of category, but --
 23 **MR SUMMERS:** That would be Kay Wheelton, on this
 24 organisation chart that we have thoughtfully been
 25 provided with?

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1 A. Absolutely. But if it went beyond a week, and let's say
 2 we are now two weeks out of line, then I would become
 3 aware of it, because reports would be coming in of our
 4 competitive nature versus the competition and our
 5 marketing department, my colleague who I devised the
 6 pricing policy with would have been knocking on my door
 7 saying "Why are your buyers not adhering to the pricing
 8 policy?", and I would then get involved, but I think
 9 I said in my statement I don't remember that ever
 10 happening on cigarettes and tobacco.

11 MR SUMMERS: Thank you.

12 MR LASOK: One interpretation of there being no problem
 13 about tobacco pricing is that the parity and
 14 differential requirements worked consistently with the
 15 Co-op's overall pricing strategy. Have you any comment
 16 on that?

17 A. Our pricing policy was adhered to, and therefore we were
 18 pricing against the competitive set of the three
 19 retailers that are contained within the pricing policy.
 20 So if those three retailers move their retails according
 21 to what you are saying is the parity and differentials,
 22 we remained in line with those three retailers.

23 Q. Now, if you go to paragraph 2.10 of your first witness
 24 statement, I just wanted to ask you a question about
 25 what this paragraph is about, because in the first

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1 sentence you say:
 2 "CGL's strategy always took precedence over
 3 a supplier's desired pricing position."
 4 Is that a general statement? You are not limiting
 5 it to tobacco?

6 A. I am not limiting it to tobacco, that applies to all
 7 categories.

8 Q. Then the second sentence refers to the trading
 9 agreements with the tobacco manufacturers, doesn't it?

10 A. Yes, it does.

11 Q. What about the third sentence, which manufacturers are
 12 you referring to here?

13 A. All manufacturers.

14 Q. That's all manufacturers?

15 A. All manufacturers, so Procter & Gamble, on an ongoing
 16 basis, would complain if their soap powder was out of
 17 line with Unilever, as an example. It's just the nature
 18 of the food industry.

19 Q. The rest of the paragraph, is that all manufacturers
 20 again?

21 A. That is all manufacturers.

22 Q. And since you didn't have any dealings with tobacco, you
 23 wouldn't know whether any of this had occurred in
 24 relation to the tobacco manufacturers?

25 A. No, I wouldn't.

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1 Q. Right. Could you turn to paragraph 5.3. The best way
 2 of approaching this, probably, because this is, as you
 3 can see, one page dealing with the pricing matrices, and
 4 the better thing may be if you simply read to yourself
 5 the whole of that page, so that you have the whole
 6 picture in the forefront of your mind.

7 A. The whole of 5?

8 Q. Yes.
 9 (Pause)

10 A. Okay, yes.

11 Q. Now, if you look at 5.3, you say that separate matrices
 12 were prepared for each manufacturer, and these showed
 13 only that manufacturer's costs and prices, and when you
 14 refer to prices there, you are referring to shelf prices
 15 as well?

16 A. Retail prices.

17 Q. Retail prices. Then you say:
 18 "When sending these to each manufacturer, CGL would
 19 ask that manufacturer to 'check and confirm' [because we
 20 see that on a number of these emails]:
 21 "(a) that the cost structure set out in the matrix
 22 was correct;
 23 "(b) that retail prices were below RRP and that CGL
 24 was therefore entitled to receive the off-invoice
 25 discounts; and

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1 "(c) that the promotional support was as agreed."
 2 I am just wondering how that compares to something
 3 that your employer told the OFT. Could you go to
 4 annex 15, please and go to tab 25. {D15/25}. You have
 5 here at tab 25 a letter written by Burges Salmon on
 6 behalf of the Co-op to the Office of Fair Trading
 7 providing information in response to a request for
 8 information made by the OFT. If you go to the sixth
 9 page, that's of course including the covering letter,
 10 you should have a page that has at the top a bit in
 11 bold -- it's internal page 5. If you look at the bottom
 12 of the page, you should see a page number.

13 A. Yes.

14 Q. Okay. So just to confirm, at the top you have the bit
 15 in bold, number 8, to the best of your knowledge and so
 16 forth?

17 A. I have that in front of me.

18 Q. If you go down to the -- this starts referring to the
 19 price matrix -- just by the first holepunch there is
 20 a heading "Price Matrix", and there is a paragraph 8.3
 21 in which the Co-op says that there is a specific price
 22 matrix for each tobacco company. Then they say:
 23 "The price matrix demonstrates that the Co-operative
 24 Group's RSPs: (a) meet the requirements of the
 25 off-invoice (O/I) discount and (b) accurately reflect

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1 and are therefore compliant with any promotional support
 2 package."
 3 **A.** Yes.
 4 **Q.** Now, that looks as though the Co-op is saying that the
 5 price matrix demonstrated to each tobacco company that
 6 the Co-op's retail prices were meeting the requirements
 7 entitling the Co-op to the off-invoice discounts and
 8 were accurately reflecting and compliant with any
 9 promotional support package?
 10 **A.** Yes.
 11 **Q.** Does that correspond to your recollection?
 12 **A.** Yes, the off-invoice discount was paid by the tobacco
 13 companies to ensure that we priced at the recommended
 14 retail price or below. So therefore they would see that
 15 on the matrices that we had actually done that, and also
 16 that we had actually published the correct promotional
 17 support package because obviously the tobacco companies
 18 would give us a bonus for a period of time for our
 19 promotion, and they would want that bonus passed on and
 20 reflected in lower retail prices.
 21 **Q.** I think you have accepted the trading agreements
 22 including parity and differential requirements so that
 23 the other function --
 24 **A.** It was nothing to do with parity and differentials. The
 25 bonus shown on the price matrices was for pricing at or

1 below the recommended retail price, and/or on the
 2 right-hand side reflecting a promotional -- lower
 3 promotional retail price.
 4 **Q.** Yes, but they were off-invoice payments under the
 5 agreements?
 6 **A.** They were off-invoice payments and they were also
 7 retrospective bonuses on those price matrices.
 8 **Q.** Right. I put it to you that one of the functions of the
 9 price matrix was to confirm to the manufacturer the
 10 Co-op's retail prices so that the manufacturer could see
 11 whether or not there was compliance with the terms of
 12 the trading agreements for the purpose of justifying any
 13 claim for a payment under the trading agreements?
 14 **A.** No.
 15 **Q.** How do you know that?
 16 **A.** The matrices were an internal document that we published
 17 for the CRTG to understand the cost prices, and was sent
 18 to the manufacturers to check that we had actually put
 19 the correct cost prices in place and that we were
 20 reflecting the recommended retail prices below -- at or
 21 below that which is what was agreed for those bonuses.
 22 It had nothing to do with the trading agreements at
 23 all, and the promotions had nothing to do with the
 24 trading agreements at all.
 25 **Q.** Well, could you have a look at -- you can close 15 for

1 the moment -- annex 5, please, and turn to tab 14. My
 2 annex 5, tab 14 is an email to Peter Newton from
 3 Mike Davison of Gallaher. {D5/14}.
 4 **A.** My tab 14 isn't. My tab 14 is a Gallaher price matrix.
 5 **Q.** Right.
 6 **THE CHAIRMAN:** That may be 14(a), what you are looking at.
 7 **A.** No, 14(a) is another Gallaher --
 8 **MR LASOK:** Could we try the page before 14?
 9 **A.** That one (indicated)?
 10 **Q.** It looks like it from this distance but sad to say my
 11 eyesight is not good enough to read it.
 12 **A.** The one I have been given looks like an email from
 13 Mike Davison to Peter Newton.
 14 **Q.** Yes, sent on 30 September 2002?
 15 **A.** Yes.
 16 **Q.** And the subject line says "Re: period 14 and 15
 17 pricing"?
 18 **A.** Yes, that's the one I have.
 19 **Q.** So could you just read through it to yourself, please.
 20 (Pause)
 21 **A.** Okay.
 22 **Q.** Now, I fully understand that, as this was an email that
 23 was sent to Peter Newton, it's probably not the kind of
 24 email that you would ever have seen; is that correct?
 25 **A.** That is correct.

1 **Q.** Yes. The only reason why I am drawing this to your
 2 attention is because you have stated the price matrices
 3 or at least the sending of the price matrices to the
 4 manufacturers has nothing to do with checking the
 5 parities and differentials. But if you look at this
 6 document, you see that Davison from Gallaher is, having
 7 checked the matrix, drawing the Co-op's attention to
 8 certain prices which don't correspond to parities, or if
 9 you look at 1, the question is whether parity would be
 10 achieved at one price level or another; 3 refers to the
 11 fact that Hamlet singles don't appear to have parity
 12 with Classic singles.
 13 **A.** Yes.
 14 **Q.** Now, what is your comment on that?
 15 **A.** My comment is the buyer is following the pricing policy,
 16 and therefore he is not following parity and
 17 differentials.
 18 **Q.** Well, the question I am putting to you is: does that
 19 document cause you to reflect upon the evidence that you
 20 have given that the communication of the price matrices
 21 to the manufacturer had nothing to do with parity and
 22 differentials?
 23 **A.** It doesn't -- the evidence I've -- stands by that. What
 24 that is saying is he has been sent the price matrices to
 25 check it, he is obviously trying to persuade

1 Peter Newton to change some prices or he is asking what
 2 are the prices going to be in the future, and it shows
 3 that Peter Newton is following the pricing policy, hence
 4 the reason why the parities and differentials have
 5 not -- are not being adhered to.
 6 **THE CHAIRMAN:** Well, do we know what Peter Newton's reply to
 7 this is?
 8 **MR LASOK:** I don't think we have the reply.
 9 **THE CHAIRMAN:** Well, do you know whether Peter Newton wrote
 10 back saying "Oh, yes, I am terribly sorry, I'll put
 11 those right", or whether he didn't reply, or ...
 12 **A.** I have no evidence to say -- I do not know whether he
 13 replied or not.
 14 **THE CHAIRMAN:** So why do you say that this shows that he was
 15 pursuing his own pricing policy rather than --
 16 **A.** No, he is following the official pricing policy, and
 17 therefore this manufacturer is saying "You are out of
 18 line on parities". Well, if we are following our
 19 pricing policy, that is what Peter Newton was required
 20 to do.
 21 **MR LASOK:** Mr Messom, I started off this line of questioning
 22 by accepting that you weren't directly involved in
 23 tobacco. Now, the reason why I am asking you these
 24 questions is because you have said something about the
 25 role of the price matrix, you have said it from your

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1 perspective, your position. I think what we have ended
 2 up with is a situation in which you cannot actually say
 3 that the price matrices weren't used for the purpose of
 4 checking compliance with parities and differentials,
 5 because here is an example where it is being used for
 6 that purpose, isn't it?
 7 **A.** I see no evidence.
 8 **Q.** You see no evidence?
 9 **A.** No. The price matrices were used to send to the CRTG
 10 societies and also because they were paying invoices
 11 themselves and needed to know what the cost prices were,
 12 and it was also sent to the manufacturers across all
 13 categories, not just tobacco, for them to check the cost
 14 prices, both promotional and ongoing, and as far as the
 15 tobacco companies are concerned to make sure that they
 16 could see that we were pricing on an ongoing basis at
 17 the recommended retail price or less, and that's what
 18 the price matrices across all categories were used for.
 19 **DR SCOTT:** Mr Messom, it may help you if you understand our
 20 understanding of what was going on in parallel, and that
 21 is what we understand that through teams of
 22 merchandisers and in some cases sales teams, the
 23 manufacturers -- ITL and Gallaher -- were going out to
 24 price check in stores, and you see a reference to that
 25 in this email, that's the price check carried out at

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1 store level in period 13 in item 3 here.
 2 So I think that the question for you is this: given
 3 that the Co-op were sending these price matrices to
 4 a manufacturer and the fact that the manufacturer was in
 5 parallel conducting checks at store level, are you still
 6 able to say that manufacturers were not taking the price
 7 matrix and results from the merchandisers visiting the
 8 stores and comparing them to see what the differentials
 9 between their products and their rivals' products were?
 10 **A.** They would do that, they still do that, and all
 11 manufacturers do that. They go into all retail stores
 12 and are checking prices on a weekly basis, even today,
 13 to see what --
 14 **THE CHAIRMAN:** So why do you say, then, that the price
 15 matrices aren't used to check the differentials?
 16 **A.** The price matrices were designed to show CRTG societies
 17 what the cost prices and the retail prices were, and to
 18 confirm back to the tobacco manufacturers in this case
 19 that we were able to receive the off-invoice bonuses
 20 which were being paid for us selling the products at
 21 retail price, at the recommended retail price or less.
 22 **MR SUMMERS:** So are you suggesting that the manufacturers
 23 actually have a secondary use for these matrices --
 24 **A.** I am not suggesting that at all, sir.
 25 **MR SUMMERS:** -- within their organisations that they might

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1 go to another department?
 2 **A.** I have no knowledge of that.
 3 **MR SUMMERS:** Thank you.
 4 **THE CHAIRMAN:** When you say in your paragraph 2.6
 5 "Compliance with CGL's pricing policy was and still is
 6 closely monitored", what was the mechanism for closely
 7 monitoring?
 8 **A.** We have an outside agency who go into our stores and our
 9 competitors' stores checking retail prices and feeding
 10 that information back on a weekly basis into the head
 11 office so that we can actually see how our prices are
 12 aligned against our competitive set, and that still goes
 13 on today.
 14 **THE CHAIRMAN:** Do they also check compliance of the stores
 15 with the price matrices or are they just comparing shelf
 16 price between one competitor and the other -- in the
 17 competing retailer and your store?
 18 **A.** They are comparing competitor versus what we have
 19 actually got in our stores against the price matrices,
 20 so they can say "You are tuppence out against retailer
 21 X", and also that particular store is actually -- hasn't
 22 put the correct price on to the shelf, and we can then
 23 obviously speak to that store and get that price
 24 corrected. And that is done on a weekly basis.
 25 **THE CHAIRMAN:** And that was being done throughout this

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1 period of 2000 to 2003?
 2 **A.** Yes, it was. I can't say whether it was the same agency
 3 that was being used at that time.
 4 **THE CHAIRMAN:** No.
 5 **MR LASOK:** I wonder whether I could ask you a related point.
 6 If you look at 5.5 of your first witness statement, you
 7 assert there that the matrices were sent to ITL and
 8 Gallaher -- or at least you say it's not the case that
 9 the matrices were sent to Gallaher and ITL in connection
 10 with their desired parities and differentials. Then you
 11 go on to say that, in the last two lines:
 12 "The manufacturer would not have been able to assess
 13 by looking at the matrix whether CGL was intending to
 14 price in accordance with such parity and differentials."
 15 If you had said "by looking at the matrix alone and
 16 nothing else", I think that sentence would work. But if
 17 we look at 5.14, we do actually see an instance of
 18 a manufacturer, Gallaher, looking at the matrix and
 19 being able to assess whether or not CGL is intending to
 20 price in accordance with parities and differentials, and
 21 responding to the Co-op. It may be using additional
 22 information to do so, but this is all part and parcel of
 23 what was actually going on in relation to tobacco.
 24 Would you not accept that?
 25 **A.** No, what I've said is that the pricing matrices were

1 used to provide the information to the suppliers to
 2 check that we had the right cost prices and the right
 3 retail prices to ensure that we would get the
 4 off-invoice bonuses.
 5 **Q.** Right. Now, can I just ask you something that has
 6 suddenly occurred to me. In paragraph 1.1 of your first
 7 witness statement, in the middle you say that you were
 8 familiar with the price matrices and that you were first
 9 made aware of them when you attended a monthly CRTG
 10 working session, and somebody complained about the fact
 11 that they hadn't got the latest price matrix?
 12 **A.** Yes.
 13 **Q.** Can you remember when that was?
 14 **A.** That was just after I joined the Co-operative Group,
 15 I joined the Co-operative Group in August 1999 and
 16 I think I went to -- the first meeting I attended was
 17 probably -- I recollect, in about October 1999.
 18 **Q.** If you go to paragraph 3.3 of your first witness
 19 statement, you are referring here to tactical and
 20 promotion bonuses?
 21 **A.** Yes.
 22 **Q.** I wanted to ask you a question about the last sentence.
 23 So could you just read the paragraph as a whole, please,
 24 so that you can see what the context is.
 25 (Pause)

1 It's the last two sentences, actually.
 2 **A.** Okay. (Pause). Okay.
 3 **Q.** Now, does the entirety of this sentence refer to
 4 promotions?
 5 **A.** Yes.
 6 **Q.** CGL was always free, as I understand it, to price at
 7 whatever price level it wished, as long as it complied
 8 with the parities and differentials?
 9 **A.** No, CGL would price according to its pricing policy.
 10 **Q.** All right. So we have these pricing agreements which
 11 have pricing differentials, but you take the view that
 12 CGL wouldn't comply with those agreements?
 13 **A.** Yes, because CGL would price according to its pricing
 14 policy. That was paramount reason for devising the
 15 pricing policy.
 16 **Q.** In 4.1 you have the policy decision not to actively
 17 promote tobacco products?
 18 **A.** That is correct.
 19 **Q.** Did that mean that during the period that we are looking
 20 at, which is 2000 to 2003, the Co-op would not itself
 21 have reduced the price of a tobacco product in order to
 22 encourage people to buy and consume that product?
 23 **A.** No, that is not correct. What we mean by not actively
 24 promoting tobacco, cigarettes, means we would not put --
 25 advertising those products on our window bills in our

1 stores, we would not put them into brochures that went
 2 door to door, we would not advertise them on -- in that
 3 sense, we wouldn't promote them. What we would do, and
 4 in order to remain competitive with the competition, we
 5 would reduce our retail prices using the bonuses, the
 6 promotion bonuses that the manufacturers provided for
 7 us.
 8 **Q.** But would you fund yourselves a price reduction in order
 9 to undercut another retailer?
 10 **A.** Generally speaking, no. So, for instance, if retailer
 11 X, who is on our pricing policy, had cut their prices,
 12 if we could not get bonus support from the manufacturer
 13 to match that price, we would have to make a decision --
 14 and this is where it would actually then be escalated --
 15 we would have to make the decision whether we are going
 16 to match that retailer using our own margin.
 17 **Q.** Right.
 18 **A.** But I do not remember that ever happening on cigarettes
 19 and tobacco.
 20 **Q.** Would the Co-op do this: would it decide to reduce the
 21 price of, let's say, manufacturer X's product, tobacco
 22 product, on the shelves for the purpose of representing
 23 to competing manufacturer Y that manufacturer X was
 24 funding you to reduce prices when that wasn't the case?
 25 **A.** No, we wouldn't do that. We were always -- I have to

1 say, and I think I've said it in my witness statement,
 2 we were always a follower of price, we did not price
 3 lead.
 4 Q. Could you turn to your second witness statement, please.
 5 A. Yes.
 6 Q. Paragraph 2.2. Just read that to yourself.
 7 (Pause)
 8 A. Yes.
 9 Q. You are saying here that the parity and differential
 10 requirements couldn't have been tailored to suit the
 11 Co-op's position because the manufacturers wouldn't have
 12 known what your desired pricing position was?
 13 A. Yes.
 14 Q. Now, if you go to annex 15 --
 15 A. Yes.
 16 Q. -- and look at tab 11 {D15/11/207}. Tab 11 ought -- is
 17 this confidential? The relevant bit isn't. I don't
 18 know just how much has been blanked out. This should be
 19 an internal ITL document dealing with CWS Retail, which
 20 is dated January 2002, and there may be stamped
 21 pagination in the bottom of the page?
 22 A. Yes.
 23 Q. If you could go to 207 --
 24 A. Yes.
 25 Q. -- there should be a bit in the middle beginning

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1 "Although central buying ..." Could you just read the
 2 second sentence, please.
 3 A. (Pause). Yes.
 4 Q. So that looks as though ITL had got a fairly good idea
 5 of what the Co-op's pricing position was?
 6 A. They would hope that if you look at the pricing policy,
 7 they've got it wrong.
 8 Q. Have they?
 9 A. Absolutely. That says -- am I allowed to read this or
 10 not?
 11 Q. Yes.
 12 A. It says:
 13 "CWS Retail currently operates a three tier pricing
 14 system [that is correct] which aims to be competitive
 15 against [REDACTED]."
 16 If you see my -- the pricing policy, we weren't
 17 competitive against [REDACTED]
 18 Q. Well, I don't quite understand that, because if you look
 19 in your first witness statement at paragraph 2.4, if you
 20 have 2.4, the first subparagraph refers to what we are
 21 talking about --
 22 A. And that is price band [REDACTED].
 23 Q. That's price band [REDACTED]?
 24 A. (Witness nods).
 25 Q. Are you sure that that's price band [REDACTED] or price band [REDACTED]?

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1 A. I am sure it's price band [REDACTED] because --
 2 Q. No, the ITL band.
 3 A. What ITL price band? I don't understand what an ITL
 4 price band is.
 5 Q. No, what they have done is they have three bands which
 6 they identify.
 7 A. Well, they know we have three bands because we send them
 8 the price matrices with the three bands on.
 9 Q. What they have done is they have got what they call
 10 price band [REDACTED], then they have a [REDACTED], and then
 11 they have a [REDACTED].
 12 A. Yes.
 13 Q. That's exactly the same as what you say at paragraph 2.4
 14 of your first witness statement.
 15 A. That is correct, but --
 16 DR SCOTT: I think you can explain this by the fact that the
 17 price matrix, for example tab 2, has RSH [REDACTED] as the first
 18 price band. I think that's the --
 19 A. Yes. Absolutely.
 20 MR LASOK: They are not cross-referring to the price matrix.
 21 A. I agree, sir, it's just that they have put [REDACTED]
 22 [REDACTED] and our [REDACTED] is the price used by [REDACTED]
 23 [REDACTED]. They would have known we had three price
 24 bands because we send them the matrices, and they would
 25 have actually known that we called them [REDACTED]

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1 It's just here it says [REDACTED] are in line with [REDACTED]
 2 [REDACTED] and they are not.
 3 Q. The thing about it is they have identified three bands,
 4 okay?
 5 A. Well, they have identified, we have actually given them
 6 the price matrices which show that we have three price
 7 bands.
 8 Q. Forget about the numbering. Number 2 and number 3 are
 9 [REDACTED] respectively?
 10 A. Yes.
 11 Q. So they are calling the first one price band [REDACTED]?
 12 A. Okay.
 13 MR SUMMERS: Forgive me, I think if you take the word "in"
 14 out and put a colon, you get the sense.
 15 MR LASOK: Yes.
 16 A. But it doesn't say there what the [REDACTED]
 17 [REDACTED] are being aligned to.
 18 THE CHAIRMAN: Perhaps wait for the question, Mr Messom.
 19 A. I am sorry, madam.
 20 MR LASOK: It wouldn't have taken them long to figure that
 21 one out, either, because all they would have to do would
 22 be to look at your price matrix and the matrices that
 23 they have for other retailers, and see where the pattern
 24 is.
 25 A. That is eminently possible. The point that I was making

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1 was that we didn't actually issue our pricing policy to
 2 any manufacturer.
 3 **Q.** That I can understand, but I think that the point being
 4 made by the OFT is that the manufacturers did take into
 5 account the retailers' desired pricing position, and we
 6 have two examples or instances of that. One we have
 7 dealt with already, which is -- and which you accept --
 8 that the manufacturer would advise the Co-op if they
 9 felt that the Co-op's prices were out of line, and the
 10 second is the manufacturer's ability, as we can see from
 11 this document, to work out what the Co-op pricing
 12 strategy was?
 13 **A.** But that doesn't say what the Co-op pricing strategy
 14 was. It says "competitive against [REDACTED]
 15 [REDACTED]", and then [REDACTED], it
 16 doesn't say what the actual pricing policy is there. If
 17 they knew, they would have put their [REDACTED] versus
 18 [REDACTED] versus ...
 19 **MR LASOK:** Yes. I have no further questions?
 20 **THE CHAIRMAN:** Anything, Mr Howard?
 21 Cross-examination by MR HOWARD
 22 **MR HOWARD:** Just a couple of questions.
 23 Mr Messom, I'm acting for Imperial and I would like
 24 to ask you a couple of questions.
 25 Could you, in bundle 15, just turn to tab 4 which is

1 one of the Imperial trading agreements. {D15/4}.
 2 **A.** Yes, I have it.
 3 **Q.** You will see there that there are four objectives set
 4 out and after that it says:
 5 "The achievement of these specific objectives will
 6 result in incentive payments being made."
 7 Now, I just want you to help us on this: if the
 8 payments were incentives, that's to say a payment to be
 9 made by Imperial if a particular target is met, there
 10 was no obligation to comply, how would that fit in with
 11 your pricing policy?
 12 **A.** Well, I have to say Imperial Tobacco always paid --
 13 **Q.** I am not asking you what they did, I am looking just at
 14 the agreement. If they had an agreement whereby they
 15 were saying: if you do something, here is an incentive,
 16 and if it's just an incentive, there is not
 17 an obligation, how does that fit in with your pricing
 18 policy that you have described?
 19 **A.** We ignored it and did our pricing policy.
 20 **Q.** Right, okay.
 21 **THE CHAIRMAN:** You are saying it would have no influence at
 22 all on your pricing policy?
 23 **A.** No. We would -- our pricing policy was sacrosanct and
 24 it was across all categories and we wouldn't make
 25 an exception for any manufacturer or any particular

1 category.
 2 **MR HOWARD:** Some questions were asked by reference to the --
 3 this agreement provided for certain payments. It didn't
 4 in fact apply to what I think you were describing as the
 5 payments for being below RRP. If you go to the matrix,
 6 which is at -- we have an example at tab 2, I imagine
 7 you are quite familiar, having been involved with these
 8 for a long time.
 9 **A.** Yes.
 10 **Q.** We see, I think you were saying to Mr Lasok but I would
 11 just like to get it clear, the cost structure which had
 12 the off-invoice, the bulk drop discount and the retro?
 13 **A.** Yes.
 14 **Q.** Can you just confirm to us what the off-invoice was?
 15 **A.** The off-invoice payment would be paid to ensure that we
 16 retail that product at the recommended retail price of
 17 that particular manufacturer or lower.
 18 **Q.** So the sums of money, such as they were, that were
 19 payable under the trading agreements, did they in any
 20 way feature in this matrix?
 21 **A.** No.
 22 **Q.** No, okay. Now --
 23 **THE CHAIRMAN:** So the off-invoice payment you are saying
 24 does not include the sums of money that we see at tab 4?
 25 **A.** That is correct, madam.

1 **DR SCOTT:** So just to be clear, if you, in the centre,
 2 received money from the trading agreements, wouldn't
 3 reflect in the margins at store level?
 4 **A.** That is correct.
 5 **DR SCOTT:** So it was a, how shall I put it, bounce for the
 6 centre?
 7 **A.** That is correct.
 8 **DR SCOTT:** Thank you.
 9 **MR HOWARD:** Now, the next point I wanted to ask you about
 10 comes out of paragraph 2.10 of your first witness
 11 statement.
 12 **A.** Yes.
 13 **Q.** You firstly explain about your strategy always taking
 14 precedence over a supplier's desired pricing position,
 15 although trading agreements with tobacco manufacturers
 16 referred to P&Ds but they didn't determine your retail
 17 prices. Occasionally manufacturers might complain that
 18 one of their brands was at a higher price, and so on,
 19 and thereby being disadvantaged. They wouldn't complain
 20 if their brand was lower. Irrespective, CGL would never
 21 commit to realign prices and so were based solely on
 22 CGL's own pricing policy. The category buyer might
 23 however use any disparity as an opportunity to negotiate
 24 promotional support.
 25 Now, firstly, this point you make about never

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1 committing to realign prices because they are based upon
 2 your pricing policy, to what extent was that position
 3 communicated as far as you were aware to manufacturers
 4 and suppliers?
 5 **A.** It wasn't, really. We never communicated our pricing
 6 position --
 7 **Q.** No, not your pricing position, the extent to which you
 8 communicated to them that you had your own pricing
 9 policy which you followed, rather than being told by
 10 them what the position --
 11 **A.** Yes, they knew we had a pricing policy, we had an annual
 12 conference, and still do have every year in September,
 13 and we make it very clear at that conference that we are
 14 in control of our own pricing.
 15 **Q.** And that's what you refer to, I think, in your second
 16 statement at paragraph 2.5, the annual September
 17 conference?
 18 **A.** Yes.
 19 **Q.** Going back to paragraph 2.10 in the first statement that
 20 we were just looking at, you have told us a number of
 21 times this afternoon that suppliers and manufacturers
 22 firstly are interested in the prices at which their
 23 products are being sold in your stores. Can you just
 24 tell us the extent to which the manufacturers and
 25 suppliers look in the stores and comment on the prices

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1 at which their goods are being sold?
 2 **A.** It's an ongoing day-to-day occurrence that manufacturers
 3 visit all retailers, the Co-op, exactly the same. If
 4 you are a national account manager or a sales director
 5 of a manufacturer, you have to know what your retail
 6 prices are in every single retailer versus your
 7 competition. It's --
 8 **Q.** Is there anything peculiar about tobacco in that regard?
 9 **A.** No, it's exactly the same as any other category.
 10 **Q.** In your last sentence here you refer to the category
 11 buyer using disparity as an opportunity to negotiate
 12 promotional support.
 13 If we just try and put some flesh on the bones of
 14 that. So in the event that a manufacturer sees -- let's
 15 say, Imperial -- that its brand, say Richmond, which is
 16 one of its well-known brands, let's say that it sees
 17 that its brand is tuppence more expensive than what it
 18 regards as the competing brand, tell us what you are
 19 referring to by reference to that example, using this
 20 disparity as an opportunity to negotiate promotional
 21 support?
 22 **A.** As in every category, the buyer would be open to
 23 an opportunity for that manufacturer to offer additional
 24 bonuses to maintain or improve our margin and reduce the
 25 retail price.

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1 **Q.** Right.
 2 **A.** That is always available every day of the week to every
 3 manufacturer. If we can get lower prices, that is what
 4 we want to do.
 5 **THE CHAIRMAN:** Would you in fact then lower the price or
 6 would you just accept the money and then continue to do
 7 what your comparative pricing policy dictates?
 8 **A.** We would lower the -- we would use that bonus, that
 9 additional discount, to lower the price. Ideally,
 10 madam, we would love to be able to lower the price and
 11 increase the margin.
 12 **THE CHAIRMAN:** So that would be an exception to your strict
 13 comparisons with other retailers?
 14 **A.** It might give us the opportunity for a short period of
 15 time to actually come below our competitors.
 16 **MR HOWARD:** Picking up that point, presumably you told us --
 17 you have mentioned it so I can say it, you compare
 18 yourself in your sort of supermarkets with [REDACTED] If
 19 you can get below [REDACTED] you don't have any objection to
 20 that, I assume?
 21 **A.** If we can get below [REDACTED] and make the budgeted margin,
 22 great. Absolutely.
 23 **Q.** So in the situation where the manufacturer is bleating
 24 that his goods, in my example Richmond, are 2p above
 25 Dorchester, then as I understand it you are saying the

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1 buyer's response is: well, as long as we can keep our
 2 margin, if you pay us enough to reduce the price and
 3 maintain our margin, then we will do it?
 4 **A.** Absolutely.
 5 **Q.** That leads on to my next question. If a manufacturer
 6 sought to ensure that his product was competitively
 7 priced, let's say 1p below a competing brand in your
 8 stores, what would he need to do so far as concerns the
 9 net wholesale price he charged CRTG as compared to the
 10 competing brand?
 11 **A.** The retail price would have to be in line with the
 12 pricing policy, and the buyer would want a margin that
 13 met his or her budget. So the cost price would have to
 14 ensure that we got the right margin.
 15 **Q.** Right. In tobacco, in terms of -- can you just give us
 16 some explanation of how the margin is calculated? You
 17 told us that the buyer has a margin per, I think you
 18 said, four categories, I think.
 19 **A.** Yes.
 20 **Q.** Can you explain? For instance, the buyer is buying,
 21 let's say, cigarettes obviously from Imperial, Gallaher
 22 and BAT.
 23 **A.** Yes.
 24 **Q.** How does he go about deciding what margin he applies?
 25 **A.** Right, the margin -- it's hereditary, really. The

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1 margin would be budgeted at the start of the year and it
 2 would be for the whole category, for the whole category,
 3 so as an example, the buyer maybe set a margin of 8 to
 4 10 per cent overall to achieve, and would also have
 5 a sales budge that it's got to achieve, and then
 6 obviously that relates then to a cash budget. And the
 7 buyer would be expected to achieve all three, sales,
 8 cash margin and percentage, but the cash, cash margin
 9 and the sales are the two most important.
 10 **Q.** Right.
 11 **A.** And that would be by a mix of brands, we would make more
 12 profit out of cigars than we would out of cigarettes,
 13 and more profit out of pipe tobacco than cigarettes.
 14 But it was an overall blend, and obviously the buyer has
 15 to maintain the pricing position versus the -- with the
 16 pricing policy versus the competitors'. So, and that is
 17 what a buyer is doing every day of the week across all
 18 categories, and doing those balances, and taking
 19 opportunities to gain extra sales and an extra margin
 20 where possible.
 21 **Q.** So the pricing decision, one is trying to look at, if
 22 one sees, for instance, let's say, we now look and we
 23 see that an Imperial brand, let's say a well-known one,
 24 Embassy, we see that in CRTG's store at 3p below
 25 Benson & Hedges, what's regarded as a rival brand.

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1 From that relationship, what, if anything, can we
 2 deduce as to the differential in the cost price to CRTG
 3 of those two brands?
 4 **A.** I would assume that they are both giving us a very
 5 similar margin.
 6 **Q.** Right. So in terms of the cost price, what can we
 7 infer, therefore, is the likely cost price of Imperial
 8 as compared to Gallaher in that example?
 9 **A.** That Imperial have given us a lower cost price.
 10 **MR HOWARD:** Thank you very much.
 11 Questioned by THE TRIBUNAL
 12 **THE CHAIRMAN:** The money from the trading agreement --
 13 **A.** Yes.
 14 **THE CHAIRMAN:** -- payable in relation to the parities and
 15 differentials, regardless for the moment of whether you
 16 were going to comply with them, does that money
 17 contribute to enabling the buyer to meet those three
 18 targets that you referred to: the cash, the cash margin
 19 and the budget?
 20 **A.** No. It went into a separate pot. And that was paid out
 21 to all of the CRTG societies on a quarterly basis,
 22 depending on their level of trade. And it was the, if
 23 I can put it this way, the carrot and the stick. It was
 24 to ensure that the CRTG societies stocked the correct
 25 range of products because the buyer in the centre was

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1 making decisions on the range of products that they
 2 wanted to stock and the manufacturer was looking to the
 3 Co-op buyer to have that discipline, so that if they
 4 said "You are going to stock Embassy", that Embassy
 5 would be stocked. The way we did it was all these
 6 central monies that came in, we would pay it out on the
 7 basis that the societies actually complied with what we
 8 from the centre said they should do, and we had four
 9 people who went out specifically round all the stores,
 10 checking to make sure that the products that we said
 11 should be stocked in that size of store were stocked,
 12 because that's how we got the discipline, and if they
 13 weren't stocked we would say "You are not getting your
 14 quarterly payment from the centre".
 15 **THE CHAIRMAN:** Was that just dependent on stocking, or were
 16 there other factors that affected whether they got
 17 a share of that fund?
 18 **A.** It was dependent on stocking and ensuring that the point
 19 of sale material for promotions was in place during the
 20 promotional period, so it was those two factors, because
 21 manufacturers would obviously give us central monies to
 22 promote their products with us. So those were the two
 23 factors.
 24 **THE CHAIRMAN:** As far as you are aware, is that what applied
 25 during the whole of the period that you are concerned

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1 with?
 2 **A.** Yes.
 3 **THE CHAIRMAN:** I see the time. Presumably it would be
 4 convenient for Mr Messom to finish this afternoon,
 5 unless you are going to be a very long time in
 6 re-examination, Mr Thompson?
 7 **MR THOMPSON:** I am not going to be a very long time and
 8 I think it would be convenient, probably, for Mr Lasok
 9 as well as for everybody else.
 10 **THE CHAIRMAN:** Yes. Let's carry on, then.
 11 Re-examination by MR THOMPSON
 12 **MR THOMPSON:** Can we pick up on that last point. I am not
 13 sure whether there is anything specific in the papers,
 14 can you turn to annex 15, tab 11 and page 211 in the
 15 stamped document. I think it's a bad point, I think
 16 it's confidential, probably. I am sorry. I think
 17 I can't take that point forward. It was merely the
 18 figures that appear towards the bottom, as to whether
 19 there was something analogous to the question that
 20 the Tribunal just asked. But I can't take that forward.
 21 So can I go to another point. Mr Lasok started by
 22 asking you when the pricing policy entered into force,
 23 and I think your answer was June 2001?
 24 **A.** Yes.
 25 **Q.** Before that, was there more or less central control over

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1 pricing by CRTG and CGL?
 2 **A.** I would say less.
 3 **Q.** In relation to P&Ds, which you refer to, or parities and
 4 differentials, which you refer to once or twice in your
 5 first witness statement, did you have any direct
 6 knowledge of that issue at the time?
 7 **A.** No.
 8 **Q.** However, you were in charge of the CGL pricing policy at
 9 that time?
 10 **A.** Yes, I was.
 11 **Q.** If a category manager had agreed to something which
 12 diverged significantly from the pricing policy, do you
 13 think you would have been asked in advance?
 14 **A.** I probably would have been made aware of it, and I would
 15 have said "The pricing policy is going to rule over
 16 everything".
 17 **Q.** Were you notified that there was any policy
 18 divergence --
 19 **A.** No.
 20 **Q.** -- in the tobacco or any other category?
 21 **A.** No, I wasn't.
 22 **Q.** Mr Lasok asked you about the price matrices, and the OFT
 23 has something of a fixation about it, but can I just ask
 24 you, it's been asked before but can I ask you again: did
 25 the price matrices have anything to do with parities and

1 differentials as far as you were concerned?
 2 **A.** As far as I was concerned, no.
 3 **Q.** And the promotional element of it, did that have
 4 anything to do with central payments under the trading
 5 agreements? You will recall the right-hand side.
 6 **A.** No. The right-hand side was purely to reflect the
 7 promotional bonuses that the manufacturer was giving us
 8 for a short period of time, that we were then notifying
 9 the CRTG societies of.
 10 **Q.** Can we look at paragraph 5.5 of your witness statement.
 11 **THE CHAIRMAN:** Could I just ask a supplementary question to
 12 that? When you were offered these tactical bonuses by
 13 the manufacturers, did you understand from the bonuses
 14 that they offered you what their thinking was behind
 15 particular promotions that they proposed to you, or were
 16 they just random promotions of particular products as
 17 far as you were concerned?
 18 **A.** No, I would have expected the conversation to take place
 19 between the national account manager of the manufacturer
 20 and the buyer to discuss the bonus, and the manufacturer
 21 might have indicated the sort of reduction in retail
 22 price he or she were looking for, the buyer would have
 23 been arguing, "Well, I am not going to reduce my
 24 margin", and that discussion would have taken place, the
 25 manufacturer obviously wants that full bonus to be

1 reflected in reduction in retail price.
 2 **THE CHAIRMAN:** That's not quite the point. Suppose ITL came
 3 to you and said "Oh, we are going to offer you a bonus
 4 for reducing the price of Richmond by 2p in your
 5 stores", did you have any understanding as to why they
 6 particularly wanted at that point to reduce Richmond by
 7 2p?
 8 **A.** Not normally, no.
 9 **MR THOMPSON:** At paragraph 5.5 of your first witness
 10 statement, the last sentence we have already looked at.
 11 **A.** Yes.
 12 **Q.** And in particular the last phrase:
 13 "The manufacturer would not have been able to assess
 14 by looking at the matrix whether CGL was intending to
 15 price in accordance with such parity and differentials."
 16 When you use the expression "intending", are you
 17 looking towards the future or to the past?
 18 **A.** I'm looking forward to the future, really, because what
 19 we are saying is: there you are, Mr Manufacturer, those
 20 are the retails that we are setting in a week's time,
 21 because we always issue them one week and implement them
 22 the following week. So it was: this is what we are
 23 going to do, please check that the cost prices are
 24 correct and that we have met the recommended retail
 25 prices at or below to achieve the bonuses that we are

1 now putting into our system.
 2 **Q.** Yes. Can we look at 5/14, which I think Mr Lasok took
 3 you to. {D5/14}.
 4 **A.** Yes.
 5 **Q.** You will recall it's an email from Mr Davison to
 6 Mr Newton.
 7 **A.** Yes.
 8 **Q.** I think in particular he took you to point 1, where
 9 there is a request about your intentions for two brands,
 10 or two products, KS, Kingsize and Superkings 10s for
 11 Dorchester, and it's asking you about your future
 12 intention, but in relation to the Richmond brand it says
 13 "which were 1.92 and 1.94 across all price bands". Do
 14 you see that?
 15 **A.** Yes.
 16 **Q.** And in paragraph 3, your point 3, this was reported back
 17 from Price Check carried out at store level in period
 18 13. Is that looking to the past or towards the future?
 19 **A.** That's looking towards the future.
 20 **Q.** So does anything in this lead you to change your mind
 21 about whether you could discover future pricing
 22 intentions from looking at those?
 23 **A.** No.
 24 **Q.** Can I ask you to turn to tab 14(a), just behind there.
 25 {D5/14a}. If you turn through three pages, you will see

1 that this is period 14 for Gallaher, and about five
2 lines down you should see Dorchester Kingsize 10s?
3 A. Yes.
4 Q. And another five lines down, Dorchester Superkings?
5 A. Yes.
6 Q. You will see that Dorchester Kingsize 10s are 1.92,
7 1.93, 1.94, as against an MRP of 1.86, so substantially
8 above MRP?
9 A. Yes.
10 Q. And there is no off-invoice bonus as a result. Do you
11 see that?
12 A. I do.
13 Q. And likewise for Superkings?
14 A. Yes.
15 Q. If you can then turn through one more page, you should,
16 about four lines down, see Hamlet cigars singles at MRP
17 61 and RSPs of 62, 62 and 63. Do you see that?
18 A. I do.
19 Q. If you then turn to 14(b), and you will have to turn
20 through three pages again, about two-thirds of the way
21 down I think it says "Richmond Kingsize" but I think it
22 should be Richmond. You will see prices of 1.92, 1.92,
23 1.92; is that right?
24 A. That is correct.
25 Q. And Superkings you will see them at 3.66, 3.68 and 3.69,

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1 I think; is that correct -- sorry, 1.92, 1.94 and 1.95.
2 A. Right.
3 Q. Is that right -- no, sorry, 1.93, 1.94 and 1.95.
4 **THE CHAIRMAN:** Perhaps you could just ask that question
5 again, Mr Thompson.
6 **MR THOMPSON:** I am sorry about that.
7 Richmond Kingsize, they are all at 1.92; is that
8 correct?
9 A. That is correct.
10 Q. And Richmond Superkings are at 1.93, 1.94 and 1.95 for
11 10s.
12 A. Yes.
13 Q. Then over the page, Castella Classic singles, about
14 two-thirds of the way down?
15 A. Yeah.
16 Q. 61, 62, 63?
17 A. Yes.
18 Q. So that's the position in period 14, 2002. So the query
19 has been raised by Mr Davison, but it appears that the
20 differences exist between the two prices notwithstanding
21 that query, and if one then turns through to tabs (d)
22 and (e), I can perhaps take this by reference to
23 a single example, about three pages in, again you will
24 find Dorchester Kingsize --
25 A. Yes.

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1 Q. -- 10s at 1.92, 1.93 and 1.94?
2 A. Yes.
3 Q. If you take it to the next tab, and turn through three
4 pages, you should find Richmond Kingsize 10s, about
5 two-thirds of the way down, at 1.92, 1.92, 1.92?
6 A. Yes.
7 Q. Do you infer anything from that about whether or not CGL
8 complied with the request from Gallaher?
9 A. No, what that -- what I would see by that is we have
10 ignored what Gallaher said and we are following the
11 pricing policy.
12 Q. Thank you.
13 There was some question about whether or not CGL
14 would initiate pricing reductions or whether it would
15 use pricing reductions by other manufacturers to
16 negotiate discounts from other -- from competing
17 manufacturers. Do you remember that?
18 A. I do.
19 Q. If we look at annex 5, tab 1, {D5/1}, we see this is
20 from Peter Newton to somebody called Tony, I think it's
21 Tony McGuinness, and it's the middle paragraph.
22 A. Right. Yes.
23 Q. What do you infer is happening here?
24 A. I think he is using the opportunity to see if he can get
25 more bonus out of this manufacturer to reduce his retail

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1 price.
2 Q. When it says, "Appropriate level of bonus and will not
3 adversely affect the current margin", what do you think
4 he is talking about there?
5 A. He wants to at least have the same level of margin that
6 he is achieving now, if not greater if he achieves
7 a bonus to reduce the retail price.
8 Q. I think you said that CGL wouldn't normally initiate
9 a bonus reduction of this kind, but from Mr McGuinness'
10 point of view, would he know whether the reduction for
11 Royals was funded by CGL or by, in this case, Rothmans?
12 Would it be clear to him what was happening?
13 A. I would have thought he would have thought that it had
14 been funded by the other manufacturer because we would
15 never fund it ourselves.
16 Q. Thank you. Finally, we had some discussion first of all
17 of your tobacco policy and your pricing policy, and
18 that's the first two tabs in annex 5.
19 A. Yes.
20 Q. I think we had some trouble in locating a date for this
21 document. Do you have any recollection of it, the first
22 one, OA it is, tab --
23 A. The tobacco policy?
24 Q. Yes.
25 A. I honestly don't know when that actually came into

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1 fruition.

2 **Q.** So far as you are aware, is this the ethical tobacco

3 policy that we have been talking about?

4 **A.** Yes.

5 **Q.** Thank you.

6 Then the next tab, this is the last question I have,

7 we see the pricing policy for June 2001.

8 **A.** Yes.

9 **Q.** I think in the left-hand column towards the bottom, is

10 that the point you were making, that matching -- I think

11 it's been said often enough, matching [REDACTED]

12 policy?

13 **A.** Yes, [REDACTED]

14 **Q.** Was the point you were making about [REDACTED]

15 [REDACTED] that the two bottom boxes were not

16 necessarily known to ITL or other manufacturers?

17 **A.** That is correct.

18 **MR THOMPSON:** I have no further questions.

19 Further questioned by THE TRIBUNAL

20 **THE CHAIRMAN:** Just one question perhaps to get clear in my

21 own mind. The bonuses that you received for pricing

22 below RRP, suppose you went into [REDACTED] and saw the price

23 that they were selling a particular tobacco product at,

24 but you realised that that price was, say, 3p below RRP,

25 and your policy, so far as the bonus from ITL was

1 concerned was that you should price 5p below RRP, how

2 then would you resolve that conflict between your policy

3 in relation to how much below RRP you should be selling

4 and your comparison with the other retailer?

5 **A.** I mean, we would obviously price against [REDACTED], and

6 I would have -- I am speculating now, I would imagine

7 that Imperial would then complain that we haven't used

8 their entire bonus to reduce down to the level that they

9 were looking for. However --

10 **THE CHAIRMAN:** I am not talking about tactical short-term

11 promotion bonuses here, I am talking about, weren't

12 there more general bonuses for pricing --

13 **A.** The ongoing bonus to ensure that we were selling at

14 recommended retail price or less. In the main those

15 bonuses were really offered by the tobacco companies for

16 our smaller convenience stores to make sure that we were

17 competitive in those stores, because previously, I think

18 before the pricing policy came into place, there had

19 been some very high retail prices set in Co-op

20 convenience stores, and those bonuses really were trying

21 to control that end of the arrangement and try to bring

22 the prices into a more competitive position rather than

23 the superstore end of the pricing. Because obviously in

24 the Co-op there is a greater proportion of business done

25 in convenience stores than in superstores. We didn't

1 have that many superstores.

2 **THE CHAIRMAN:** Then looking at the other end of the market,

3 then, the convenience store market, if there was a

4 conflict between what you had agreed as regards pricing

5 below RRP with ITL and your comparison with the unnamed

6 convenience store comparator, how would that be

7 resolved?

8 **A.** I think the discussion between buyer and national

9 account manager to try and resolve that.

10 **THE CHAIRMAN:** So a discussion between the relevant ITL

11 person and Co-op person?

12 **A.** Yes.

13 **THE CHAIRMAN:** Right.

14 Well, thank you very much, Mr Messom, for staying on

15 a little bit late, but I hope it's convenient for you to

16 have finished your evidence today.

17 **A.** Much appreciated, thank you, madam.

18 **THE CHAIRMAN:** So you are now released from the witness box,

19 though it might be a good idea for you not to be in

20 touch with other Co-op witnesses until they have given

21 their evidence.

22 **A.** I will do exactly that, madam.

23 **THE CHAIRMAN:** Thank you.

24 (The witness withdrew)

25

1 Discussion re timetable

2 **THE CHAIRMAN:** Now, on Thursday, as I understand it, we are

3 going to have Mr Owen and your opening as far as the

4 Gallaher arrangement is concerned; is that right?

5 **MR THOMPSON:** Yes. I was really getting up probably for the

6 benefit of, I think, Morrisons as much as anything else.

7 **THE CHAIRMAN:** Yes.

8 **MR THOMPSON:** Subject to what either Mr Lasok or Mr Williams

9 may say, I would think that, there is a reasonable

10 prospect of us finishing possibly in the morning or

11 certainly early in the afternoon so that there is a good

12 chance that, if everywhere is ready to go, that

13 Morrisons could get going in the afternoon. That's my

14 impression, but I don't know what Mr Lasok and

15 Mr Williams may want to say about that.

16 **THE CHAIRMAN:** Have you any idea as to, within reason, how

17 long you are likely to be with Mr Owen?

18 **MR LASOK:** We think that Mr Owen will be comparable to the

19 other Co-op witnesses that we have had today. There are

20 always unforeseen eventualities but in a case like this

21 they could either shorten or lengthen the period that

22 would be required. Of course, one has to bear in mind

23 that it's not simply cross-examination by me, but it's

24 also the examination in totality. But I think it's fair

25 to say that we would hope that we would have finished

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1 the Co-op by lunchtime, with the hope that we would
 2 start Morrisons after lunch. But that's always subject
 3 to --
 4 **THE CHAIRMAN:** Yes, of course.
 5 Mr Howard, are you planning to do a short opening on
 6 Morrisons before the witnesses are called?
 7 **MR HOWARD:** Yes.
 8 **THE CHAIRMAN:** Who is going to be the first Morrisons
 9 witness, Mr Jones?
 10 **MR JONES:** Madam, the first witness in relation to Morrisons
 11 is actually an ITL witness, Mr Matthews. And we have
 12 for our part have a concern, given the way the timetable
 13 is now unfolding, that Mr Eastwood will then be called,
 14 our best guess is that that will happen next Tuesday,
 15 but the obvious question, the Tribunal of course is not
 16 sitting on Monday, Mr Matthews on this timetable would
 17 start either Thursday afternoon or Friday, we expect him
 18 to be one of the lengthier witnesses in terms of
 19 cross-examination, but Mr Lasok or Mr Williams may think
 20 differently. That's why I say at the moment it looks as
 21 if Mr Eastwood is going to be on Tuesday. He doesn't
 22 currently work directly for Morrisons, he is on
 23 secondment, he lives in Amsterdam. The question arises
 24 of whether he needs to be here on Friday just in case
 25 that estimate is wrong.

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1 I was going to ask, with your permission, that we be
 2 able to tell him that he won't be required until next
 3 week to avoid him having to travel back and forth in the
 4 interim.
 5 Madam, I may also say, since I am on my feet, that
 6 if it helps in terms of the timetable generally, the
 7 question has been raised of what is happening on the
 8 Safeway day. Of course there is no Safeway witnesses
 9 giving evidence on that day. If it is right for us to
 10 assume that the Tribunal is happy to rely in large part
 11 on the written pleadings in relation to the Safeway
 12 documents, and doesn't require Mr Saini to go through
 13 those documents one by one, then we won't need that day
 14 for Safeway. Mr Saini instead will be able to make
 15 relatively brief submissions, and that's a time at which
 16 at least some of the lost ground can be made up.
 17 (Pause)
 18 **THE CHAIRMAN:** As far as Morrisons are concerned, are you or
 19 Mr Saini planning to open in relation to Morrisons? Or
 20 have you said what you are going to say in your earlier
 21 opening and then leaving it to Mr Howard?
 22 **MR JONES:** It would be Mr Saini if it's either of us, he may
 23 have some additional comments to make generally, it will
 24 depend in part on what ITL says, but if he does have
 25 anything to say, we anticipate that will be relatively

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1 brief.
 2 **THE CHAIRMAN:** Mr Lasok, it seems to make sense to say to
 3 Mr Eastwood that he should be here on Tuesday rather
 4 than get him here from Amsterdam on Friday just in case
 5 we get up to him, on the basis that we might then have
 6 a day in hand to catch up if catching up is needed.
 7 **MR LASOK:** With respect, I quite agree. The only possible
 8 contribution I can make to this is to perhaps make the
 9 delicate suggestion that the mini openings don't need to
 10 repeat arguments that are generic to the cases as
 11 a whole, but if they were restricted to the facts and
 12 matters that are relevant to the particular appeal that
 13 they introduce, that might be one way of reducing time.
 14 **THE CHAIRMAN:** Well, I don't consider that Mr Howard has
 15 been unduly lengthy in his openings, but no doubt he
 16 will bear that point in mind. I think the upshot of
 17 that, then, Mr Jones, is that Mr Eastwood can be told to
 18 come on Tuesday, but he needn't be here on Friday.
 19 **MR JONES:** Yes, I am grateful for that.
 20 **THE CHAIRMAN:** Then on Thursday we will have Mr Owen and the
 21 opening from Mr Thompson, and then on Friday we will
 22 have Mr Matthews. We will have Mr Howard's opening
 23 on --
 24 **MR HOWARD:** I very much hope that we actually start
 25 Mr Matthews on Thursday afternoon, but it obviously

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1 depends on how long the others take. I should say that
 2 Mr Matthews works in the United States and has come
 3 over, he works for ITL but has come over in order to
 4 give evidence, so it's fairly important, I think, if
 5 it's possible, that his evidence should be finished on
 6 Friday.
 7 **THE CHAIRMAN:** If we start him on Thursday afternoon, then
 8 that should be possible.
 9 So can we meet at 10.30 on Thursday or should we
 10 meet at 10?
 11 **MR HOWARD:** I think 10.30 would be a good idea.
 12 **THE CHAIRMAN:** Well, thank you very much, everybody, and we
 13 will meet again then on Thursday at 10.30.
 14 (5.00 pm)
 15 (The court adjourned until 10.30 am on
 16 Thursday, 13 October 2011)

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