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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

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

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

19 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 16)**

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

## APPEARANCES

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

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

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

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

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

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

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1 Wednesday, 19 October 2011  
 2 (10.30 am)  
 3 MR GRANT EASTWOOD (continued)  
 4 **THE CHAIRMAN:** Good morning. I remind you you are still on  
 5 oath, Mr Eastwood. Mr Williams.  
 6 Cross-examination by MR WILLIAMS (continued)  
 7 **MR WILLIAMS:** Good morning, Mr Eastwood.  
 8 **A.** Good morning.  
 9 **Q.** Could you turn to paragraphs 17 and 18 of your witness  
 10 statement and read those to yourself, please.  
 11 (Pause)  
 12 **A.** Yes.  
 13 **Q.** So, jumping straight to the end of 18 for the minute  
 14 where you say you could safely put the trading  
 15 agreements in a drawer and forget about them, I think  
 16 you were asked a question about this by Dr Scott  
 17 yesterday, and I don't think you say he did forget about  
 18 them; this is a figure of speech, isn't it, I think?  
 19 **A.** I wouldn't be -- it wouldn't be forefront of mind in  
 20 terms of parity or pricing or the agreement in whole, it  
 21 would be the annual sum that we had agreed twice a year,  
 22 that's the only time it would be reflected on.  
 23 **Q.** We can perhaps start to explore some of the reasons why  
 24 you might say that in a moment. Looking at the file we  
 25 have of communications between ITL and Morrisons,

1

1 I don't suppose you are saying that the buyer forgot  
 2 about the agreements or might have forgotten about the  
 3 agreements, given that ITL was writing to the buyer week  
 4 in, week out, making reference to its requirements?  
 5 **A.** I wouldn't have said that the buyer forgot about them,  
 6 but it wouldn't have been the whole discussion week in,  
 7 week out, no.  
 8 **Q.** So we covered some of this ground yesterday about what  
 9 actually happened in practice and I wondered if I could  
 10 just try and pull some of this together and see if you  
 11 agree with my interpretation of the evidence.  
 12 We looked yesterday at paragraph 15 which says that  
 13 your pricing generally reflected the differentials?  
 14 **A.** Correct.  
 15 **Q.** I think what paragraphs 17 and 18 are saying against  
 16 that background are that if Gallaher decided to fund  
 17 lower prices, using a tactical bonus, which would  
 18 disturb the differentials, then whether parities and  
 19 differentials would be maintained would depend on  
 20 whether ITL responded with an offer of tactical funding?  
 21 **A.** That's correct.  
 22 **Q.** We saw yesterday that that scenario was catered for in  
 23 the trading agreements through the opportunity to  
 24 respond clause?  
 25 **A.** That is correct.

2

1 **Q.** As we saw, it was up to ITL whether it would fund  
 2 a counter promotion, if I can put it that way, but if it  
 3 did, you could be expected to accept that offer of  
 4 tactical funding because it would lower your prices and  
 5 that was good for you?  
 6 **A.** That's also correct.  
 7 **Q.** Just focusing on some of the specific points you make in  
 8 these paragraphs, in 17 can I focus on the words: "I saw  
 9 them simply as expressing ITL's own desired position  
 10 reflecting the state of the market at the time the  
 11 agreements were entered into"?  
 12 **A.** Yes.  
 13 **Q.** Are you saying that the agreements only reflected the  
 14 state of the market at the time the agreements were  
 15 entered into, as in that they didn't bite when market  
 16 conditions changed?  
 17 **A.** I'm saying that, as per yesterday, at the point we  
 18 signed the agreement the pricing was already there, so  
 19 nothing ... so nothing changed.  
 20 **Q.** But that's a slightly different point, isn't it?  
 21 Because I am just trying to unpack what you are saying  
 22 "I saw them simply as expressing ITL's own desired  
 23 position, reflecting the state of the market at the  
 24 time". Perhaps if we put this in the context of the  
 25 agreement, you will see what I mean. Could you turn to

3

1 tab 85, please. Under the heading "Pricing" on the  
 2 second page, do you see in the second line there is  
 3 a reference to "natural price list differences"?  
 4 {D17/85}  
 5 **A.** Correct.  
 6 **Q.** So obviously the price lists changed from time to time,  
 7 and the differentials were affected by changes in the  
 8 price lists?  
 9 **A.** The prices changed at Budget time and at manufacturers'  
 10 price increase and it is correct that the differentials  
 11 could change, depending what increase was applied.  
 12 **Q.** They were often very stable but they could vary with the  
 13 price lists?  
 14 **A.** The differentials were stable.  
 15 **Q.** In fact I think what I am saying is that in practice we  
 16 see that for example on certain brands, the differential  
 17 was very stable over time?  
 18 **A.** That's correct.  
 19 **Q.** But at least the way this is written, the differentials  
 20 adapt to market conditions, it's not simply a factor of  
 21 the state of the market at the time the agreements were  
 22 entered into, just to pick up the language you use in  
 23 your witness statement?  
 24 **A.** The point I make was that, as we entered into the  
 25 agreement, those prices were there, which were, if not

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1 very similar to points in time thereafter. As you have  
 2 just demonstrated, the movement was very consistent, so  
 3 the answer is yes, it was already there and those  
 4 differentials were already there.  
 5 **Q.** Yes, but all I am saying really is the agreement did  
 6 adapt to the market, it was a living agreement, it  
 7 wasn't simply a static --  
 8 **THE CHAIRMAN:** Do you mean that there were further  
 9 subsequent schedules, changing the differentials?  
 10 **MR WILLIAMS:** I think I am just saying, I'm making the point  
 11 that one can't simply see the agreement as a snapshot at  
 12 a particular point in time. The way the agreement works  
 13 is it tended to adapt to, for example, changes in the  
 14 price list, so that I'm just trying to understand the  
 15 significance of the words "the state of the market at  
 16 the time the agreements were entered into", that's all.  
 17 I think we have explored that. I think we are agreed  
 18 that if price lists change, that has implications for  
 19 what the agreement requires.  
 20 **A.** Yes, yes.  
 21 **Q.** We see similar provision in 17/4, but I don't think we  
 22 need to go to that.  
 23 Can we turn to 17/4 on a different point, please,  
 24 it's tab 4 of the file you have there. {D17/4}. I just  
 25 want to come back to the idea that Morrisons could

1 forget about the agreements. I think you said yesterday  
 2 that the intent was to honour the agreements?  
 3 **A.** Correct.  
 4 **Q.** We see in section A under the heading "Pricing" it says:  
 5 "WM Morrison to confirm instore promotional  
 6 activities which may affect pricing strategy."  
 7 I think you agreed yesterday that was an obligation  
 8 on Morrison?  
 9 **A.** Yes, so as we promoted a product in store, when it was  
 10 in store we would have notified Imperial.  
 11 **Q.** Yes, so that's something you had to do under the  
 12 agreement?  
 13 **A.** That's right, and it also worked to our advantage if, as  
 14 in further paragraphs in my statement, where we  
 15 manufactured a promotion in terms of it was neither  
 16 agreed with another manufacturer and then we would  
 17 reduce the retails of our own accord and then start  
 18 a dialogue with Imperial suggesting that there was  
 19 an agreed promotion to force them to react, therefore to  
 20 get lower funding and then reverse it out on the  
 21 previous manufacturer, if that makes sense.  
 22 **Q.** We will come on to explore that in just a minute. I was  
 23 focusing on the question of whether you could forget  
 24 about the agreement and I was really just putting to you  
 25 that you couldn't forget about the agreement, at least

1 to this extent: there was an obligation on you to notify  
 2 ITL of a promotion on a Gallaher brand?  
 3 **A.** It's one point of the whole agreement, so that is  
 4 correct, yes.  
 5 **Q.** One thing you say in paragraph 18 of your statement,  
 6 that putting Gallaher prices down wouldn't have been  
 7 a breach of the agreement; do you remember saying that,  
 8 seeing that a minute ago?  
 9 **A.** Absolutely clear.  
 10 **Q.** Would you accept that putting Gallaher prices down  
 11 without telling ITL was a breach of the agreement?  
 12 **A.** No, not at all. We would never have to discuss Gallaher  
 13 pricing with Imperial.  
 14 **Q.** Sorry, it says here:  
 15 "WM Morrison to confirm instore promotional  
 16 activities which may affect pricing strategy."  
 17 **A.** The word "promotion" is key here. If I had a promotion  
 18 of Gallaher or Rothmans I would automatic -- we would  
 19 have notified Imperial to allow them to react. If  
 20 I changed Gallaher pricing for other than a promotion,  
 21 I would not expect my buyers to be discussing the price  
 22 with Imperial, unless it was for their own negotiation  
 23 tactic.  
 24 **Q.** Perhaps my question wasn't clear. I was only asking  
 25 whether you would agree it would be a breach of the

1 agreement to not notify ITL of a promotion on a Gallaher  
 2 brand?  
 3 **A.** With a Gallaher brand, it is correct that we would  
 4 notify ITL.  
 5 **Q.** And you did do that from time to time?  
 6 **A.** On promotions, yes.  
 7 **THE CHAIRMAN:** Sorry, I didn't understand that answer then.  
 8 When you talk about a promotion or promotional activity,  
 9 to which this obligation to notify ITL applies, is that  
 10 a promotion sponsored or funded by Gallaher as opposed  
 11 to one decided by Morrisons of its own accord?  
 12 **A.** We use the word "promotion" as a short period of time,  
 13 in essence, and it was usually reflected in store points  
 14 of sale that said "was" and "now", and therefore  
 15 encouraged the customer to purchase. So it's only those  
 16 type of activities that we were, as I read, agreed we  
 17 were obliged to notify Imperial.  
 18 **THE CHAIRMAN:** Regardless of who was funding that  
 19 short-term?  
 20 **A.** Regardless, yes.  
 21 **THE CHAIRMAN:** But if there was a longer term decision to  
 22 change the price of a Gallaher brand --  
 23 **A.** There would be no discussion.  
 24 **THE CHAIRMAN:** Right.  
 25 **DR SCOTT:** So we assume that because the merchandisers were

1 watching what was going on, they would soon notice; yes?  
 2 **A.** Absolutely, and for the buyer to ring up and say "We  
 3 have done a promotion on a Gallaher brand and you can  
 4 see it in store today as you go in", you are absolutely  
 5 correct, they would have already noticed it themselves.  
 6 **DR SCOTT:** But we are talking now about what you are  
 7 describing as a non-promotional price change?  
 8 **A.** Yes, and they would notice that as well.  
 9 **DR SCOTT:** You may not know the answer to this, but do we  
 10 have an example of that in the papers so that we can  
 11 understand how people reacted, because presumably there  
 12 would be some reaction when people saw that happening?  
 13 As I say, you may not know the answer to that.  
 14 **A.** I can't answer that.  
 15 **DR SCOTT:** Mr Saini, do we --  
 16 **MR WILLIAMS:** I think there is an example in the Richmond  
 17 and Dorchester context, but it's from the Gallaher  
 18 perspective, because we see that ITL's strategy by late  
 19 2000 is to match Richmond and Dorchester, and we see  
 20 that by some time early the following year that's become  
 21 Gallaher's strategy too, and so just the pattern of the  
 22 documents tends to suggest that Gallaher has picked up  
 23 what ITL is doing rather than the other way around and  
 24 adopted the same strategy. I think that might provide  
 25 an example of the sort of thing you have in mind,

1 Dr Scott.  
 2 **MR SAINI:** I think it might help, I do not want to interrupt  
 3 my learned friend's cross-examination, just to clarify  
 4 with Mr Eastwood what you means by promotional  
 5 activities here.  
 6 **THE CHAIRMAN:** I think that's what we just did. As  
 7 I understood it, what you mean is a short-term special  
 8 offer, if I can call it that --  
 9 **A.** Correct.  
 10 **THE CHAIRMAN:** -- regardless of who is funding that 2p or  
 11 5p off but it doesn't cover longer term decisions --  
 12 **A.** Price reliant.  
 13 **THE CHAIRMAN:** -- about what the price should be.  
 14 **MR SAINI:** My only query was in the kind of argot of this  
 15 case, where would a tactical bonus fall within that, so  
 16 if for example Gallaher had a tactical bonus on  
 17 a particular product, say Dorchester, and that was  
 18 adopted by Morrisons, they would use the price, is that  
 19 a promotional activity or is that a longer term ...  
 20 **A.** You are absolutely correct. Some of the tactical  
 21 bonuses were short-term, some were medium term and some  
 22 were long-term. So depending on if we knew the period  
 23 in advance, then it would depend on the conversation we  
 24 are having.  
 25 **DR SCOTT:** I think if I explain my concern: part of the

1 reason why the manufacturers are concerned to agitate  
 2 about differentials is they don't want to be  
 3 disadvantaged in respect of the pricing of their product  
 4 compared to that of their rivals. The price change that  
 5 you are envisaging is one in which in that case Gallaher  
 6 are getting an advantage over ITL, and what we are  
 7 trying to understand is how you understood the agreement  
 8 in that context.  
 9 **A.** Other than promotions?  
 10 **DR SCOTT:** This is other than promotions.  
 11 **A.** Other than promotions we had no obligation to tell  
 12 Imperial that we had moved prices down or up, whichever.  
 13 **DR SCOTT:** But leaving aside informing them, did you see any  
 14 reason ... well, yes, okay.  
 15 **MR WILLIAMS:** I think where you and I had gotten to is you  
 16 had agreed it would be a breach of the agreement not to  
 17 tell ITL that there was a promotion on a Gallaher brand?  
 18 **A.** I wouldn't say it was a breach, but yes, we had agreed  
 19 to inform them of a promotion.  
 20 **Q.** The agreement contemplates that you will do that?  
 21 **A.** Correct.  
 22 **Q.** Would you agree that in similar vein it would be  
 23 contrary to the agreement to tell ITL that there was  
 24 a promotion on a Gallaher brand when there wasn't  
 25 a promotion on a Gallaher brand?

1 **A.** Not at all, this is normal day to day trading, cat and  
 2 mouse trading, we would manufacture as many scenarios as  
 3 we possibly could in order that we could reduce the cost  
 4 to reflect in the retail to pass onto the customer.  
 5 **Q.** I think you deal with this in paragraph 24 of your  
 6 witness statement, so do you want to read that to  
 7 yourself.  
 8 **MR HOWARD:** If it's being suggested that's a breach of the  
 9 agreement, I think Mr Williams ought to identify the  
 10 term that he says is being breached.  
 11 **MR WILLIAMS:** Sorry, I thought we had just been discussing  
 12 "WM Morrison to confirm instore promotional activity  
 13 which may affect pricing strategy."  
 14 **MR HOWARD:** Yes, but you are putting a different point,  
 15 which is it is a breach to say something that there is  
 16 a promotion when there isn't. If that's the sentence he  
 17 is relying on, fine, but I just wanted to know whether  
 18 there was anything else --  
 19 **THE CHAIRMAN:** Well, I think he may well argue that in order  
 20 to give business efficacy, if that's not an old  
 21 fashioned phrase, to that sentence it's an underlying  
 22 assumption that they will --  
 23 **MR WILLIAMS:** Tell the truth.  
 24 **THE CHAIRMAN:** -- tell the truth, but that may be for  
 25 future reference, but Mr Eastwood is saying that wasn't

1 his understanding as to the commercial realities of the  
 2 situation.  
 3 **MR WILLIAMS:** And we were going to move on to paragraph 24,  
 4 I think, where he deals with this issue in his witness  
 5 statement.  
 6 **A.** (Pause) Yes.  
 7 **Q.** I just wanted to put this paragraph of your witness  
 8 statement in the context of what you have said so far.  
 9 I think you have said so far that you generally priced  
 10 on the basis of price list differentials, unless there  
 11 was a promotional activity which disturbed those  
 12 differentials?  
 13 **A.** That's correct.  
 14 **Q.** So the sort of scenario that you are describing here  
 15 I think would involve a departure from the price list  
 16 differentials without there being a manufacturer  
 17 promotion to create that departure from the  
 18 differentials?  
 19 **A.** As I described yesterday, if we priced well below that  
 20 of the bonus level, so if we were given 5p for example  
 21 and we went to 6p, Imperial, from my point of view,  
 22 would be elated. The paragraph here describes Morrisons  
 23 forward buying stock at Budget time, which allowed us to  
 24 hold the price further down for a longer period, so the  
 25 differentials would have been disturbed and therefore

1 the gap could have been bigger and Imperial would have  
 2 been very elated.  
 3 **Q.** I think what you are contemplating in 24 is that you  
 4 hold down the price of the Gallaher brand without  
 5 funding from Gallaher, so I am not sure that's something  
 6 which would cause ITL to be elated?  
 7 **A.** It's already being funded. The forward buy proposal  
 8 works on the basis that the Chancellor announces the  
 9 Budget, at 6 o'clock that evening the costs go up. I am  
 10 already sat on X amount of weeks' stock. Rather than  
 11 reflect the Chancellor's request to put the price up by  
 12 Xp, I continue to hold the price down. And invariably,  
 13 as I recall, and we kept -- if we ever did it, and we  
 14 did do it several times -- all cigarettes from all  
 15 manufacturers down rather than reflect the manufacturer  
 16 -- the Chancellor's Budget.  
 17 **Q.** Did you talk about forward buy then, sorry?  
 18 **A.** Yes.  
 19 **Q.** I think you deal with forward buys in paragraph 22.  
 20 **A.** Sorry.  
 21 **Q.** I am looking at paragraph 24. I was just reacting to  
 22 something you said. I think you said that in this  
 23 situation ITL would be elated, because its price was --  
 24 were you just reading the wrong paragraph? Should we  
 25 start again?

1 **A.** Sorry, I read paragraph 22.  
 2 **Q.** Sorry, if we start again on 24, we might make better  
 3 progress this time?  
 4 **MR HOWARD:** Perhaps you should read it and then ask the  
 5 question, Mr Williams.  
 6 **MR WILLIAMS:** I thought I did ask --  
 7 **THE CHAIRMAN:** Yes, he is reading it.  
 8 **MR HOWARD:** No, no, it's just a misunderstanding. It was  
 9 evident from the whole discussion that we were talking  
 10 about different paragraphs.  
 11 (Pause)  
 12 **MR WILLIAMS:** So, as I say, I just wanted to put this  
 13 paragraph in the context of what we have heard so far  
 14 about your approach to pricing. I think generally you  
 15 have said that you would price on the basis of the price  
 16 list differentials. We covered this ground. And you  
 17 would depart from those differentials when there was  
 18 a promotion and then the opportunity to respond clause  
 19 would bite and so on.  
 20 **A.** Correct.  
 21 **Q.** I think what you contemplate here is a departure from  
 22 the price list differentials without there being  
 23 a promotion by Gallaher?  
 24 **A.** Correct.  
 25 **Q.** So this would be an exception?

1 **A.** Hypothetical promotion.  
 2 **Q.** That's right, but I think this is a sort of exception to  
 3 your general practice, I think?  
 4 **A.** This would be us hypothetically creating a promotion,  
 5 yes.  
 6 **Q.** But it would be an exception to the general practice of  
 7 pricing --  
 8 **A.** Yes, correct, absolutely.  
 9 **Q.** If we can just explore what you say in this paragraph,  
 10 you say:  
 11 "We would also play the manufacturers off against  
 12 each other, for example at the end of a promotion  
 13 I might hold down the price."  
 14 Is this a decision you would make or a decision the  
 15 buyer would make?  
 16 **A.** That's -- the buyer may make the decision or, as I had  
 17 the final say, I could have made that decision, so it  
 18 would be based on a recommendation, I would be looking  
 19 at profitability, the sales of the whole department and  
 20 in some cases I had the opportunity to cross-fund  
 21 profits from one category to another, because my targets  
 22 were based on total department profit, not necessarily  
 23 just tobacco.  
 24 **Q.** I just wanted to explore what you are saying here. You  
 25 are saying if you hold down the price on a Gallaher

1 product after Gallaher has ended the promotion, that  
 2 might cause ITL to think there is a Gallaher promotion  
 3 and offer at that point a funded reduction?  
 4 **A.** What I am suggesting here is, if the promotion had ended  
 5 and it was a national promotion and it continued with  
 6 Morrisons for longer, it almost would get Imperial  
 7 nervous thinking that we had got an extended promotion,  
 8 therefore would create a chain reaction where they may  
 9 have to fund their brand back down or -- to compete.  
 10 **Q.** Are you talking about a situation where ITL has been  
 11 matching a Gallaher promotion already?  
 12 **A.** Yes, and then remove the bonus accordingly and the  
 13 retails have gone up.  
 14 **Q.** I just wanted to check that against the way you express  
 15 yourself here. You say:  
 16 "That would put pressure on ITL to offer a funded  
 17 reduction if ITL provided that additional funding."  
 18 So you are talking about -- I think you have  
 19 explained now -- a continuation of a previous offer?  
 20 **A.** Correct.  
 21 **Q.** Rather than a new offer?  
 22 **A.** The bonus is removed and it's to put pressure on them  
 23 back to put the bonus back on.  
 24 **Q.** So you have given ITL the opportunity to respond to  
 25 a Gallaher promotion and it has responded, and you are

1 now dealing with a situation where the question is: is  
 2 ITL going to continue to offer funding even though the  
 3 Gallaher promotion has ended?  
 4 **A.** Yes.  
 5 **Q.** Could you turn to tab 85, please, and just read to  
 6 yourself the first bullet point which we looked at  
 7 yesterday. {D17/85}.  
 8 **A.** Which bullet point?  
 9 **Q.** Sorry, under the heading "Pricing".  
 10 (Pause)  
 11 **A.** Yeah.  
 12 **Q.** So this does have two parts, doesn't it? The first part  
 13 is the opportunity to respond, and the second part says:  
 14 "Should any additional funding be agreed to support  
 15 a response to competitor activity, it should be removed  
 16 once that activity has ended."  
 17 So the agreement contemplates in this situation that  
 18 you will tell ITL effectively -- I think this is the way  
 19 it has to work -- that the Gallaher promotion has ended  
 20 so that they can end the funding that they were  
 21 offering?  
 22 **A.** This is -- may I just read again.  
 23 **Q.** Of course.  
 24 (Pause)  
 25 **A.** This is suggesting to me that once the promotion's

1 ended, that they will remove their bonus accordingly,  
 2 and that would be the case.  
 3 **Q.** But for that to work, you would have to tell them the  
 4 promotion's ended, because if you did what you describe  
 5 in paragraph 24, they could be led up the garden path  
 6 endlessly?  
 7 **A.** In many cases this is public information, a great  
 8 example would be DFS, you see it many times on the  
 9 television when it says "Promotion ends 31 January".  
 10 Many supermarkets' signage as you walk in today has  
 11 a start and end date on the signage, so it would be  
 12 public information. We would encourage our customers  
 13 specifically, towards the end of a promotion, to make  
 14 the most of this advantageous price, and you will see on  
 15 many occasions additional signs going "hurry while  
 16 stocks last" or "offer ends this weekend". So it was  
 17 something that we wouldn't necessarily have to ring up  
 18 and say "the promotion ends"; you could see it by just  
 19 reading the signage.  
 20 **Q.** And that would apply in tobacco as well?  
 21 **A.** Correct, we had something which we called a hymn board  
 22 because it reflected a church hymn board, and it stood  
 23 either side of the kiosk which we put promotions on. If  
 24 I recall correctly it had ten slots on each side of  
 25 which promotional point of sale used to be placed within

1 that. And at the actual point of purchase, before it  
 2 was banned, it used to have a shelf barker which had "6p  
 3 off" or whatever the offer was, with the dates and the  
 4 brand.  
 5 **Q.** Doesn't that mean that this strategy in paragraph 24  
 6 could never work, because ITL would know that the  
 7 Gallaher promotion had ended?  
 8 **A.** What ITL wouldn't know is whether we have had a separate  
 9 discussion to extend the offer for whatever reason.  
 10 Sometimes when you go into a promotion in many  
 11 categories just because you have excess stocks or you  
 12 have a different tactical reason to promote, and  
 13 therefore at the end of promotions you sometimes see in  
 14 stores where it says "Offer extended for two weeks or  
 15 things like that. So the answer is no, they wouldn't  
 16 always know whether the promotion did end on that  
 17 specific date.  
 18 **Q.** In that case I go back to the agreement, and if there  
 19 are going to be promotions which are going to continue  
 20 beyond the published date, if I can put it that way, in  
 21 order for this provision "should any additional funding  
 22 be agreed to support a response to competitor activity  
 23 it should be removed" et cetera, in order for that to  
 24 work at all, you have to tell ITL when the Gallaher  
 25 promotion comes to an end?



1 **A.** If the Gallaher chose to extend the promotion  
 2 themselves, then it would be in our interests to also  
 3 tell Imperial "we would like you to extend the  
 4 promotion" and therefore we could be the only retailer  
 5 at that time to have a longer overall promotion than any  
 6 other. So yes, we would share that information with  
 7 Imperial if Gallaher had decided to extend it  
 8 themselves.  
 9 **Q.** But you are talking there about them extending the  
 10 promotion, I am making a different point which is about  
 11 the end of the promotion, because what this contemplates  
 12 is at the end of the promotion, ITL will withdraw the  
 13 additional funding it's been offering and it can only do  
 14 that at the end of the promotion if it knows when the  
 15 promotion has ended?  
 16 **A.** We wouldn't normally ring them up in advance and say  
 17 "this promotion has ended" or "ends on Monday", they  
 18 would go into the store, as we have discussed  
 19 previously, and notice that the price has changed and  
 20 then there will be a confirmation thereafter, usually,  
 21 "Yes, the promotion has now ended", which gave Imperial  
 22 usually a lag of one week or two weeks.  
 23 **Q.** I understand that's the way it works when everything is  
 24 working as it's supposed to work, but in paragraph 24,  
 25 you are talking about a different situation, which is

21

1 a situation in which the Gallaher promotion has ended  
 2 and yet you don't put the Gallaher price back up,  
 3 because you are trying to extract additional funding  
 4 from ITL --  
 5 **A.** Correct, so --  
 6 **Q.** I am saying that in order for you to do that you have to  
 7 disregard the bit of the agreement which says implicitly  
 8 or explicitly, depending on how you read it, that you  
 9 have to tell them when the promotion comes to an end, if  
 10 they have not figured it out for themselves from  
 11 publicly available information?  
 12 **A.** And the whole of this exercise could have been done  
 13 within one phone call within ten minutes, so at  
 14 9 o'clock on Monday morning we may not have removed the  
 15 Gallaher promotion and then we could have had the phone  
 16 call with Imperial. So there is not huge amounts of  
 17 time, we are trying to manufacture -- we could have also  
 18 been talking to Gallaher to say --  
 19 **THE CHAIRMAN:** I think the point that's being put to you, as  
 20 far as I understand it, is that you are under  
 21 an obligation in the contract to tell them when the  
 22 Gallaher promotion is ending because the likelihood is  
 23 they will want to end their own promotion.  
 24 **A.** Absolutely correct.  
 25 **THE CHAIRMAN:** And that seems to be something you have

22

1 agreed that you will do. But what you seem to be saying  
 2 in paragraph 24 is: "sometimes we would not tell them  
 3 and in fact, by keeping the price low ourselves, even  
 4 though Gallaher are no longer funding it, we would lead  
 5 them to believe that we were still being funded by  
 6 Gallaher and therefore we would not tell them, as we  
 7 were supposed to, that the Gallaher funding was ended".  
 8 Is that the point?  
 9 **A.** That's absolutely correct, and then at the same time we  
 10 would then do the reverse to Gallaher and try and expect  
 11 a promotion thereafter, and thus we would end up in  
 12 a situation where we would have them both funded again.  
 13 **MR WILLIAMS:** Would you deliberately breach the agreement?  
 14 **A.** We would deliberately manufacture situations like this,  
 15 yes.  
 16 **Q.** Would you deliberately breach the agreement?  
 17 **A.** I wouldn't use the word "breach", but yes, the scenario  
 18 I have just described, we would deliberately do that to  
 19 extract longer promotions.  
 20 **Q.** Can I just understand what's at stake in this situation  
 21 for you? At the point when you have persuaded ITL to  
 22 continue funding the promotion, in the scenario you  
 23 describe here, I think it's right to say you are losing  
 24 money, aren't you, because you are making the same  
 25 margin on the ITL brand as you would have done at

23

1 a higher price, but they have just funded the lower  
 2 price, but you are out of pocket on the Gallaher brand  
 3 because you are funding that yourself?  
 4 **A.** That could be the case, yes.  
 5 **Q.** That does seem to be the logic of what you are saying in  
 6 paragraph 24?  
 7 **A.** We would be looking at a longer term gain, so if in one  
 8 week we lost some money, but for the longer term for  
 9 three or four weeks we gained more and a sharper price,  
 10 then the overall cash profit would be positive.  
 11 **Q.** So you only roughly break even -- I am not being precise  
 12 about the maths -- at the point when you do persuade  
 13 Gallaher to re-fund the promotion which it's just  
 14 decided to terminate; is that right?  
 15 **A.** Well, "break even" I would challenge --  
 16 **Q.** Sorry, I don't mean "break even" in absolute terms,  
 17 I mean break even relative to the margin you would have  
 18 made if you hadn't engaged in this game?  
 19 **A.** Here we seem to be talking about margin, there is  
 20 a perception thing which is critical to Morrisons, that  
 21 customers see that we have promotions and lower prices  
 22 than anybody else, it was not always just about a break  
 23 even situation on absolute cash profit.  
 24 **Q.** I think you said earlier on that these promotions would  
 25 tend to be short-term?

24

1 A. You would hope some -- most -- in the main they were  
 2 four weeks but as you can see from all the evidence,  
 3 particularly around a Budget or a manufacturer's price  
 4 increase, some of these got continually extended to  
 5 four weeks, eight weeks, 12 weeks.  
 6 Q. It just all seems like quite a lot of effort for  
 7 a fairly modest prize, really, which is the ability to  
 8 be slightly cheaper than your rivals potentially, if all  
 9 of this comes off, for a short period?  
 10 A. I think that's how competition works within  
 11 supermarkets, it's the sum of all the small parts that  
 12 make the bigger picture. So yes, whilst we may have  
 13 done this on tobacco, somebody could have been doing it  
 14 on beans, somebody else could have been doing it on  
 15 teabags and then the whole picture then generates that  
 16 perception to the customer that Morrisons is a very  
 17 competitive business.  
 18 Q. Anyway, I do not want to get too distracted by this  
 19 because I think we agreed earlier on that this would be  
 20 an exception to your normal pricing in line with RRP  
 21 differentials?  
 22 A. That's correct.  
 23 Q. Can we now move to look at some documents in the file  
 24 which show how all of this actually worked in practice.  
 25 Could you turn to tab 2 of annex 17, please. Do you

25

1 want to read that to yourself. {D17/2}.  
 2 (Pause)  
 3 A. Yes.  
 4 Q. So these are minutes of a meeting between Colin Wragg  
 5 and Justin Addison, and they are the minutes prepared by  
 6 Morrisons. We can see various objectives and agenda  
 7 listed in the main part of the minutes. But actually  
 8 when you look at the right-hand side there is a heading  
 9 "Action"?  
 10 A. Correct.  
 11 Q. So are these actually action items rather than a list of  
 12 the objectives or agenda?  
 13 A. May I just explain the purpose of this document? This  
 14 document was a minute and an aide memoire to the buyer.  
 15 In a typical buyer's day they would go into six or seven  
 16 meetings back-to-back, so it wouldn't be something where  
 17 you would sit in a meeting and write there and then, it  
 18 could be something that he wrote in an evening, it could  
 19 be a message back to himself. So invariably what would  
 20 happen is he would have the meeting, he would then go  
 21 back to his desk, write some notes, record some facts of  
 22 points discussed in the meeting or indeed write some  
 23 notes back to himself, of which he would then tend to  
 24 action -- or not action if they needed none --  
 25 accordingly some days after, or there and then if it was

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1 that important.  
 2 Q. That's helpful, thank you.  
 3 So I think from what you just said then, focusing on  
 4 item 3, that is an action on Justin Addison arising from  
 5 the meeting, it's something that would have been  
 6 discussed at the meeting?  
 7 A. So when I look at the date, the date of the meeting is  
 8 10 April, which, when I also look at the chronological  
 9 document there was a Budget increase on 21 March. This  
 10 date would suggest this is the first meeting that  
 11 Justin's had with Imperial roughly after the Budget. It  
 12 would be normal that they would be looking at the  
 13 bonuses to make sure all the bonuses are correct and all  
 14 his retros are set up. Retrospective bonusing was  
 15 a hugely administrative process, but financially was  
 16 a lot of money. This could be a note from Justin back  
 17 to himself having gone through all the bonuses,  
 18 et cetera, that he needs to look at his hand rolling  
 19 tobacco versus anything he had seen as he went through  
 20 those schedules regarding the Budget.  
 21 Q. So on the basis that this has in some way come out of  
 22 this meeting, it looks like an issue arising from the  
 23 meeting somehow is that he is going to realign hand  
 24 rolling tobacco retails, so that looks like something he  
 25 is going to do in order to implement parity and

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1 differential requirements?  
 2 A. I totally disagree. That absolutely says  
 3 "Justin Addison to realign HR tobacco retails", it  
 4 doesn't say regarding what. That could be a message to  
 5 himself, because it's just after the Budget.  
 6 **THE CHAIRMAN:** But realigning them with what --  
 7 A. It could well be, as an example, we had 12.5 gram,  
 8 25 gram, and 50 gram packets, that could be a message to  
 9 Justin himself where he has the pro ratas wrong, it  
 10 could be many things, but it doesn't simply mean this is  
 11 reflective of a trading -- the trading agreement.  
 12 **MR WILLIAMS:** You would agree that "realign" is the sort of  
 13 language we see, in, for example, the second trading  
 14 agreement, it was the sort of language that was used to  
 15 describe implementation of parities and differentials?  
 16 A. I disagree that in this particular instance this is  
 17 aligned to a trading agreement. This is Justin's  
 18 language, it's a note back to himself talking about what  
 19 I can't really comment on, but given the comment that  
 20 I made earlier about the 12.5, 25 and 50 gram  
 21 differentials, it could well just be about realigning  
 22 those differentials.  
 23 Q. It does arise from a meeting with ITL, doesn't it?  
 24 A. Correct, and it also arises from a meeting which I would  
 25 suggest was the first meeting after a Budget, which

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1 there would be a phenomenal amount of paperwork.  
 2 **Q.** Could we move to document 9, please. {D17/9}.  
 3 First of all, do you want to read the section  
 4 relating to L&B and JPS under the first heading.  
 5 (Pause)  
 6 **A.** Yes.  
 7 **Q.** So this relates to the end of a period during which  
 8 Imperial had paid retro bonuses on L&B and JPS to  
 9 maintain a lower price against Mayfair?  
 10 **A.** Yes.  
 11 **Q.** Which were linked brands under the first trading  
 12 agreement at this time?  
 13 **A.** Yes.  
 14 **Q.** What it looks like, and you can tell me if you agree, is  
 15 that Imperial has picked up some intelligence about  
 16 what's happening on Mayfair from some of its other  
 17 customers or from some sort of other, and it's passing  
 18 that intelligence on to Morrisons. I'm focusing there  
 19 on the first sentence:  
 20 "I understand that Mayfair brands are moving up from  
 21 Monday, 2 October. I believe this is a general increase  
 22 in the multiple retailers."  
 23 **A.** If I may just refer back into the chronological --  
 24 **Q.** Please do, because I was going to go there in a minute,  
 25 actually, so if you want to ...

1 **A.** Because --  
 2 **Q.** There is no MPI or anything at this time, I don't think.  
 3 **A.** No, but I do believe in the previous MPI Mayfair had  
 4 announced that it wasn't going to move any prices,  
 5 and --  
 6 **THE CHAIRMAN:** Do you mean Mayfair or Gallaher?  
 7 **A.** Mayfair as in -- sorry, Gallaher announced on the  
 8 Mayfair brand that there was no movement. If I refer to  
 9 document 3 in the Gallaher file, annex 7: {D7/3}  
 10 "Dear Justin, I write to confirm the following price  
 11 changes and bonuses for Mayfair. These are to be in  
 12 store from Monday, 5 June until further notice and the  
 13 bonuses applicable."  
 14 **MR WILLIAMS:** I am not sure whether any of this is answering  
 15 my question, I am afraid.  
 16 **THE CHAIRMAN:** Just take it one step at a time, Mr Williams  
 17 will ask you a question.  
 18 **A.** Sorry.  
 19 **MR WILLIAMS:** We are going to go through the various  
 20 different things that are happening in this document,  
 21 and if you want to make points of that sort, we will get  
 22 there, don't worry. I was asking you something about  
 23 the first line under "Pricing Movements" where it  
 24 says --  
 25 **MR HOWARD:** I wonder if I could just rise to raise a point

1 of clarification just bearing in mind I think the  
 2 timetable issues. We have not actually established  
 3 whether the witness contemporaneously saw this letter.  
 4 Unless one establishes that, we are into really what is  
 5 an argument between counsel and the witness as to what  
 6 was going on. Now, it may be Mr Eastwood knows his way  
 7 around the files and can provide that argument, but  
 8 I just wonder what the evidential value is unless we  
 9 establish first whether he had seen the letter at the  
 10 time.  
 11 **THE CHAIRMAN:** Well, is this challenging something that  
 12 Mr Eastwood has said in his statement, either generally  
 13 or about this particular document?  
 14 **MR WILLIAMS:** Not about this particular document, Madam, but  
 15 it goes to the question of whether the differentials  
 16 were maxima and whether they were operated as maxima in  
 17 practice, which is something Mr Eastwood does say in his  
 18 statement. You know, we did discuss yesterday the  
 19 extent of Mr Eastwood's involvement in the account, the  
 20 closeness of his supervision over the buyers, and his  
 21 familiarity with the documents. He comments in his  
 22 witness statement on annex 1 to Morrison's notice of  
 23 appeal and says "I agree with everything that's said in  
 24 it".  
 25 So we do find ourselves once again in a slightly

1 invidious position where if we don't put the documents  
 2 to the witness we will be criticised. If we do put the  
 3 documents it's obviously laborious, because we are  
 4 asking the witness to think themselves into a position  
 5 they weren't in at the time --  
 6 **MR HOWARD:** My point was just a simpler one. Mr Williams  
 7 can do what he likes. My point is surely one first  
 8 establishes with the document whether the witness  
 9 actually saw it at the time. If the answer is yes,  
 10 fine, go into questions. If the answer is "actually, no  
 11 I saw it when preparing for the case", then that's  
 12 a different matter. At the moment we simply don't know  
 13 the basis on which the discussion is taking place.  
 14 **DR SCOTT:** We do know one important factor here, and it  
 15 relates to whether these were maxima or were being  
 16 treated as fixed and that factor is this: what we have  
 17 heard is that you have two levels, you have the buyer  
 18 and you have the superintending layer where targets are  
 19 set for the whole department, as I understand it.  
 20 **A.** Correct.  
 21 **DR SCOTT:** Now, why does that matter? It matters because if  
 22 Mr Addison and later Mr Giles are being judged on the  
 23 margins they make in tobacco, but Mr Eastwood is being  
 24 judged on the margin he makes across his department,  
 25 then they have rather different perspectives on how the

1 pricing is done.  
 2 **MR HOWARD:** That may be an appropriate matter, I am not  
 3 rising to make submissions at this stage, I am really  
 4 making a very simple point, which is -- there is a big  
 5 danger in this case that somebody whose practice is not  
 6 based in competition is in commercial practice, it's  
 7 essential in cross-examination or in any evidence to  
 8 establish actually whether what you have is evidence or  
 9 not. That's all I am making, it's a very simple point.  
 10 We just need to understand what the witness knows about  
 11 this document. In relation to Dr Scott's point, if  
 12 there is a more general point as to how this is all  
 13 working, that's fine, but we need to be clear what is  
 14 being asked and what is then being elicited.  
 15 **MR WILLIAMS:** Mr Howard is quite right, but I was rather  
 16 working on the basis that Mr Eastwood didn't check every  
 17 letter that Mr Addison sent or received at the time, and  
 18 to some extent this is necessarily a retrospective  
 19 exercise.  
 20 **THE CHAIRMAN:** The question is: Mr Eastwood, this letter  
 21 that we are looking at, is it a letter that you would  
 22 have seen at the time?  
 23 **A.** No.  
 24 **THE CHAIRMAN:** It's not, so it's being put to you, because  
 25 as I understand it, you make comments in your witness

1 statement about whether the agreements set maximum  
 2 relativities or fixed relativities; you understand that?  
 3 **A.** Correct.  
 4 **MR WILLIAMS:** I was actually starting with what I thought  
 5 was a more straightforward point, which is about the  
 6 first sentence, but the main reason for going to the  
 7 document is the point you have made, Madam.  
 8 **THE CHAIRMAN:** This gets us back to the question of whether,  
 9 in order to challenge that part of his witness  
 10 statement, it's necessary for the OFT to put every  
 11 document on which they wish to rely as showing that the  
 12 price schedules set fixed rather than maxima to the  
 13 witness, even if the witness has never seen that  
 14 document before, in order then to say "Does that cause  
 15 you to change your mind about what you said in the  
 16 witness statement?"  
 17 Now, this is a point we raised quite early on in the  
 18 case on the basis that it was going to take a long time  
 19 if every document needed to be put to the witness in  
 20 order for the OFT then to challenge a statement which is  
 21 made very generally in these witness statements about  
 22 whether these are fixed or maxima.  
 23 Now, I don't know whether any discussion took place  
 24 between you on that point, but it certainly would speed  
 25 things up if we could agree that, when the OFT wishes to

1 submit at the end of the day that Mr Eastwood is wrong  
 2 about what he says about these being maxima and they  
 3 were in fact fixed, ITL or Morrisons are not going to  
 4 jump up and say "Oh, well, you didn't put that letter to  
 5 Mr Eastwood" --  
 6 **MR HOWARD:** If I can make clear my position --  
 7 **THE CHAIRMAN:** -- then that's the situation we are in.  
 8 **MR HOWARD:** -- it depends really what you are putting the  
 9 letters to the witness for, and it really arises in  
 10 a way from what Dr Scott was saying. If one is wanting  
 11 to say to the witness, "Look, as a matter of practice,  
 12 the way everything worked was that the maxima were  
 13 treated as fixed, and here is a whole lot of instances",  
 14 I am not going to argue why they are wrong about that,  
 15 but they say, "Here are a whole lot of instances where  
 16 it's fixed", or to take Dr Scott's point, "There is some  
 17 other basis on which it must have been fixed", then you  
 18 can put that to the witness.  
 19 If, on the other hand, what you are doing is saying  
 20 to the witness, "Look at this letter, doesn't this mean  
 21 the following textually, and let's have a discussion  
 22 about textually what was happening", that seems to me to  
 23 be completely inappropriate and unhelpful. I certainly  
 24 don't say they need to put letters which a witness  
 25 hasn't seen. If they want to run an argument at the end

1 of the day, which is I think what they are saying, to  
 2 say "Although the agreements say maxima, actually look  
 3 at what happened, here is all the correspondence and we  
 4 say this is only consistent with a fixed case", we can  
 5 deal with that, but that's really just an argument on  
 6 what was happening in the correspondence. I am not  
 7 really sure why you are assisted in debating the point  
 8 with the witness beyond perhaps challenging by saying  
 9 "Look, there are a number of instances where this is  
 10 what happened".  
 11 **THE CHAIRMAN:** What we seem to be doing is putting each of  
 12 those instances or alleged instances to the witness by  
 13 showing him the particular letter, and that is what is  
 14 taking such a lot of time. If we could find a way  
 15 through that, then things would speed up.  
 16 **MR HOWARD:** That's my point. I am trying to be helpful to  
 17 say that I just cannot believe for the next two to three  
 18 weeks more of this, that we need to go through every  
 19 letter, particularly where you are doing it with  
 20 a witness who didn't actually see it at the time.  
 21 **MR SAINI:** Could I respectfully suggest that there is a way  
 22 through this which is I am not going to submit at the  
 23 end of this case that documents that Mr Eastwood was not  
 24 a party to should have been put to him. There are  
 25 a large documents to which Mr Eastwood was a party,

1 where he is not just the party named because he has the  
 2 email address, but the letters are to him. To take  
 3 an example, document 31 where there is a reference to  
 4 prices, Mr Williams can put to Mr Eastwood this is  
 5 a document he received, for his attention, was that  
 6 a fixed or a maximum price. But in case Mr Williams is  
 7 worried that he has to put every document, I am not  
 8 going to suggest that he has to put every document to  
 9 this witness.  
 10 **THE CHAIRMAN:** Is that helpful, Mr Williams? If we can  
 11 limit the cross-examination where you are challenging  
 12 statements that are made very generally, as I accept, by  
 13 witnesses and the witnesses are not, when they are asked  
 14 about it, necessarily limiting what their evidence to  
 15 even the time that they were involved with tobacco but  
 16 are saying as far as they know it applied both before  
 17 and after, not necessarily Mr Eastwood but generally, it  
 18 seems now to be agreed that you need only put to the  
 19 witness documents of which he clearly has knowledge at  
 20 the time, because he sent them or received them, in  
 21 order to challenge those statements. If, at the end of  
 22 the day, you wish to rely on other elements or other  
 23 incidents over the period which you say show that these  
 24 were operated as fixed rather than maxima, you will not  
 25 be picked up as not having put that case to the witness.

1 Is that where we are, then, at the moment?  
 2 **MR HOWARD:** I think there is a sort of nuance to it. It's  
 3 not for me to teach somebody how to cross-examine, but  
 4 what would have thought you would be saying to the  
 5 witness is "You say this was operated on a maxima basis,  
 6 what's the basis for your saying that?" That's the sort  
 7 of first factual question you have to identify. In the  
 8 light of that you have to decide what you have to do in  
 9 cross-examination. If he says, "Actually because I was  
 10 fully aware of everything that was going on, including  
 11 all these letters", then you may have to go to the  
 12 letters. If on the other hand, he says "Actually,  
 13 I don't really know, it's just based upon those letters  
 14 I was involved in", that's a different matter. One has  
 15 to first have the basic premise question to the witness  
 16 and then you go from there.  
 17 **MR WILLIAMS:** I thought we had that exchange yesterday,  
 18 Madam, that was the purpose of the opening four or five  
 19 questions of my cross-examination. It obviously doesn't  
 20 follow from that that Mr Eastwood has seen every letter  
 21 but I was trying to get to the bottom of how far he  
 22 understands how it works, and he said he understood it  
 23 very well and in detail. So I do think that that's  
 24 something we explored yesterday.  
 25 I wasn't planning to mechanically put every document

1 to the witness. I have chosen a selection of documents  
 2 which I thought clearly illustrated the points I wanted  
 3 to make and documents which Mr Eastwood was party to,  
 4 and that was the approach I was going to take.  
 5 **THE CHAIRMAN:** Let's limit it, if we may, to documents to  
 6 which he is a party on the basis of what we have  
 7 discussed this morning.  
 8 **MR WILLIAMS:** I can certainly do that. Would that be  
 9 a convenient moment to have a ten minute break and then  
 10 I can look at my notes and make sure we work through the  
 11 documents as efficiently as possible?  
 12 **THE CHAIRMAN:** Yes. We will come back at 25 to 12.  
 13 (11.25 am)  
 14 (A short break)  
 15 (11.40 am)  
 16 **THE CHAIRMAN:** We are considering, Mr Williams, Mr Howard,  
 17 Mr Saini, whether it would be helpful for the Tribunal  
 18 to issue a direction or a ruling of some kind as to the  
 19 scope of cross-examination that's necessary in the light  
 20 of the discussion we had before the break, and we may  
 21 propose some wording which we will put together over the  
 22 short adjournment, to see if that would enable us to  
 23 shorten the proceedings somewhat, without of course  
 24 having any adverse effect on the thoroughness of the  
 25 analysis of the relevant documents, if the parties would

1 consider that helpful. I see lots of nodding going on.  
 2 Mr Howard, you are not nodding.  
 3 **MR HOWARD:** I am not necessarily disagreeing, I suppose it  
 4 rather depends on the nature of the direction. What  
 5 I would suggest is perhaps we need to start having  
 6 perhaps some guillotines on the timetable, and that may  
 7 be the way one actually focuses the mind. What is  
 8 happening with the timetable is we fall behind and we  
 9 are pushing more and more into a sort of concertinaed  
 10 period, and either we will have to have a guillotine or  
 11 we are going to have to basically extend the time of the  
 12 hearing. That becomes an unavoidable consequence.  
 13 I would suggest probably, at least in relation to  
 14 the factual evidence, we have to now basically adhere  
 15 very strictly to the timetable unless something really  
 16 goes wrong, and therefore people can formulate their  
 17 cross-examination -- particularly the OFT -- in the  
 18 light of that. I think where things have gone wrong is  
 19 their estimates have not taken account of the  
 20 possibility of re-examination, and that's what one needs  
 21 to factor in.  
 22 **THE CHAIRMAN:** Well, it's not the re-examination that's  
 23 particularly been the difficulty, it's the time that  
 24 it's taken to put each small point, because the letters  
 25 need an explanation as to what the letter is, then

1 questions about the letter, then questions about what  
 2 happened as a result of the letter, that's all been  
 3 rather more laborious than we foresaw, and that's why it  
 4 may assist if the number of items that have to be put to  
 5 the witness can be reduced.  
 6 But proceed for the moment, Mr Williams, thank you.  
 7 **MR WILLIAMS:** Madam, I was going to start with a document  
 8 that was not sent to Mr Eastwood but just to ask him  
 9 a question about whether he had any involvement with it.  
 10 Could you turn to tab 16, please. {D17/16}. Before  
 11 we spend too much time on it, is this a document you  
 12 would have seen at the time?  
 13 **A.** Not at all.  
 14 **Q.** Do you see in the second paragraph, there is a sentence  
 15 which says:  
 16 "You are probably aware that the broad marketplace  
 17 has moved ... you may remember from my presentation on  
 18 the Richmond repositioning and launch of Superkings that  
 19 our strategy is parity with Dorchester."  
 20 **A.** Yes.  
 21 **Q.** Do you know anything about that presentation?  
 22 **A.** I wouldn't have been at the presentation, no.  
 23 **Q.** Did Mr Addison report back to you from the presentation?  
 24 **A.** I couldn't recall.  
 25 **Q.** So could we move to tab 26, please. {D17/26}. Do you

1 want to read that to yourself. This is a letter to you.  
 2 This is in the period we discussed yesterday when you  
 3 were holding the fort.  
 4 **A.** Yes. (Pause). Yes.  
 5 **Q.** So this letter refers to one of the schedule of costs,  
 6 bonuses and margins that we saw referred to in the  
 7 second trading agreement yesterday and which, under the  
 8 second trading agreement -- although that wasn't in  
 9 application here -- you were paid a bonus to price in  
 10 accordance with.  
 11 I just wanted to focus on the third point, first of  
 12 all: would you agree that the prices referred to in the  
 13 third point -- that is Drum 12.5 grams -- are prices  
 14 which Mr Matthews or Mr Carroll had added into the  
 15 schedule in order to maintain parities and differentials  
 16 with Gallaher brands?  
 17 **A.** Reading this paragraph, it's about increasing a bonus to  
 18 maintain a parity with Amber Leaf, yes.  
 19 **Q.** Yes, and I think what it says is that:  
 20 "Although not discussed yesterday, I would be  
 21 grateful for a parity position on 25, a shelf price of  
 22 3.84."  
 23 So the way this seems to have worked is there was  
 24 a conversation on Tuesday, we see from the line "as  
 25 Tuesday's conversation"?

1 **A.** Yes.  
 2 **Q.** And quite a lot of what is in this letter reflects that  
 3 conversation, so I think so had been discussed. What we  
 4 see in point 3 is slightly different, and this is  
 5 probably why it's in bold, that Mr Matthews has taken  
 6 the liberty of making a change to the schedule which  
 7 hadn't been discussed, and we can see over the page, if  
 8 you look, you can see that the 3.84 is in the schedule,  
 9 so he has actually made the change?  
 10 **A.** So with -- what he has actually done, he has made the  
 11 change in terms of reflecting the bonus. The reason,  
 12 I guess -- and it is a guess -- he hasn't discussed  
 13 them, by default if he gives us a 12.5 gram reduction,  
 14 which we have discussed, then Morrisons have a strict  
 15 pro rata basis, so if you have a 25 gram or a 50 gram,  
 16 a bonus should reflect that. So we always reward the  
 17 customer for buying more. So whilst he may not have  
 18 been explicit in mentioning the 25 gram or 50 gram, it  
 19 would be taken as read that we would automatically  
 20 reflect that bonus accordingly.  
 21 **Q.** I think what the third point is actually saying is "Drum  
 22 to be at parity with Amber Leaf, this is a 10 per cent  
 23 reduction"?  
 24 **A.** Yes.  
 25 **Q.** And then:

1 "Although not discussed yesterday, I would also be  
 2 grateful for a parity position on 25."  
 3 So he has come up with the number of 3.84 on the 25,  
 4 because it's parity with Amber Leaf?  
 5 **A.** It's the -- if we look to the reverse of the page, the  
 6 schedule, he has also give me a bonus of £1.87, so  
 7 that's what it's reflecting. So that bonus reflects  
 8 what he's expecting.  
 9 **Q.** Yes. The way I read this, he says, for example in  
 10 relation to 12.5 grams:  
 11 "This represents a 10p reduction per SKU  
 12 necessitating an additional bonus per outer."  
 13 So he wants to be at parity with Amber Leaf, he  
 14 identifies the price he needs to price at to be at  
 15 parity with Amber Leaf, he calculates the bonus he needs  
 16 to pay you in order to make sure that you are happy to  
 17 price at parity with Amber Leaf?  
 18 **A.** Yes.  
 19 **Q.** And that's all on 12.5 grams, and that's all it seems  
 20 had been discussed?  
 21 **A.** Correct.  
 22 **Q.** But in relation to 25 grams, he didn't have the same  
 23 conversation with you about 25 grams and he is applying  
 24 the same logic to 25 grams?  
 25 **A.** And he is correct to apply the same logic, will be a

1 pro rata basis on the cost. I wouldn't necessarily --  
 2 if I had a bonus on a 25 gram that equalled £1, it would  
 3 be a minimum expectation that on a 25 gram it would be  
 4 £2, and therefore we wouldn't necessarily have to have  
 5 a detailed conversation about doubling the number.  
 6 **DR SCOTT:** But what's happening at the 50 gram is you appear  
 7 to be getting a lower margin and the customer appears to  
 8 be getting poorer value.  
 9 **A.** Sometimes that happens across all categories that I've  
 10 worked within. I would like to say that all my margins  
 11 were higher as we went bigger, but sometimes that's not  
 12 the case.  
 13 **DR SCOTT:** I was trying to understand what you meant by  
 14 "pro rata".  
 15 **A.** We try as best we possibly can, where if a customer buys  
 16 one -- sorry, buys twice the amount, he or she gets some  
 17 reward. If he buys four times the amount, he gets some  
 18 reward. It may not always work out specifically the  
 19 same. Yes, in some cases, and you will see in all  
 20 supermarkets now, the bigger the pack the reward has  
 21 been diluted.  
 22 **MR WILLIAMS:** I was really just reading what the document  
 23 says, which is that Mr Matthews came up with the price  
 24 of £3.84 because he wants to be at parity with  
 25 Amber Leaf, and actually Dr Scott is right, you can't

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1 get to the price of £3.84 by pro rating, it's quite  
 2 clear that it's driven by the price of Amber Leaf rather  
 3 than some pro-rated calculation, because wouldn't 196 --  
 4 **A.** The point I make on pro rata is for buying two, I am not  
 5 talking about pence per mil, I am talking about the  
 6 number of packs, ie if you double the quantity you buy,  
 7 then you should be rewarded as such. It does not  
 8 necessarily always as an exact --  
 9 **Q.** Do you mean you or the customer, sorry?  
 10 **A.** The customer.  
 11 **Q.** But they aren't rewarded here, are they, because it  
 12 would be ... I beg your pardon, £3.92.  
 13 **DR SCOTT:** It's when you go to the £7.94 that they are  
 14 paying 12p more than they would if they bought twice  
 15 the ...  
 16 **A.** Yes, and sometimes that would happen, unfortunately.  
 17 **MR WILLIAMS:** The simple point that I was getting at really  
 18 is that Mr Matthews has come up with £3.84 because it's  
 19 parity with Amber Leaf.  
 20 **A.** And that could well be, I can't recall, the point I am  
 21 making is that it specifically -- he's talked about  
 22 12.5 gram and then realised automatically that there is  
 23 a pro rata situation and he would have to offer a bonus.  
 24 **Q.** What he said about this is that he had made  
 25 an assumption that if he was funding the £3.84 price,

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1 then you would be happy with that, you would be happy to  
 2 go with that and he put it in the schedule for that  
 3 reason. Do you agree with him that that's what happened  
 4 there?  
 5 **A.** No, I stand by that he has offered me 12.5 gram bonus  
 6 and therefore by default I would be expecting a 25 gram  
 7 one.  
 8 **Q.** He does say "I would be grateful for a parity position  
 9 on 25 gram, a shelf price of £3.84"?  
 10 **A.** Correct.  
 11 **Q.** So that's why he has put £3.84 in, and that's the reason  
 12 why he has put £3.84 in.  
 13 **A.** Yes.  
 14 **Q.** Could we then turn to tab 28, please. {D17/28}. So this  
 15 is a series of schedules that were sent to you. Are you  
 16 familiar with this document?  
 17 **A.** I am familiar with the document, yes.  
 18 **Q.** I wanted to focus on the fourth period, which is covered  
 19 in the last line of the block there, the fourth covers  
 20 the period from 9 April 2001. If you turn to the  
 21 schedules, I think we have worked out that they are in  
 22 reverse order, or at least the fourth schedule is first.  
 23 Because if you look at the price of Richmond Kingsize,  
 24 it's £3.39, in about the middle of the page on the first  
 25 schedule, you see. In the second schedule, it's £3.34.

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1 So it looks as though the 5p increase is from £3.34 to  
 2 £3.39. That's what this is referring to.  
 3 **A.** Yes.  
 4 **Q.** The start of the letter says:  
 5 "With reference to yesterday's telephone  
 6 conversation, please find attached two new schedules of  
 7 costs, bonuses and margins."  
 8 The letter is dated 6 April, and actually it's only  
 9 the fourth period that is looking forward, really,  
 10 because that starts on 9 April.  
 11 **A.** Yes.  
 12 **Q.** Would you agree that this is -- just to go back a stage.  
 13 So ITL gets to the price of 3.39 by reducing the  
 14 tactical bonus that it's paying you on Richmond?  
 15 **A.** Yes.  
 16 **Q.** And the assumption seems to be that you are going to  
 17 price at 3.39. Is that something you would have  
 18 discussed or agreed in the telephone conversation?  
 19 **A.** I can't actually remember the telephone conversation.  
 20 If I give you some background to the document, though,  
 21 it was unusual to see so many schedules, 6 April I think  
 22 I have been holding the fort now for about two weeks in  
 23 Justin's absence, as he's moved on, and I would have  
 24 called all of the tobacco manufacturers to give me  
 25 an absolute up-to-date status of where we are in terms

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1 of retrospective bonuses, et cetera, because, as Justin  
 2 exited the business there and then, then there was lots  
 3 of administration to pull together.  
 4 So hence this is why I've asked for a February,  
 5 March, April, and then I would have laboriously sat down  
 6 and tried to work through all of the schedules to see  
 7 exactly what bonuses were reflecting what, et cetera, to  
 8 make sure that we had accrued all the correct monies.  
 9 So I can't remember the exact conversation other than it  
 10 was more about good housekeeping.  
 11 **Q.** There are two different things going on, aren't there,  
 12 because the first three schedules are looking backwards  
 13 and the fourth schedule is looking forwards?  
 14 **A.** Correct.  
 15 **Q.** What I am asking you is whether you have any  
 16 recollection as to whether the 5p shelf increase on  
 17 Richmond in the fourth schedule, forward looking move,  
 18 whether that had been agreed with you?  
 19 **A.** I don't have a recollection whether it had been agreed  
 20 in terms of the conversation. I can't recollect that  
 21 conversation.  
 22 **Q.** But we do know that ITL wanted to see the price at  
 23 £3.39, that's what we get from the fourth schedule,  
 24 which is the first schedule?  
 25 **A.** Yes.

1 **Q.** We also know that that reinstated parity between  
 2 Richmond 20s and Dorchester 20s, we know that because if  
 3 we look at annex 7 and turn to document 10 -- it might  
 4 be useful for the Tribunal to have annex 7 not very far  
 5 away while we are dealing with Mr Eastwood -- so we  
 6 could see this is a fax dated 26 March? {D7/10}.  
 7 **A.** Yes.  
 8 **Q.** Which is dealing with a price move on Dorchester,  
 9 a price increase to £3.39. I think if you go back  
 10 a tab to tab 9, we can see that it was at £3.34?  
 11 **A.** Yes.  
 12 **Q.** So that's a 5p --  
 13 **A.** Differential.  
 14 **Q.** -- increase in the price of Dorchester --  
 15 **A.** Yes.  
 16 **Q.** -- in document 10 there in the fax of 26 March.  
 17 So just coming back to tab 28 of the ITL file, which  
 18 we were looking at, would you agree that the reason why  
 19 ITL is increasing the price of Richmond is to reinstate  
 20 parity with Dorchester 20s?  
 21 **A.** I would suggest that Gallaher have bonused the  
 22 Dorchester brand, whether it be a short promotion from  
 23 this snapshot is hard to tell, that they have removed  
 24 the bonus and Dorchester has gone back up. And in  
 25 response, Imperial bonused the Richmond brand to match

1 Dorchester, and as the promotion ended or as the bonus  
 2 was removed, in this particular instance Imperial have  
 3 also chosen to remove the bonus to return back to £3.39.  
 4 **Q.** So they were reducing the level of the bonus essentially  
 5 so that you would then move the price to £3.39 and price  
 6 the brands at parity?  
 7 **A.** As I'm saying, it could well have been a promotion but  
 8 it's very difficult to read from that snapshot. It  
 9 could have been a promotion on Dorchester to which they  
 10 reacted -- sorry, which they reacted and then the bonus  
 11 was removed, as I said, and then subsequently Imperial  
 12 followed suit.  
 13 **Q.** Yes, well, I can give you a little bit of context if  
 14 that's helpful. There were bonuses being paid on  
 15 Dorchester and Richmond at this point in time.  
 16 What we see here is I think a removal of part of  
 17 that bonus rather than the whole of it?  
 18 **A.** Which was normal practice.  
 19 **Q.** Yes. What I am asking you about is whether your  
 20 understanding of this document would have been that ITL  
 21 wanted the brands to go to parity at £3.39, so it  
 22 removed the bonus which it was paying to subsidise the  
 23 lower price, working on the basis that by taking that  
 24 bonus away you would then move to the parity price of  
 25 £3.39?

1 **A.** The word "parity" is your specific word. What I would  
 2 say is, did Imperial want to remove the bonus and  
 3 therefore, you know, I would reflect whatever price  
 4 I wanted to go to, then the answer is clearly yes. But  
 5 not necessary was it parity. I could have gone lower,  
 6 I could have gone higher, and if I went higher, I fully  
 7 accept that some of the bonus may have been removed.  
 8 **Q.** That's not what they are aiming at, though, is it, they  
 9 are aiming at £3.39, they are aiming at the parity  
 10 price?  
 11 **A.** In this particular schedule, £3.39 is the maximum, yes,  
 12 so if I went to £3.38, as we discussed yesterday, or any  
 13 other number lower, Imperial would have been very happy.  
 14 **Q.** Can we move on, then, to tab 31, please. {D17/31}. You  
 15 can cast your eye over the whole document if that's  
 16 helpful, but I wanted to focus at the moment on  
 17 a discrete part of it on the second page, which doesn't  
 18 seem to be connected with anything on the first page.  
 19 I was interested in point 2.  
 20 **A.** Yes.  
 21 **Q.** Now, I think you said a minute ago when we were looking  
 22 at the last document that if Imperial -- sorry, if you  
 23 put Imperial at a price which was lower than £3.39, they  
 24 would be very happy?  
 25 **A.** Correct.



1 Q. Looking at the second point here, ITL's talking about  
 2 cigar band prices and it says:  
 3 "As per the message I left some weeks ago, your  
 4 current shelf prices on our cigar brands are still below  
 5 those outlined in the last schedule. All brands are 6p  
 6 below where they should be."  
 7 So it doesn't look in this instance as though ITL is  
 8 very happy to see that the prices of the cigars are  
 9 lower than where they should be?  
 10 A. If I may, referring back to the context in which I took  
 11 the role on, I specifically asked the tobacco  
 12 manufacturers to go through all the schedules with all  
 13 the bonuses applicable. There was a Budget increase  
 14 that was around about that time, of which I think cigars  
 15 were 6p. As I have gone through, it would be -- it  
 16 could well have been, and I can't remember specifically,  
 17 they said "All your bonuses have now changed, as per the  
 18 Budget increase", and subsequently there was  
 19 a manufacturers' price increase. This was purely  
 20 highlighting to me, as I read it now, "We have removed  
 21 our bonus or at that point if you choose your -- you  
 22 know, the Chancellor put 6p up, your margin will be, you  
 23 know, substantially less than what you were enjoying  
 24 previously".  
 25 Q. The Budget was on 8 March, I think. This is three

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1 months after the Budget?  
 2 A. Clearly.  
 3 Q. It's just that you said a minute ago that there was  
 4 a Budget around this time. But --  
 5 A. Sorry, I --  
 6 Q. -- it was three months before?  
 7 A. Yes, and that could well have been the case. I was  
 8 managing a whole team of beers, wines and spirits, I was  
 9 trying to do a tobacco buyer's job, which is a full-time  
 10 job, this --  
 11 **THE CHAIRMAN:** Are you saying then that you had erroneously  
 12 not implemented a 6p Budget increase on cigars?  
 13 A. It could have been absolutely a mistake in terms of, you  
 14 know, having tried to implement so many hundred retails  
 15 at once, this purely is, you know, an oversight, and you  
 16 know, I've asked both the manufacturers to confirm  
 17 schedules, and as he said some weeks previous I reminded  
 18 you, this to me is just me trying to get my  
 19 administration back in line to make sure I had accrued  
 20 all the right bonuses, et cetera.  
 21 **DR SCOTT:** Sorry, the 6p relates to what size of cigar  
 22 packaging?  
 23 A. If I refer to -- the Imperial had an MPI on the 29th in  
 24 the chronological document, on 29 January 2001, and it  
 25 says Classic and King Edwards Coronets, 6p for five.

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1 **MR WILLIAMS:** Sorry, what date was that?  
 2 A. 29 January 2001.  
 3 Q. Yes, and then there was a Budget after that?  
 4 A. Sorry, yes, there was a Budget --  
 5 Q. Then this is three months after that again.  
 6 A. Yes, and then we have got various numbers, so I could  
 7 well have missed, if the 6p just coincidentally ties up  
 8 to the Imperial MPI, which is a couple of days after  
 9 Justin leaves, therefore it could have been missed from  
 10 then, I have gone into -- I have gone from  
 11 manufacturers' price increase end of January and then  
 12 a couple of weeks later on on 8 March -- sorry, 7 March  
 13 I have a Budget, on 8 March Imperial manufacturers'  
 14 price increase. In the space of five weeks I am faced  
 15 with a phenomenal amount of change and retail change.  
 16 It just fits, reading the document now, that 6p and that  
 17 6p tie back up, and it is purely an administrative call.  
 18 Q. Does it fit, though, because I think you have this  
 19 schedule in front of you and I don't know if you are  
 20 saying that this could be connected with something in  
 21 January or February, or whether you are saying that it  
 22 could be connected with something in the Budget, I think  
 23 you were saying the Budget originally?  
 24 A. I am clearly saying in this period and up to this period  
 25 from the point that Justin left to now, that I would

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1 have been going through many administrative tasks in  
 2 terms of ensuring that we were collecting all the right  
 3 bonuses, et cetera, so specifically when he mentions the  
 4 6p on the cigars, I can't comment exactly what he was  
 5 referring to, other than we were in a period of --  
 6 I would call was, you know, very tense administration.  
 7 Q. You have the schedule there, haven't you, the schedule  
 8 at the front of the MPI list file?  
 9 A. Yes.  
 10 Q. If you look at the ITL MPI on 8 March -- do you have  
 11 that on page 4 of the document?  
 12 A. Yeah.  
 13 Q. I don't see it that any of them changed by 6p.  
 14 A. No, and I refer back to what I've previously said. On  
 15 29 January there was a 6p increase on cigars, of which  
 16 was about the time Justin left, it could well have been  
 17 lost in that particular period, because it would be  
 18 some weeks before I managed to get any start into the  
 19 paperwork that was left behind.  
 20 Q. That's six months ago, though, isn't it?  
 21 A. That's not unusual, it wouldn't be a high priority,  
 22 I would have assumed at this point that Justin was up to  
 23 date, and it's not six months, it's four months, we are  
 24 talking at the end of 29 January. I would have assumed  
 25 he was up to date, until I sat down and went through all

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1 of his paperwork bearing in mind -- may I say it was the  
 2 corporate year end as well, it was at the end of  
 3 January, so I would be doing the year end results for  
 4 the previous year, I had also had to march one of my  
 5 buyers out of the building, I was faced with a price  
 6 increase on 29 January, a couple of weeks later I was  
 7 faced with a Budget increase and on 8 March I was faced  
 8 with more manufacturers' price increase. I believe the  
 9 6p is reflected somewhere in the myriad of all these  
 10 changes that there was some administration to be caught  
 11 up.  
 12 **Q.** I think on the logic of what you are saying, really you  
 13 are saying it's a matter for you and ITL has brought  
 14 this to your attention and it's up to you if you want to  
 15 do something about it?  
 16 **A.** I have gone to them, as you can see by the previous  
 17 letter with all the schedules that they pull out, to say  
 18 "Can I ensure that I am claiming all the correct  
 19 bonuses, et cetera". So this is them bringing to my  
 20 attention these bonuses have been removed, et cetera,  
 21 and that's it from my -- for me to deal with  
 22 accordingly, as and when.  
 23 **Q.** Can you turn to tab 32 then. {D17/32}. There is  
 24 another list of various items in this memo, and just  
 25 look at the last line.

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1 It's really starting to look as though this isn't  
 2 for you to deal with accordingly because they are making  
 3 the same point to you again and they are assuming you  
 4 have increased shelf prices of cigars, and it does look  
 5 as though they are concerned about their own interests  
 6 here, that's the way this reads, "I assume you have  
 7 increased the shelf prices of cigars", and this isn't  
 8 really looking out for you and your margin, this is  
 9 looking out for their own interests?  
 10 **A.** I would be very surprised if ever Imperial would be  
 11 upset that their prices were cheaper than their  
 12 competitors', so I go back to the point, if anything,  
 13 the relationship I had with Paul Matthews was quite  
 14 tense and he knew as well as I knew in a couple  
 15 of weeks' time, when I got on top of it, if my margin  
 16 looked lower than it should be, there would be  
 17 a discussion.  
 18 **Q.** When you say you would be very surprised, is that you  
 19 now superimposing a view on this document with  
 20 hindsight? Is that something you are saying with  
 21 hindsight, rather than something you specifically recall  
 22 about this exchange?  
 23 **A.** I don't specifically recall this exchange. I am merely  
 24 generalising that if Imperial had competitor advantage  
 25 and it was done through my cost and not their cost, they

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1 would be -- generally I would have thought they would be  
 2 happy.  
 3 **Q.** If they were happy, they could have left it there,  
 4 couldn't they? They could have left it with the  
 5 document in tab 31 and not written to you again?  
 6 **A.** I can't comment why he continues to mention it in  
 7 another email -- another fax, sorry.  
 8 **MR SUMMERS:** May I just ask: in those circumstances, might  
 9 there not have come a point at which you would have  
 10 written to him asking for support for the period during  
 11 which your prices were below?  
 12 **A.** At this particular -- very rarely does many  
 13 correspondence go outwards, it's more inwards, I would  
 14 be dealing with many, many hundreds of suppliers. If  
 15 anything there would have been a conversation, I guess,  
 16 and I don't recall this, but --  
 17 **MR SUMMERS:** I asked because we have heard evidence from the  
 18 manufacturers saying that this was really very much  
 19 a normal reaction that people take, this is why they  
 20 reminded them that their prices were not what they  
 21 should be.  
 22 **A.** I really can't recall this, sorry.  
 23 **MR SUMMERS:** Thank you.  
 24 **MR WILLIAMS:** Just so I've made it clear what I am saying,  
 25 the letter at tab 31 says "as per the message I left

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1 some months ago", so there has already been a message,  
 2 then you are asked in this letter at tab 31 to increase  
 3 the price to where they should be, and tab 32 makes the  
 4 same point again. So it looks like ITL is really  
 5 insisting on an increase in the price of its brand, it's  
 6 not looking out for your interests, it's looking out for  
 7 its own interests. The reason it's doing that is  
 8 because it wants to be at a fixed relativity to its  
 9 competitors.  
 10 **A.** I can't really comment why there is two quotes of the  
 11 6p, other than I would like to reiterate, at the period  
 12 we are looking at, there is potentially three or four  
 13 increases going on and I have just marched my buyer out  
 14 of the building.  
 15 **Q.** Could we turn to tab 41, please. {D17/41}. I think  
 16 this is unique in the sense that it's a letter to you  
 17 and Paul Giles?  
 18 **A.** It could well have been, because I was in a handover  
 19 meeting with Paul -- to Paul.  
 20 **Q.** This letter is written in the context of forthcoming  
 21 MPI?  
 22 **A.** Yes.  
 23 **Q.** It says that -- sorry, I wanted to focus on the  
 24 paragraph that says "We are also looking at holding  
 25 Richmond Kingsize", do you want to read that paragraph

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1 to yourself?  
 2 **A.** Yes.  
 3 **Q.** Feel free to look at the letter as a whole if that's  
 4 helpful.  
 5 **A.** Thank you. (Pause). Yes.  
 6 **Q.** So I think we saw yesterday that -- we can look at this  
 7 if it's helpful -- ITL was positioning Richmond at 5p --  
 8 the differential of 5p more expensive than Sterling. Do  
 9 you remember that?  
 10 **A.** Yes.  
 11 **Q.** So working on that basis, because this paragraph is  
 12 talking about holding Richmond relative to Sterling,  
 13 I am working the basis that Sterling is at £3.34, £3.35,  
 14 does that seem like a sensible assumption?  
 15 **A.** When I read the sentence, it's talking about the MPI, so  
 16 I am expecting an increase. And it says, "We are  
 17 looking at holding the Richmond Kingsize and Superkings  
 18 brands at those specific prices", therefore it would  
 19 suggest by that first sentence to me that they are going  
 20 to bonus back the manufacturers' price increase.  
 21 **Q.** Yes. But if you read on, it says:  
 22 "Of course, if the market price for Sterling moves  
 23 up, we would wish to do the same."  
 24 So it looks like they are maintaining their position  
 25 relative to Sterling; do you agree?

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1 **A.** I can't comment at that point, because however with  
 2 Sterling only just being about to launch in your  
 3 business, I haven't actually got it in my business at  
 4 that point.  
 5 **Q.** Yes, well, that's a fair point.  
 6 So I really wanted to focus on the words "of course  
 7 if the market price for Sterling moves up, we would wish  
 8 to do the same". Do you understand that as a reference  
 9 to ITL's parity and differential strategy?  
 10 **A.** I understand by reading that they are trying to, as you  
 11 say, parity with that brand. However, to talk to me  
 12 about a price move in the market on a brand that I do  
 13 not have, I don't understand why that conversation would  
 14 even be there.  
 15 **Q.** It looks as though you are about to put Sterling into  
 16 your business, and they are pricing Richmond with  
 17 reference to Sterling, and, as I mentioned a few moments  
 18 ago, we know that the relativity between Richmond and  
 19 Sterling settled at 5p, 5p above, and so I read this as  
 20 ITL choosing the point that the price of £3.39, £3.40  
 21 with reference to the price of Sterling. That's what it  
 22 looks like?  
 23 **A.** Reading it and logically, I would see that they have  
 24 seen Sterling in the market already in other competitors  
 25 and they have chosen to bonus their manufacturers' price

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1 increase back down to those levels to compete with  
 2 Sterling, if that's what I would suggest.  
 3 **Q.** Just focusing on the words "Of course if the market  
 4 price for Sterling moves up, we would wish to do the  
 5 same", so that's telling you that if, once you have  
 6 launched Sterling, if you haven't done it already, when  
 7 the price of Sterling, when the market price of Sterling  
 8 moves up, I think that's the shelf price, do you agree?  
 9 **A.** Yes.  
 10 **Q.** So if the shelf price of Sterling goes up, they would  
 11 want to do the same, ie they would want to move the  
 12 shelf price of Richmond up?  
 13 **A.** Or remove the bonus to reflect that, yes.  
 14 **Q.** They would probably do both, they would probably remove  
 15 the bonus as part of that, but what they are actually  
 16 saying is they would want the shelf price to move up  
 17 commensurately with a shelf price increase in Sterling;  
 18 do you agree?  
 19 **A.** With regards to the market?  
 20 **Q.** The shelf price, the market price.  
 21 **A.** Yes. Yes.  
 22 **Q.** Now, in terms of what happens next, you are not part of  
 23 that series of events, but I think it would be just  
 24 helpful to look at it, because it does follow on from  
 25 this letter.

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1 **THE CHAIRMAN:** What does this point go to, then,  
 2 Mr Williams?  
 3 **MR WILLIAMS:** What it goes to is that Mr Eastwood has been  
 4 told in this letter that they would want to follow  
 5 Sterling up, and that's exactly what we see in the next  
 6 four documents. So I wanted to then come back to this  
 7 document, which is a letter to Mr Eastwood.  
 8 **THE CHAIRMAN:** Perhaps you can summarise the facts that you  
 9 would establish from those other documents, and see if  
 10 Mr Eastwood is able to agree or disagree.  
 11 **MR WILLIAMS:** What happens, Mr Eastwood, is that I've made  
 12 an assumption in this document that Sterling is at  
 13 £3.34, £3.35, because that's 5p below the Richmond  
 14 price. We see from document 12 in annex 7 -- feel free  
 15 to open it if that's going to be helpful to you -- that  
 16 Sterling moves to £3.39, £3.40, which looks like a 5p  
 17 price increase, working out where we seem to be in the  
 18 letter at tab 41.  
 19 That's followed, four days later, by ITL sending you  
 20 a new schedule, which we see at tab 50, from which we  
 21 can see that Richmond was moving to £3.44, £3.45, which  
 22 reinstates a 5p differential above Sterling.  
 23 What we see then is that, in document 14 in the  
 24 Gallaher bundle, which is annex 7, {D7/14}, Gallaher  
 25 doesn't put up Kingsize but it does put up Superkings

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1 2p. So you have Sterling at £3.39, £3.42.  
 2 The last document in the sequence is one of these  
 3 emails that's a message for Paul Giles but which arrived  
 4 in your inbox, that's at tab 56, and that says:  
 5 "Paul" -- do you have 56?  
 6 **A.** Yes.  
 7 **Q.** "Paul, with reference to our recent conversation  
 8 concerning the forthcoming price moves, I too would like  
 9 to move the shelf price of Richmond Superkings up 2p to  
 10 £3.47."  
 11 Have you any recollection of whether you saw this at  
 12 the time?  
 13 **A.** I definitely have no recollection.  
 14 **Q.** This letter is explicit that ITL want to move the shelf  
 15 price of Richmond Superkings up 2p to £3.47 because  
 16 Sterling is about to move up 2p, Sterling Superkings are  
 17 about to move up 2p as well; do you agree?  
 18 **A.** Reading this, yes, it would say that he wants to move  
 19 the price of Richmond up 2p to £3.47. I would have --  
 20 without reading all the schedules, I would assume he has  
 21 therefore removed bonuses, et cetera.  
 22 **Q.** Would you assume that he has removed bonuses so that  
 23 your margin is maintained at £3.47, so that there is no  
 24 disadvantage to you in moving to £3.47?  
 25 **A.** Yes.

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1 **Q.** So just going back to tab 41, would you agree with this:  
 2 when Mr Matthews says "of course, if the market price  
 3 for Sterling moves up, we would wish to do the same",  
 4 what that reflects is that ITL's strategy was that it  
 5 would make sure that Richmond was 5p above Sterling at  
 6 all times, it would want the price of Richmond to move  
 7 up so that it was 5p above the price of Sterling?  
 8 **A.** I can't say from that particular paragraph because  
 9 I don't know the facts, but Sterling could have been  
 10 bonused down at that particular time and if Sterling  
 11 bonus is removed and the market moves, then Richmond  
 12 would move up again. But without reading all of the  
 13 documents, it's very difficult to say.  
 14 **Q.** When you read a letter which said: "of course, if the  
 15 market price for Sterling move up, we would wish to do  
 16 the same", wasn't that telling you that ITL wanted its  
 17 brands to be at a particular interval to the competing  
 18 Gallaher brand, at a specific interval, at a fixed  
 19 interval?  
 20 **A.** The only thing I would have read in this letter, and by  
 21 this stage Paul has arrived, Paul Giles, so I would have  
 22 naturally passed all correspondence to do with tobacco,  
 23 even if they are written to myself, because I would be  
 24 saying "Paul, could you read this letter, if we need to  
 25 do anything, come back to me", et cetera. All I read in

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1 this letter is Richmond is looking now to compete with  
 2 the Sterling brand.  
 3 **Q.** When you say "compete with", it says it wants to follow  
 4 it up?  
 5 **A.** Compete in terms of whatever it chooses, it pegs itself  
 6 against, whether it be 5p, 10p, it sees Sterling as  
 7 a suitable alternative that customers may choose.  
 8 **Q.** And they were pegging themselves against that?  
 9 **A.** All I can say from here is, in this paragraph, that  
 10 Richmond sees Sterling as a competitive brand.  
 11 **Q.** What the letter doesn't say is: "of course, if Sterling  
 12 moves up we would want to reduce the level of the bonus  
 13 that we are paying on Richmond, we would want to reduce  
 14 the investment so that we are no longer funding  
 15 a particular low price". What it says is "we want to  
 16 see the shelf price go up".  
 17 **A.** We are talking about Sterling, we hadn't even launched  
 18 the product at this stage, we wouldn't have had a debate  
 19 about a competitor's brand that you don't even stock.  
 20 **Q.** I am just really asking you what this told you about  
 21 ITL's strategy, and I think what you have said is that  
 22 it tells you that ITL wanted to peg Richmond against  
 23 Sterling?  
 24 **A.** To compete with Sterling, yes.  
 25 **Q.** I am just going to ask you a few questions about the

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1 sequence of documents that we have just seen, the  
 2 pattern that we see in the correspondence. Could you  
 3 just look at paragraph 25 of your witness statement,  
 4 please. On the second page, it says "both manufacturers  
 5 would often write in tones". Do you have that sentence?  
 6 **A.** Yes.  
 7 **Q.** Do you want to just read that, the next three sentences,  
 8 down to "I didn't have time or consider it necessary to  
 9 respond" and so on.  
 10 (Pause)  
 11 **A.** Yes.  
 12 **Q.** Really, what I wanted to ask you was this: you talk here  
 13 about ITL issuing you with orders, but I had rather  
 14 thought that what we see in the correspondence is ITL  
 15 writing to you in relation to price moves that are  
 16 needed or that form part of the pricing strategy that  
 17 you had agreed to support and which we looked at  
 18 yesterday; do you agree with that?  
 19 **A.** I would just like to point out, with regards to the  
 20 pricing, in every case they would have had a discussion  
 21 with the buyer, the buyer would make the decision.  
 22 **Q.** That was part of the point I was going to put to you.  
 23 In most of the documents we have seen the letter follows  
 24 on from a conversation?  
 25 **A.** Correct.

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1 Q. So what it looks like is ITL has had a conversation with  
 2 the buyer and then the buyer might have said "Can you  
 3 put it all in writing, can you follow up in writing" and  
 4 set out details of the bonus, whatever it is. The  
 5 letter was an extension of the phone conversation. ITL  
 6 wasn't spontaneously issuing you with orders and  
 7 instructions, this was part of a dialogue with  
 8 Morrisons?  
 9 A. Correct.  
 10 Q. I just go back to the point I asked you about: this is  
 11 not ITL writing in tones which issue you with orders;  
 12 I would agree some of the correspondence is a bit terse,  
 13 but it's written against the background, which is that,  
 14 you, Morrisons, have agreed to support their pricing  
 15 strategy based on particular differentials?  
 16 A. With regard to some of the tones in the letters, that's  
 17 not the case, no, they were written in strong, tense and  
 18 combative manners and not always what we had discussed.  
 19 Q. Do you agree that the letters that we have just been  
 20 looking at, the selection of letters which were sent to  
 21 you at the time, ITL were sending you those letters in  
 22 the context of its pricing strategy of maintaining  
 23 pricing differentials?  
 24 A. With regards to those particular letters, I would agree.  
 25 With regards to my statement in terms of our

1 relationship, it's not specifically focusing on those  
 2 three letters. This is about a relationship that has  
 3 gone on for many years, and it was very tense, and, you  
 4 know, that's how it was.  
 5 Q. Because the observation I was going to make in relation  
 6 to at least the letters we have looked at is there is no  
 7 sign of you pushing back or complaining about the manner  
 8 of ITL's correspondence, you say you didn't have time to  
 9 deal with that, and I can understand that, but there is  
 10 another explanation, which is the point we were talking  
 11 about yesterday, which is that you have agreed to  
 12 support the strategy and actually there is a resonance  
 13 between what ITL's asking you to do and what you were  
 14 going to do anyway. So it's not really right to  
 15 characterise this as the issuing of instructions or  
 16 orders, this is just the implementation of the agreement  
 17 and it's something which you are happy to do?  
 18 A. I refer back to my previous comment, this statement  
 19 reflects more than a three year relationship, I am not  
 20 specifically talking about just pricing in general.  
 21 Q. Just focusing on the letters which we saw which show ITL  
 22 asking you or telling you that you needed to increase  
 23 prices to maintain parities and differentials, would you  
 24 agree that those documents indicated to you and to  
 25 Morrisons at the time that ITL wasn't looking to

1 maintain price ceilings, if I can put it that way, it's  
 2 looking to maintain fixed specific intervals or fixed  
 3 parity relationships between its brands and Gallaher's  
 4 brands?  
 5 A. With regards to fixed pricing, I totally disagree.  
 6 There has never been a discussion about fixed pricing --  
 7 Q. I am not talking about fixed pricing in the sense of --  
 8 A. An absolute price.  
 9 Q. -- fixing the price, I am talking about the relativity.  
 10 ITL's not just saying to you, "Please make sure that we  
 11 are no worse off than parity", it's saying, "We want to  
 12 be at parity, can you move our price to parity"?  
 13 A. Parity was the maximum. As I've said on several  
 14 occasions, if I was cheaper, then I still maintain if  
 15 I was investing in Morrison's margin to be cheaper, then  
 16 Imperial would have been happy.  
 17 Q. What we see is ITL asking you to move to the specific  
 18 price which maintains the particular differential?  
 19 A. Which in most of these cases means removing or adding  
 20 a bonus.  
 21 Q. What I am putting to you is it must have been clear to  
 22 you in Morrisons, and certainly to the buyers that were  
 23 dealing with all of these instructions day-to-day, that  
 24 the strategy that you were agreeing to support really  
 25 involved fixed differentials rather than maximum

1 differentials or price ceilings?  
 2 A. No, I maintain it was maximum differentials, not fixed.  
 3 Q. Would you agree that as long as Morrisons was given the  
 4 right incentives by changing the level of the tactical  
 5 bonus, you were very happy to maintain the specific  
 6 intervals, the fixed differentials, both by way of price  
 7 increase and price decrease?  
 8 A. Not necessarily fixed, as I have said on several  
 9 occasions, if we chose to go deeper and particularly  
 10 post Budget where I may have enjoyed some additional  
 11 stock profit, then that was something we would be doing.  
 12 Q. Could we turn to tab 67, please. {D17/67}. I'll just  
 13 ask you whether this is a document you would ever have  
 14 seen. This is a draft of the trading agreement which we  
 15 saw yesterday, it's an earlier draft. Is this  
 16 a document you would have seen at the time?  
 17 A. Not at all.  
 18 Q. I wanted to move on to Gallaher, then, if I can. Do you  
 19 want to look at paragraph 20 of your statement.  
 20 A. Yes.  
 21 Q. I just wanted to ask you: were you aware that Gallaher  
 22 had a strategy of maintaining pricing differentials in  
 23 the same way that ITL was -- ITL did, I should say.  
 24 A. I was not formally aware, no.  
 25 Q. You weren't formally aware?

1 A. As in there was nothing that I had ever received or  
 2 presented to them that said "This is what we plan to  
 3 do".  
 4 Q. Do you mean there wasn't a document?  
 5 A. Correct. I had had no document or discussions.  
 6 Q. But I asked you a slightly different question, which  
 7 was: were you aware that Gallaher had the strategy of  
 8 maintaining pricing differentials?  
 9 A. No is the answer.  
 10 Q. I'll tell you that Gallaher did have a strategy of  
 11 maintaining certain pricing differentials, like ITL, and  
 12 under that strategy Embassy and Regal were linked to  
 13 B&H, which is a pricing relationship we saw yesterday in  
 14 the ITL trading agreement. Do you want to refresh your  
 15 memory in relation to that?  
 16 MR SAINI: Madam, I am not sure what the evidential basis is  
 17 for these questions.  
 18 THE CHAIRMAN: Where is this going, Mr Williams, if he says  
 19 he was not aware at the time of the Gallaher pricing  
 20 differentials?  
 21 MR WILLIAMS: I wanted to put to him one document from the  
 22 top which is dealt with in annex 1 of Morrison's notice,  
 23 and I just wanted to ask him a couple of short questions  
 24 about it. I am not planning to take up a lot of time.  
 25 THE CHAIRMAN: Perhaps you could rephrase your question by

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1 saying that it's the OFT's case that the Regal and ...  
 2 MR WILLIAMS: Sorry, I thought I was just reciting the terms  
 3 of an internal Gallaher strategy document, and I wasn't  
 4 talking about Morrisons, I was simply articulating it in  
 5 the terms in which it appears in the Gallaher strategy  
 6 document. But I can make that clearer by saying: the  
 7 OFT has documents which it's obtained from Gallaher,  
 8 which at least the OFT appear to say that Gallaher had  
 9 a pricing strategy of maintaining pricing differentials  
 10 very much like the strategy we have just been looking at  
 11 in the context of the ITL documents, and under which, as  
 12 I say, Regal and Embassy were linked to B&H in the same  
 13 way that ITL linked those brands.  
 14 For completeness, the differential between Embassy  
 15 and B&H was Embassy 3p under B&H, at least at one  
 16 particular point, and Regal it was minus 5. So that's  
 17 the context of the question I am just about to ask you.  
 18 Could you turn to document 5 in annex 7. {D7/5}.  
 19 Actually, there are two documents in my 5.  
 20 A. That's correct.  
 21 Q. Do you want to read that to yourself?  
 22 It's not a document Mr Eastwood is party to, but  
 23 it's an important document in this part of the case and  
 24 I wanted to ask him about it.  
 25 (Pause)

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1 A. Yes.  
 2 Q. So focusing on point 2 --  
 3 A. Yes.  
 4 Q. -- "Justin Addison to review retail pricing on Embassy  
 5 and Regal", and then there is a reference to Sobranie,  
 6 Pantellas and miniatures. Focusing on the first part of  
 7 that, those are ITL brands?  
 8 A. Correct.  
 9 Q. And in much the same way as the last similar document we  
 10 looked at, it does look as though the need for  
 11 Justin Addison to review the pricing on Embassy and  
 12 Regal is an action arising from, here, a meeting with  
 13 Gallaher?  
 14 A. I would like to reiterate these are minutes and  
 15 aide memoires to Justin. If we look at the date, the  
 16 document is dated 7 September. There was an Imperial  
 17 price increase on 3 September -- sorry, apologies.  
 18 There was a Gallaher increase on 8 August, and  
 19 an Imperial one on 21 August. Justin could have well  
 20 come back from the meeting he had had with Gallaher and,  
 21 as I said, this is an aide memoire, he would have been  
 22 going through all his bonus schedules for everything and  
 23 he has just wrote a note to himself, he may have noticed  
 24 that his margin is unduly low or whatever, and it's just  
 25 a point of reference for himself to do something --

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1 Q. Sorry, but it is a point of reference to himself which,  
 2 looking at this document, is something arising from the  
 3 meeting he had with Gallaher?  
 4 A. Correct, but he would have taken into the meeting his  
 5 full margin documents that would include every brand  
 6 that he stocked.  
 7 Q. Yes, but the obvious way to read this is that this came  
 8 up at the meeting?  
 9 A. I wouldn't say it was obvious, I would like to  
 10 reiterate, these are sometimes aide memoires back to  
 11 themselves to do an action. As I said, in some cases  
 12 they would go from 8 o'clock to 4 o'clock without any  
 13 breaks, in back-to-back meetings. They would write some  
 14 notes, messages back to themselves, to action on their  
 15 return.  
 16 Q. Really the obvious way to read this is that at the  
 17 meeting Gallaher asked Mr Addison to have a look at the  
 18 pricing of Embassy and Regal. That's what this document  
 19 really shows?  
 20 A. I can't comment, and I won't speculate on that.  
 21 Q. Would you agree that the obvious, if not the only  
 22 reason, why Gallaher would be asking Mr Addison to  
 23 review the retail pricing on Embassy and Regal is  
 24 because it's concerned about the position of Embassy and  
 25 Regal relative to its own brand?

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1 A. I can't comment on what the conversation was.  
 2 I maintain --  
 3 Q. But I am not asking you to comment on what the  
 4 conversation was, I am just asking you to comment on  
 5 a dialogue between a buyer and a supplier.  
 6 A. Isn't that a conversation?  
 7 **THE CHAIRMAN:** What you are being asked is: do you accept  
 8 that the inference to be drawn from this document is  
 9 that there was a discussion between Mr Addison and the  
 10 Gallaher representative about the pricing of Embassy and  
 11 Regal?  
 12 A. No, I don't. I refer back to, this could be a memo back  
 13 to Justin, as he has gone through in the meeting, where  
 14 he notes his abnormal margins, et cetera, and put it  
 15 down as a note to himself to review.  
 16 **MR WILLIAMS:** I understand your saying that, but I do think  
 17 there is a meaningful question that I can ask  
 18 Mr Eastwood on assumption, which is that if you are  
 19 wrong in that assumption, and this is recording that  
 20 there was some discussion at the meeting of the need for  
 21 Morrisons to review the retail pricing on Embassy and  
 22 Regal, that the obvious reason why Gallaher would have  
 23 brought that up with you, with your buyer, is because  
 24 they are concerned about the pricing of Embassy and  
 25 Regal relative to their competing brand?

1 A. If I may finish, then, if that is the obvious, then  
 2 Sobranie is a no brand. There would have been no  
 3 discussion, so why would he mention that himself? We  
 4 focused on the realignment of Embassy and Regal but  
 5 clearly it says "Sobranie, Panatellas" which is a no  
 6 brand, so Justin would have not sat in a meeting talking  
 7 about Sobranie and realigning Sobranie with Gallaher.  
 8 **THE CHAIRMAN:** It's a what brand, sorry?  
 9 A. It's a very small insignificant brand.  
 10 **THE CHAIRMAN:** It's not a Gallaher brand?  
 11 A. So it would be no.  
 12 **MR WILLIAMS:** I am not sure that you did answer my question,  
 13 but I do not want to labour the point.  
 14 **THE CHAIRMAN:** I think his answer was that, no, he didn't  
 15 accept that that was necessarily the reason.  
 16 **MR WILLIAMS:** Right.  
 17 **MR SUMMERS:** Mr Eastwood, may we just be absolutely certain  
 18 what the status of the minutes is? Was a copy of this  
 19 document sent to the Gallaher people?  
 20 A. Never, no, this was --  
 21 **MR SUMMERS:** Although in fact you have noted that certain  
 22 actions are required by them?  
 23 A. That was a note for, so if I take here -- I am not  
 24 certain. Simon Davis, in number 1, "Kiosk roll-out,  
 25 full surveys forward to Simon Davis. Where it has

1 "action" there, "SD", Justin would then have had  
 2 a conversation with Simon Davis to say "I have been in  
 3 a meeting with Gallaher, et cetera, can you have a look  
 4 at the surveys for this", so it was a purely internal  
 5 document, invariably to himself.  
 6 **MR SUMMERS:** Right, so "AS" is actioned, that's not a memo  
 7 to AS that he should initiate?  
 8 A. No, he would expect and in his next meeting, he would  
 9 refer back to these just to recall "are you outstanding  
 10 an action", or you know, "I need to ask you something",  
 11 or whatever he wrote, it was a memoire to himself at the  
 12 next meeting to ask this.  
 13 **MR SUMMERS:** Who was John Spurs?  
 14 A. John was the trading director, so my boss.  
 15 **MR SUMMERS:** Thank you very much.  
 16 **MR WILLIAMS:** Madam, we have now worked through the ITL  
 17 material quite quickly, and more quickly than I had  
 18 anticipated, actually, and we have now got to the  
 19 Gallaher bit of the case. I had perhaps hopefully  
 20 thought when we had the short adjournment I would have  
 21 the opportunity at lunchtime to work out what to do  
 22 about Gallaher, because we don't have documents to which  
 23 Mr Eastwood is a party, and I haven't yet worked out how  
 24 best to put the case to him. I don't know what the best  
 25 thing to do about that is, all that occurs to me is that

1 if we rise for five minutes now it will then be 10 to 1  
 2 and we will be coming back for 10 minutes. It might be  
 3 that we could then finish my cross-examination before  
 4 lunch. What I do not want to do is simply flounder  
 5 through my notes.  
 6 **THE CHAIRMAN:** Let's take a break, then, for you to  
 7 reorganise yourself.  
 8 **MR WILLIAMS:** If we could just take five minutes, that would  
 9 be very useful, thank you.  
 10 **THE CHAIRMAN:** We will come back in five minutes then.  
 11 (12.43 pm)  
 12 (A short break)  
 13 (12.50 pm)  
 14 **MR WILLIAMS:** Mr Eastwood, before the short break I asked  
 15 you various questions about the ITL account.  
 16 A. Yes.  
 17 Q. I think where we had got to is that in relation to the  
 18 documents which you weren't a party to at the time, you  
 19 weren't able to say anything very much about those  
 20 documents, and even in relation to the documents you did  
 21 see at the time, there is a very limited amount that you  
 22 can recall about what was happening at the time; is that  
 23 fair?  
 24 A. That's correct, yes.  
 25 Q. So thinking then about the Gallaher account --

1 A. Yes.  
 2 Q. -- looking at this file, there are fewer although  
 3 a small number of documents in which you were involved?  
 4 A. Yes.  
 5 Q. Is it the case that Gallaher may have been employing  
 6 a particular strategy in Morrisons stores and working  
 7 with Morrisons to achieve that strategy, and you simply  
 8 wouldn't have been aware of that? Is it possible that  
 9 Gallaher was doing that and you wouldn't have been aware  
 10 of it?  
 11 A. Doing what?  
 12 Q. That Gallaher was employing a particular pricing  
 13 strategy in relation to pricing differentials as ITL was  
 14 and you wouldn't have been aware of that?  
 15 A. Correct.  
 16 THE CHAIRMAN: That's a slightly different question from the  
 17 first way you phrased that, which was: was there  
 18 a particular strategy that they had agreed with  
 19 Morrisons rather that they were operating?  
 20 MR WILLIAMS: Sorry, that's the question I meant to ask,  
 21 Madam, you are quite right, so I'll put the question  
 22 again.  
 23 Is it possible that Gallaher was employing  
 24 a particular strategy in Morrisons and there was  
 25 an agreement or understanding with the buyers that they

1 would co-operate in this strategy, as you co-operated  
 2 with ITL's strategy, and that you, as the trading  
 3 manager, wouldn't have been aware of that?  
 4 A. It's not possible, in that as a buyer moves prices there  
 5 was a formal sign-off, so by default I would be asking  
 6 very pushing questions, why are we moving something, if  
 7 there was no obvious -- I would say anything is  
 8 possible, but it's very, very small chance.  
 9 MR WILLIAMS: If Mr Eastwood is going to say it's not  
 10 possible, then I am have to go to some documents that he  
 11 was not party to at the time, Madam, unless the Tribunal  
 12 is going to disregard that evidence, because ...  
 13 MR SAINI: Madam, I may be able to assist on this point:  
 14 there are documents in bundle 7 to which Mr Eastwood is  
 15 a party, take randomly document 10.  
 16 MR WILLIAMS: We have been to document 10.  
 17 MR SAINI: The questions that need to be put in relation to  
 18 those documents -- and again I hesitate to interrupt the  
 19 cross-examination -- are questions such as when Gallaher  
 20 identify a selling price for 3.39, is that a fixed or  
 21 a maximum price? Now, that type of case has to be put,  
 22 I accept that case does not have to be put when  
 23 Mr Eastwood is not a party, but it has to be put where  
 24 he has received these documents.  
 25 THE CHAIRMAN: Well, let's go through the documents

1 Mr Eastwood is a party to.  
 2 MR WILLIAMS: It's quite difficult to cross-examine on the  
 3 basis of one document in isolation from everything else,  
 4 though, Madam --  
 5 THE CHAIRMAN: Yes, it is --  
 6 MR SAINI: Madam, there's more than one document, with  
 7 respect.  
 8 THE CHAIRMAN: Yes, I can see the dilemma, that if you are  
 9 saying, Mr Eastwood, that you weren't aware, but you  
 10 would have been aware, that some pricing strategy was  
 11 being operated as between Morrisons and Gallaher, then  
 12 Mr Williams does need to show you some documents which  
 13 may indicate to you that actually there was something  
 14 going on of which you were unaware, but it may be that  
 15 not every document needs to be put.  
 16 MR WILLIAMS: No, I wasn't going to put every document,  
 17 Madam.  
 18 Could you turn to, in the ITL bundle, document 19,  
 19 please, which I think is a letter we have not looked at  
 20 yet today. The only thing I wanted to pick up from this  
 21 document is at this point ITL is funding a particular  
 22 price, £16.25 on the 100s. Do you see that?  
 23 A. Yes.  
 24 Q. Can you then turn to annex 7, please, and turn to tab 8.  
 25 {D7/8}. We only have a selection of documents over time

1 here, but this is 14 November, and the Dorchester 100s  
 2 are at £16.45. If you turn over the page to tab 9,  
 3 {D7/9}, Dorchester 100s move to £16.25, and this is on  
 4 9 February, so Gallaher are moving Dorchester 100s to  
 5 parity with Richmond 100s, and we saw from tab 19 that  
 6 at this time Richmond 100s were at £16.25 as well. Do  
 7 you see that?  
 8 A. Correct.  
 9 Q. Now, if we then, in this sequence, turn to document 31  
 10 in the ITL file. {D17/31}.  
 11 A. Yes.  
 12 Q. We see here, from this document -- you can look at it --  
 13 on the first page ITL moved Richmond from £16.25 to  
 14 £16.75?  
 15 A. Yes.  
 16 Q. And the packages there.  
 17 A. Yes.  
 18 Q. If you then turn to tab 11 in annex 7, {D7/11}, this is  
 19 one of the documents which is copied to you at the time.  
 20 A. Yeah.  
 21 Q. We can see that Dorchester moves up to £16.75 as well?  
 22 A. Correct.  
 23 Q. So at the time, it would have been apparent to you that  
 24 Gallaher was seeking to move Dorchester up to parity  
 25 with Richmond at "16.75?"



1 **A.** May I point out something that's missing? This is  
 2 talking about price marked packs. There was an influx  
 3 of price marked packs in the industry, Imperial launched  
 4 price marked packs, so if we look at document 18 -- was  
 5 it document 19 that we first started on, you may  
 6 remember that in my recent note, I wrote Richmond 100  
 7 price marked packs. What actually happened was, and  
 8 this I can recall because you will see in the evidence  
 9 I used the words, I think it was a tense relationship,  
 10 price marked packs caused some issue with Morrisons.  
 11 **THE CHAIRMAN:** So on that, is that 100 MP, is that --  
 12 **A.** PMP, price marked pack. So this is a pack that on it  
 13 has £16.25.  
 14 **THE CHAIRMAN:** It just says "MP".  
 15 **A.** Sorry, it says "PMP". In the first sentence, "You may  
 16 remember that in the recent note about Richmond 100  
 17 PMP". This is document --  
 18 **MR WILLIAMS:** 17/19, Madam.  
 19 **THE CHAIRMAN:** I was looking at annex 7.  
 20 **A.** Sorry, Madam, this is the Imperial document, 17/19.  
 21 **THE CHAIRMAN:** Yes, I can see that.  
 22 **A.** So what actually happened was Imperial brought out, if  
 23 I recall, a £15.99 price marked pack, it was  
 24 a considerable saving from a standard price, and over  
 25 the period of about -- and I am guessing now -- 6 to

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1 12 months they reintroduced price marked packs going  
 2 back up to their standard price. So it would be quite  
 3 right that, as we refer to Gallaher, that Dorchester  
 4 would -- or Gallaher would have seen that, because it  
 5 was in every supermarket other than Morrisons at that  
 6 point, and they too would be reflecting -- as each price  
 7 marked pack flushed out, they would be following that.  
 8 So Dorchester would have had to have bonused its  
 9 products down considerable pounds when that first  
 10 arrived.  
 11 **MR WILLIAMS:** So are you talking about £16.25 or 16 --  
 12 **A.** If I generalise, and I don't know the exact detail, but  
 13 we could work through it, but it would be quite  
 14 laborious. It would be normal for Richmond to have been  
 15 about £18. At some point they brought the price -- they  
 16 launched a price marked pack down to £15.99. They did  
 17 a set run, as in a production run, and then the next run  
 18 was £16.25, and the next run was £16 ... all the way  
 19 back, I guess -- and I am guessing -- back to £18 so the  
 20 customer had been rewarded with promotions.  
 21 Dorchester would have -- or Gallaher would have seen  
 22 that, because every supermarket would have seen these  
 23 big packs, and similarly then, because they didn't have  
 24 price marked packs, would have bonused the price down  
 25 accordingly.

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1 So as they saw each price marked pack flushed  
 2 through, yes I can see that Gallaher would adjust the  
 3 bonus accordingly versus the price marked pack that was  
 4 visible at that time.  
 5 **THE CHAIRMAN:** Because their strategy was to match Richmond.  
 6 **A.** Was to match, yes.  
 7 **MR WILLIAMS:** I don't know if that's a convenient moment,  
 8 I don't think we will be very long after lunch, Madam,  
 9 and then we can move on.  
 10 **THE CHAIRMAN:** 2 o'clock then, and let me remind you,  
 11 Mr Eastwood, you mustn't speak to anybody about your  
 12 evidence during the break.  
 13 **A.** Thank you very much.  
 14 (1.00 pm)  
 15 (The short adjournment)  
 16 (2.00 pm)  
 17 **THE CHAIRMAN:** Good afternoon. We have circulated a draft  
 18 of a proposed direction following on from the  
 19 interchange we had this morning on whether we can  
 20 establish some ground rules which might enable  
 21 cross-examination to be shortened somewhat.  
 22 I appreciate that you have only had a few moments to  
 23 consider the draft.  
 24 If anyone has any comments that they would like to  
 25 make at this stage, we can hear those, or it might be

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1 best if we finish Mr Eastwood's cross-examination at  
 2 least, if you are not going to be very much longer.  
 3 That's probably the best way to proceed, rather than  
 4 keep Mr Eastwood waiting. So let's proceed with that,  
 5 and then we can consider the direction a little bit  
 6 later.  
 7 **MR WILLIAMS:** Mr Eastwood, so picking up where we were just  
 8 before lunch, I think you were telling the Tribunal that  
 9 Gallaher had the strategy of maintaining parity between  
 10 Dorchester and Richmond.  
 11 **A.** No, what I had actually said, that it was Richmond price  
 12 marked pack had been produced, that was in the industry,  
 13 and Dorchester it would appear had reduced their retails  
 14 as we went through the document and it was removing  
 15 bonuses as each new price marked pack came into the  
 16 supermarkets.  
 17 **Q.** When I think what you actually said in response to a  
 18 question from the Chairman, the Chairman said "Their  
 19 strategy was to match" and you said "Yes" --  
 20 **A.** Evidently from what we just looked at and at price marked  
 21 pack, yes.  
 22 **Q.** But if it's evident now to you looking at those  
 23 documents, then presumably it was evident to you at the  
 24 time as well?  
 25 **A.** Could well have been, yes, but I wasn't -- at that --

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1 that's the first time I've looked at those documents,  
 2 but consecutively, yes.  
 3 **Q.** Yes, but I am simply saying that's what was happening in  
 4 the business at the time?  
 5 **A.** Correct, yes.  
 6 **Q.** And I think the inference you have drawn from what was  
 7 happening is that they were matching?  
 8 **A.** In that particular instance, yes.  
 9 **Q.** If you could open annex 7, please, and turn to tab 10,  
 10 or actually possibly tab 11, tab 11 is a better one.  
 11 {D7/11}  
 12 So this is a fax containing the £16.75 selling price  
 13 that we were looking at before lunch?  
 14 **A.** Yes.  
 15 **Q.** I think one of your general comments before lunch was  
 16 that these faxes didn't come out of the blue, there  
 17 tended to be a conversation and so on. It seems pretty  
 18 likely, doesn't it, that as part of these exchanges, it  
 19 would have become apparent to -- well, it's you, it's  
 20 Mr Eastwood in this case, but certainly to the buyers  
 21 dealing with the account day in, day out, that Gallaher  
 22 was making particular price moves for particular  
 23 strategic purposes, such as -- as we saw before lunch --  
 24 matching Richmond 100s down and then matching Richmond  
 25 100s back up?

1 **A.** The discussion that would have been had would have been  
 2 around their brand specifically, so it would be -- and  
 3 I generalise here, "As you recall we gave you a bonus of  
 4 X and you reduced it, we now want to remove some of the  
 5 bonus", et cetera, et cetera. It wouldn't be say  
 6 specifically, "We want to match that brand, that brand".  
 7 The conversation was more about the Gallaher brand or  
 8 whoever's brand we were discussing at that point.  
 9 **Q.** Wouldn't it, because we have seen a great many ITL  
 10 documents where that's exactly the nature of the  
 11 conversation you were having with them, ie they were  
 12 saying "We want to go to this price to match Gallaher"?  
 13 **A.** I can only tell you specifically about it here, and  
 14 I don't recall the conversation, and I generalise again,  
 15 it would have been: we want to discuss about the bonus  
 16 and therefore we would be discussing about Dorchester  
 17 specifically.  
 18 **Q.** If we look at the way the fax works, it says:  
 19 "Please find attached price changes and retro  
 20 bonuses from a particular date."  
 21 When we turn over, the date is July 16 until further  
 22 notice. Then what it says is:  
 23 "The selling price [and we were focusing on £16.75  
 24 at the moment] is £16.75", and it sets out the bonus  
 25 associated with that.

1 So that is telling you what Gallaher thinks the  
 2 selling price should be and the bonus it's willing to  
 3 pay at that selling price?  
 4 **A.** The 16th of the 7th is the date that I would expect the  
 5 bonuses to be changed accordingly, not the sale price  
 6 from that date.  
 7 **Q.** I was saying 16.75.  
 8 **A.** Sorry, I thought you said --  
 9 **Q.** All of these prices are selling prices is really what it  
 10 says?  
 11 **A.** Absolutely correct, the selling price, yes.  
 12 **Q.** They are not maximum prices, it's envisaged these are  
 13 the selling prices?  
 14 **A.** It's envisaged those are the proposed selling prices  
 15 with the bonus reflecting that.  
 16 **Q.** Exactly, so essentially as we have seen in the ITL  
 17 documents there is a package which consists of  
 18 a particular bonus which corresponds to a particular  
 19 selling price, and the bonus is paid on the basis that  
 20 you are going to that selling price?  
 21 **A.** In this particular instance we would have gone from  
 22 £16.25 to £16.75, therefore 50 pence of that would have  
 23 been removed, and there was an expectation I reflect  
 24 that to the new price of £16.75.  
 25 **Q.** And ITL expected you to go to £16.75 -- sorry, Gallaher,

1 I beg your pardon.  
 2 **A.** Yes.  
 3 **Q.** If you turn back to tab 10, {D7/10}, it's the same sort  
 4 of document, it works in the same way, doesn't it?  
 5 **A.** Very similar, it would be a removal of a bonus.  
 6 **Q.** So what Gallaher are saying here is:  
 7 "As we have discussed [this is with you again] the  
 8 prices are moving to particular selling prices."  
 9 And you seem to have agreed or discussed a move to  
 10 a particular selling price on the basis at which  
 11 a particular level of bonus will be paid?  
 12 **A.** We have certainly discussed the removal of a bonus which  
 13 would reflect in the £3.39, that's correct, yes.  
 14 **Q.** They go hand in hand?  
 15 **A.** It would be in the same conversation, removal of bonus,  
 16 and by sheer coincidence, but with removing the bonus  
 17 would reflect the difference back upwards form our  
 18 current selling price.  
 19 **Q.** To £3.39 in this instance?  
 20 **A.** Yes.  
 21 **Q.** So what these sorts of documents show us is that, around  
 22 the times of these sorts of communications, there is  
 23 an understanding between you and the manufacturer that  
 24 you are going to price at the prices we see in these  
 25 documents?

1 A. I think that's too generic. I think there was  
 2 an understanding that we reflect the bonus move and it  
 3 would come to that price. Would we sit there  
 4 specifically saying "And therefore it will be 3.39"?  
 5 The answer would be no, but there would be a generalised  
 6 understanding "if I remove 5p, you will add 5p back on".  
 7 **DR SCOTT:** One of the things that we see from the schedules  
 8 is that the margins get mentioned, and both  
 9 manufacturers seem concerned in the way that they bonus  
 10 to maintain your margins.  
 11 A. It's a requirement, a trading requirement that with all  
 12 categories, not just tobacco, invariably we would ask  
 13 that our margin would be maintained on any promotion.  
 14 **DR SCOTT:** So the concomitant of that, therefore, is that  
 15 you do actually expect the prices to move like that  
 16 with --  
 17 A. Correct.  
 18 **DR SCOTT:** Thank you.  
 19 **MR WILLIAMS:** So moving back to tab 11, when you have  
 20 a price communication like this, it works really in  
 21 a very similar way to the way that we saw the ITL  
 22 relationship working this morning, except that we don't  
 23 know that this happened against the background of  
 24 a trading agreement. What we can see is that Gallaher  
 25 has a strategy of maintaining parity between, in this

1 case, Dorchester and Richmond. It seems almost  
 2 impossible to believe that in the context of the  
 3 discussions between Morrisons and Gallaher at the time,  
 4 Gallaher won't have conveyed that that was its strategy.  
 5 We can see that there is an understanding between you  
 6 and Gallaher that you are going to price at the price  
 7 point that will fulfil that strategy?  
 8 A. I think I need to be extremely clear. I've not had  
 9 a discussion about a strategy, even with this document  
 10 in front of me, with Gallaher or Imperial together that  
 11 would suggest that that was the case. This is merely  
 12 a discussion about Dorchester is at X price, we want to  
 13 move or increase our bonus, and accordingly I have  
 14 therefore agreed that I will move the retails  
 15 accordingly to the bonus. Could have been more, could  
 16 have been less, but in essence it was always about  
 17 Dorchester, not the relationship to any other brand.  
 18 Q. Can we take that in stages, though, because we have  
 19 already seen in relation to ITL that that wasn't ITL's  
 20 view of the world, that it didn't just look at the  
 21 pricing of its own brands without reference to the price  
 22 of a linked Gallaher brand, that was the whole basis of  
 23 its pricing strategy; do you agree?  
 24 A. Correct.  
 25 Q. When you talked to ITL about what ITL was doing with its

1 pricing and what it wanted you to do with your pricing,  
 2 that strategy loomed large, it was part of what ITL was  
 3 trying to get across to you?  
 4 A. It was known, yes.  
 5 Q. I think you said a few moments ago that, just based on  
 6 seeing a few of these documents in sequence, it jumps  
 7 off the page that Gallaher is pursuing a matching  
 8 strategy as between Richmond and Dorchester?  
 9 A. Correct.  
 10 Q. That won't have been any less obvious at the time to  
 11 people who were living and breathing these accounts, day  
 12 in, day out, whether it was Mr Addison or Mr Giles or  
 13 you?  
 14 A. But if there was an introduction of new brands or  
 15 a change in strategy, I've not seen anything that  
 16 suggests we are now moving from matching this brand by  
 17 5p or 4p to matching that brand. And at the time we are  
 18 talking about, there were several new introductions of  
 19 brands. So --  
 20 **THE CHAIRMAN:** But just focusing on this 100 multipack,  
 21 16.75, did you understand at the time that the reason  
 22 why they were suggesting that price and reducing their  
 23 bonus was because Richmond 100 multipacks had moved to  
 24 that price?  
 25 A. I don't recall the exact conversation, but I think

1 that's a fair summary of what went on, yes, ie they saw  
 2 the Richmond price marked pack and therefore would want  
 3 to have a discussion.  
 4 **THE CHAIRMAN:** But do you remember whether that's something  
 5 you understood at the time, or at the time did that  
 6 16.75 not ring any bells as having any significance as  
 7 regards Richmond?  
 8 A. It would have had significance, yes.  
 9 **MR WILLIAMS:** You would have understood how it fitted into  
 10 Gallaher's strategy: in the same way that you were  
 11 talking to ITL about what it was doing strategically,  
 12 you would have had the same sorts of conversations with  
 13 Gallaher?  
 14 A. I didn't have a pricing strategy discussion with  
 15 Gallaher. If you look at the period we are talking  
 16 about, it's a short period. I never had that  
 17 discussion, I was more interested in the administrative  
 18 work, and I don't believe subsequently the buyers that  
 19 worked for me had a discussion about a Gallaher pricing  
 20 strategy.  
 21 Q. Would you agree with this: for someone like Mr Giles,  
 22 who was working with these accounts day in, day out,  
 23 communicating with the manufacturers on a regular basis,  
 24 if not day in, day out, about what they were doing with  
 25 their prices, it is not a great leap of imagination to

1 think that he will have developed a pretty good  
 2 understanding of what Gallaher was seeking to achieve  
 3 through discussions with Gallaher and through  
 4 discussions about particular price moves for particular  
 5 purposes?  
 6 **A.** I think it is fair to say that, if we use Mr Giles as  
 7 an example, would he realise that Gallaher were  
 8 sensitive on certain price moves of Imperial brands  
 9 through, you know, actions have been taken, and the  
 10 answer is clearly yes.  
 11 Would he know the precise strategy, I stand by --  
 12 I don't think he would.  
 13 **Q.** I should make it clear at this point that I have already  
 14 put to you that I think the document at tab 5 says  
 15 something very different about the way in which these  
 16 interactions were working, and that it would have been  
 17 absolutely clear, for example, to Mr Addison at the time  
 18 that Gallaher was interested in the pricing relativity  
 19 between these brands. I am now simply asking you  
 20 questions based on the sorts of documents we see at  
 21 tabs 10 and 11.  
 22 What I am putting to you, Mr Eastwood, is that we  
 23 have a situation here where Morrisons must have  
 24 appreciated, and did appreciate, that both of the  
 25 manufacturers were pursuing mutually reinforcing

1 strategies, essentially the same strategies on the same  
 2 brands, or at least some of the same brands.  
 3 Here we are looking at documents relating to  
 4 Richmond and Dorchester, but those weren't the only  
 5 brands that their strategies overlapped in relation to,  
 6 and that that will have been obvious certainly to the  
 7 buyers, Mr Addison and Mr Giles, in dealing with the  
 8 manufacturers as regularly as they did?  
 9 **A.** I go back to: yes, Mr Giles would know that this was  
 10 sensitive, but it's no different than any other category  
 11 I can think of. Do I know Fosters lager would be  
 12 sensitive to the pricing or activity of Carling lager?  
 13 The answer is yes. Doesn't mean I need to know the  
 14 strategy, but what's going on, I know the two are always  
 15 competing, and it is fair to say, as you say, that  
 16 Mr Giles would know that these brands were competing  
 17 with other brands, yes.  
 18 **Q.** And he would have appreciated that the manufacturers  
 19 were both pursuing the same strategy; that's the other  
 20 point I am putting to you?  
 21 **A.** He would certainly appreciate that each one would want  
 22 a competitive advantage over the other, yes, because  
 23 that's how they were going to move their market share.  
 24 **Q.** I am putting something a bit different to you, which is  
 25 that we know exactly what ITL's strategy was because we

1 have seen the trading agreement, we have seen all the  
 2 documents around that and I am putting to you that  
 3 Mr Giles and Mr Addison before him would have understood  
 4 that Gallaher was pursuing the same strategy in  
 5 Morrisons stores and that the relationship between him  
 6 and Gallaher crystallised into co-operation in that  
 7 strategy?  
 8 **A.** I disagree. The Imperial strategy is clear, and we have  
 9 discussed it at great length. The Gallaher one is by  
 10 association of, I would say, more sensitivity. Do  
 11 I believe that Paul or Mr Giles or Mr Addison knew  
 12 specifically it was 2p, 3p, 5p, versus this brand or --  
 13 no, I don't, but do I believe that he knew that Embassy  
 14 and Benson & Hedges were sensitive to each other,  
 15 et cetera, or Dorchester and Richmond in this case, then  
 16 the answer is clearly yes.  
 17 **Q.** Which tab do you have open, is it 10 or 11?  
 18 **A.** 10.  
 19 **Q.** So we looked at tab 10 earlier on, because this was  
 20 a Dorchester move to £3.39, which we saw, followed by  
 21 a Richmond move to £3.39, we saw that in document 28 of  
 22 annex 17. We don't need to go back to it now. What  
 23 I am putting to you is that it would have been obvious  
 24 to the manufacturers, to Gallaher and to ITL, that when  
 25 one of them put their prices up -- here Gallaher putting

1 its price up to £3.39 -- it would have become obvious to  
 2 you through experience that Morrisons was co-operating  
 3 with their respective strategies so that when one brand  
 4 went up, the linked brand went up to the same price. It  
 5 would have become obvious to them over time that  
 6 Morrisons was co-operating with both manufacturer in  
 7 those strategies?  
 8 **A.** Are you saying there is a link without the bonus being  
 9 discussed, are you saying that there was an automatic  
 10 move, because categorically I am stating there isn't.  
 11 The discussion was: we have given you a bonus of Xp,  
 12 would you reflect it? We reflected it. We have removed  
 13 the bonus of Xp, we have reflected it. Is there an  
 14 automatic link, and I think that was the wording that  
 15 was used? The answer is clearly not.  
 16 **Q.** I don't think I used the words "automatic link",  
 17 I didn't mean to suggest that. I think what I am saying  
 18 is that even in circumstances where we don't have  
 19 a trading agreement in Gallaher, I am saying that custom  
 20 and practice will have evolved to a point where ITL  
 21 would have been able to look at what Morrisons was doing  
 22 with prices of the Gallaher brand and ITL will have been  
 23 confident that when it put its prices up, for example,  
 24 to 16.75, if it went first, then it would expect the  
 25 price of Dorchester to follow. And likewise, when

1 Gallaher put its prices up to £3.39 in this document,  
 2 Gallaher would have been confident that Richmond was  
 3 going to follow, which indeed it did, we saw that this  
 4 morning?  
 5 **A.** I can't comment on what Imperial/Gallaher thought about  
 6 their assumptions in the market, I can only tell you  
 7 what the facts are I was faced with. If the bonus was  
 8 given, we took it; if the bonuses was removed, we  
 9 reflected that. I can't comment on Gallaher or  
 10 Imperial's assumption about what they thought.  
 11 **Q.** You can't comment on their state of mind, but Morrisons'  
 12 dealings with each of the manufacturers will have  
 13 generated that confidence; that's what I am putting to  
 14 you: Morrisons' willingness to move prices to particular  
 15 price points on the basis of the level of bonus it was  
 16 being paid at that point in time will have generated  
 17 a custom and practice which each manufacturer would have  
 18 been able to see in the market and which would have  
 19 given it confidence that when one of them went up, you  
 20 could be expected to put the linked brand up too?  
 21 **A.** It would also suggest that if one continues to go up we  
 22 would end up at the manufacturers' recommended price,  
 23 which we never did. There was always a case of just  
 24 reflecting the bonus that was passed on or removed at  
 25 that point in time.

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1 **Q.** Just to be clear, as I said a few minutes ago, this is  
 2 not limited to the scenario that we see in these  
 3 documents relating to Richmond and Dorchester, because  
 4 the minute of the meeting at tab 5 tells us that this  
 5 isn't just about promotional bonuses and so on, actually  
 6 Gallaher expected Morrisons to price its brands and ITL  
 7 brands at particular relativities, in other words the  
 8 relationship between Gallaher and Morrisons was to all  
 9 intents and purposes the same as the relationship we  
 10 have seen with ITL, that is a co-operation around the  
 11 maintenance of P&Ds, parities and differentials, whether  
 12 or not that was in the context of a trading agreement?  
 13 **MR SAINI:** Can I just say that that's an extremely unclear  
 14 question, if one looks at it on the transcript. It may  
 15 be helpful if the questions are broken down into smaller  
 16 chunks.  
 17 **THE CHAIRMAN:** Let's see if Mr Eastwood is prepared to --  
 18 did you understand the question, which is broadly that  
 19 the --  
 20 **A.** We are using -- I think that I answered this prior to  
 21 lunch, in that this particular document is a minute and  
 22 an aide memoire to Justin, in this particular instance,  
 23 and I thought I had answered it. Does this mean that  
 24 Justin had a discussion with a Gallaher representative  
 25 about Embassy and Regal? The answer is no, I stand by

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1 that previous comment.  
 2 **MR WILLIAMS:** Thank you very much, Mr Eastwood.  
 3 **THE CHAIRMAN:** Mr Howard, you have some questions of  
 4 Mr Eastwood?  
 5 **MR HOWARD:** I do.  
 6 I have a concern about the questions that have just  
 7 been put and the lack of clarity in the Office of Fair  
 8 Trading's case. I think, particularly in the light of  
 9 the way questions were put, it is essential that we do  
 10 get some clarity as to what the OFT believes they are  
 11 asking.  
 12 Amongst the last questions that Mr Williams put, he  
 13 said:  
 14 "You can't comment on their state of mind, but  
 15 Morrisons' dealings with each of the manufacturers will  
 16 have generated that confidence; that's what I am putting  
 17 to you: Morrisons' willingness to move prices to  
 18 particular price points on the basis of the level of  
 19 bonus it was being paid at that point in time will have  
 20 generated a custom and practice which each manufacturer  
 21 would have been able to see in the market and which  
 22 would have given it confidence that when one of them  
 23 went up, you could be expected to put the linked brand  
 24 up too?"  
 25 The point that's totally unclear, and this is yet

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1 another retailer where it's unclear, whether the OFT is  
 2 intending to put a case to a witness that when, for  
 3 instance, Gallaher withdrew its bonus so that the price  
 4 of its product went up as a result of the reduced bonus,  
 5 whether ipso facto as a result of that Morrisons was  
 6 obliged to put up the price of the Imperial product.  
 7 Now, I do respectfully say we have to get some  
 8 clarity as to whether that is the case that the OFT is  
 9 intending to put. If they are intending to put it, it  
 10 has to be put properly, fair and square.  
 11 So before I start my cross-examination, I would ask  
 12 you to direct Mr Williams to make clear what it is he is  
 13 seeking to put.  
 14 **THE CHAIRMAN:** Yes. As I understand it there is some  
 15 confusion in that question that you asked, Mr Williams,  
 16 as to whether we are only dealing with responses to  
 17 changes in bonus by the respective manufacturers and  
 18 Morrisons responding to that, or whether the question  
 19 that you were putting was whether there was a custom and  
 20 practice that if Gallaher's bonus was reduced, say, and  
 21 the price of the Gallaher brand went up, that Morrisons  
 22 would then put up the price of the Imperial product  
 23 without there having been any action on the part of  
 24 Imperial. Is that the clarification you are seeking,  
 25 Mr Howard?

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1 **MR HOWARD:** Yes.  
 2 **THE CHAIRMAN:** Is that the case? Because the preceding  
 3 questions all seemed to relate to the manufacturers  
 4 altering their bonuses in response to each other and  
 5 Morrisons reflecting those bonus changes in their retail  
 6 prices, rather than Morrisons making changes in their  
 7 retail prices without that trigger of a bonus change?  
 8 **MR WILLIAMS:** Should I answer you, Madam, or should I put  
 9 the question to the witness?  
 10 **THE CHAIRMAN:** Well, I hope you can put a question to the  
 11 witness which makes it clear to everybody what case the  
 12 OFT is putting as regards the arrangement between  
 13 Gallaher and Morrison, at least.  
 14 **MR WILLIAMS:** What I am putting to you, Mr Eastwood, is that  
 15 there was an understanding between Gallaher and  
 16 Morrisons that Morrisons would support its pricing  
 17 strategy of maintaining parities and differentials in  
 18 the same way that you had an agreement to that effect  
 19 with ITL, and that the documents we have been looking at  
 20 with Richmond and Dorchester, they are the same sorts of  
 21 documents as we see in relation to the ITL account; that  
 22 is to say Gallaher providing you with pricing  
 23 instructions which are the implementation of that  
 24 understanding, that agreed strategy, but that the  
 25 agreement wasn't so limited, and the reason we know it's

1 not so limited is from the document at tab 5, which  
 2 tells us that Gallaher believed that Morrisons should be  
 3 pricing ITL brands and Gallaher brands with reference to  
 4 one another, and there is no suggestion that that's in  
 5 the context of a promotion, it's not limited to moving  
 6 bonuses around and all the rest of it, there is  
 7 an understanding that that's what you will do, and that  
 8 the --  
 9 **THE CHAIRMAN:** Well, that's not really clarified matters.  
 10 As far as I understand your evidence, Mr Eastwood,  
 11 you were saying that the manufacturers could expect that  
 12 you would, other things being equal, respond to  
 13 an increase or a decrease in bonuses by adjusting the  
 14 retail price.  
 15 **A.** Absolutely correct.  
 16 **THE CHAIRMAN:** It probably was apparent to you that the  
 17 manufacturers were pursuing their own strategy of -- or  
 18 that their moves in bonus mapped each other in relation  
 19 to certain brands, because they regarded those brands as  
 20 competing, and you were aware of that.  
 21 **A.** That's correct.  
 22 **THE CHAIRMAN:** Was there, so far as you were concerned, any  
 23 obligation in relation to Gallaher that you would change  
 24 your retail prices, otherwise than in response to  
 25 a change in the bonus, in order to help them fulfil

1 their strategy as far as what parities and differentials  
 2 they wanted to exist between different brands?  
 3 **A.** None whatsoever, it was always about the functionality  
 4 of the bonus.  
 5 **THE CHAIRMAN:** Is it your case, Mr Williams, that there was  
 6 in relation to Gallaher a custom and practice --  
 7 **MR HOWARD:** Or Imperial, because he hasn't put a case based  
 8 on Imperial either.  
 9 **THE CHAIRMAN:** Well, with Imperial, we have the trading  
 10 agreement which has been discussed. What I thought we  
 11 were trying to establish is how far, even in the absence  
 12 of a trading agreement with Gallaher, the same thing  
 13 happened with Gallaher as happened with ITL, whatever  
 14 that is.  
 15 **MR HOWARD:** Well, the case that the OFT has not put to this  
 16 witness or to any witness is that under these agreements  
 17 there was any requirement, here of Morrisons, that if  
 18 Imperial put up its price, that there was a requirement  
 19 to put up the price of a Gallaher product; or if  
 20 Imperial put down its price, that there was  
 21 a requirement to put down the price of a Gallaher  
 22 product. I make this point because that is said to be  
 23 the position in the decision and in Professor Shaffer's  
 24 report. What appears to be something that the OFT just  
 25 does not want to do is to articulate this with the

1 witnesses. Why, I am not entirely clear. But we do  
 2 insist, if that is their case, that they put it properly  
 3 to the witnesses or they explain why they are not going  
 4 to put it.  
 5 **THE CHAIRMAN:** Mr Williams, is it your case still that, both  
 6 in relation to ITL and in relation to Gallaher, there  
 7 was an obligation on Morrisons to reinstate a parity or  
 8 differential regardless -- when there had been -- when  
 9 one manufacturer had moved the price, regardless of  
 10 whether the other manufacturer moved the price?  
 11 **MR WILLIAMS:** The difficulty is, Madam, that if one has  
 12 a scenario where tactical bonuses are being paid in  
 13 relation to a particular brand at a particular point in  
 14 time, the condition of the tactical bonus being paid is  
 15 that prices are at a particular level. If the price of  
 16 a linked brand moves up because a bonus has been  
 17 reduced, then, as a matter of practicality, one sees  
 18 communications then on the other side reducing the level  
 19 of the bonus. But the point that we make is that all of  
 20 these price moves and the dealings between the  
 21 manufacturers and the retailers are all in furtherance  
 22 of the parity and differential strategy.  
 23 So we don't accept that it's an objection to the  
 24 ipso facto point, if I can put it that way, we don't  
 25 accept that that's an objection to our case, and it's

1 not the way it's articulated in the decision.  
 2 **THE CHAIRMAN:** Nonetheless, are you now saying that it's not  
 3 your case that there was that ipso facto requirement  
 4 that what was happening was that the retailers were  
 5 receiving offers of tactical bonuses to reinstate the  
 6 P&Ds? They may have realised that was why they were  
 7 receiving them; they may not, but that that was how the  
 8 system was working, rather than there being an automatic  
 9 obligation to increase or decrease the competitor's  
 10 price once they had accepted a bonus, or once they had  
 11 changed the retail price of the other brand?  
 12 **MR WILLIAMS:** Madam, the case in the decision is not made on  
 13 the basis of automaticity. This is a matter that was  
 14 dealt with in opening and it will be dealt with in  
 15 closing. I do not want to open up a grand debate about  
 16 the shape of the case as a whole with Mr Eastwood  
 17 sitting in the witness box. But that isn't the basis of  
 18 the OFT's decision. You have seen a great many of the  
 19 documents in the case in the course of  
 20 cross-examination, you have seen the way in which  
 21 dealings between the manufacturers and the retailers  
 22 worked. It's our case that, for example in relation to  
 23 ITL and Morrisons, there is a trading agreement, there  
 24 is an agreement that certain differentials would be  
 25 maintained --

1 **THE CHAIRMAN:** Yes.  
 2 **MR WILLIAMS:** -- and that --  
 3 **THE CHAIRMAN:** Is it your case that the Gallaher agreement  
 4 with Morrisons or the arrangement in the absence of  
 5 a written agreement was the same as it was with ITL?  
 6 **MR WILLIAMS:** Yes, Madam, I am sorry that that didn't come  
 7 across in the last question. The purpose of the last  
 8 question was to put to Mr Eastwood that the relationship  
 9 between Gallaher and Morrisons was, to all intents and  
 10 purposes, the same as the relationship with ITL, except  
 11 we don't see the trading agreement, but that's the way  
 12 it worked.  
 13 **THE CHAIRMAN:** Well, is there any other question that you  
 14 would like now to put to Mr Eastwood in response to the  
 15 point that Mr Howard has made, to ensure that the case  
 16 that you are going to be putting at the end of the day  
 17 is a case that's been put to this witness?  
 18 **MR WILLIAMS:** Yes, can I just have a moment?  
 19 **THE CHAIRMAN:** Yes.  
 20 (Pause)  
 21 **MR WILLIAMS:** Madam, that's the case we want to put to  
 22 Mr Eastwood, that the relationship with Gallaher was, in  
 23 practice, the same as the relationship with ITL, that  
 24 there was an understanding between Gallaher and  
 25 Morrisons that Morrisons would maintain parities and

1 differentials for Gallaher and that the relationship  
 2 worked in the same way as the relationship with ITL,  
 3 which we explored in some detail this morning, whether  
 4 or not that was against the background of a trading  
 5 agreement.  
 6 **A.** I say there wasn't.  
 7 **THE CHAIRMAN:** There wasn't. Thank you, Mr Williams.  
 8 Cross-examination by MR HOWARD  
 9 **MR HOWARD:** I am simply going to make this point at the  
 10 moment, because I think it is important, that it is  
 11 a matter of great concern that the case that is in the  
 12 decision is not actually put to the witnesses, and that  
 13 when the OFT are challenged about this -- and this isn't  
 14 the first time -- they are not actually able to  
 15 articulate what their case is. You have to remember  
 16 this has given rise to a fine of some £110 million. We  
 17 are in, I think, week 4, and to simply say "Oh, well, it  
 18 will all become clear in due course" we say is contrary  
 19 to any fair and due process. I've made that point, and  
 20 I'll now cross-examine.  
 21 Just on this point, Mr Eastwood, you were being  
 22 asked about price moves for strategic purposes: how  
 23 usual is it, in your experience as somebody heavily  
 24 involved in a supermarket, that manufacturers seek to  
 25 influence the supermarket selling price in order to gain

1 a competitive advantage?  
 2 **A.** It is normal that, in most categories, price could be  
 3 used as a competitive advantage, and whether it be  
 4 long -- sorry, long-term reduction in price or long-term  
 5 promotions and things like that, then that is normal  
 6 practice where one brand would want advantage over the  
 7 other.  
 8 **Q.** How usual is it to use bonuses in order to get shelf  
 9 price reductions?  
 10 **A.** It is the norm.  
 11 **Q.** It's the norm, so washing powder, the two, Unilever and  
 12 whoever else competes, they see one product at whatever  
 13 it is and they want to get either to the same price or  
 14 below; how do they do that?  
 15 **A.** Through a bonus. They would offer a bonus, as --  
 16 regardless what the category is, and subject to the  
 17 margin, et cetera, and the -- it fits with the strategy,  
 18 then, you would reflect it, that's correct.  
 19 **Q.** Richmond and Dorchester, I think you told us, was it  
 20 clear that Richmond and Dorchester were in the same  
 21 segment of the market?  
 22 **A.** I think -- I can't recall. Generally then the answer  
 23 would be yes. But at the time we are looking at, we  
 24 seem to be creating so many subsectors all of the time,  
 25 we went from a premium sector to a mid sector to a very

1 low, and then as the climate was getting tougher then  
 2 even a low sector became very fragmented, but generally  
 3 the answer would be yes.  
 4 **Q.** If we go back a stage, at paragraph 5 of your statement,  
 5 you tell us that Morrisons' commercial strategy was to  
 6 maximise long-term profitability whilst targeting low  
 7 prices and maintaining the highest level of product  
 8 availability. Okay? You also say a little further on  
 9 about tobacco in paragraph 7 that customers are highly  
 10 brand loyal and price sensitive and will potentially  
 11 switch to other brands in the face of price increases?  
 12 **A.** Mm.  
 13 **Q.** Presumably the propensity to switch depends upon the  
 14 degree of brand loyalty?  
 15 **A.** Correct.  
 16 **Q.** Yes.  
 17 **A.** And how many brands are in that category.  
 18 **Q.** Yes. So we know that there are categories, and I am not  
 19 doing justice to the categories -- sorry?  
 20 **DR SCOTT:** I think you were talking about switching brands  
 21 whereas he is talking about switching retailers.  
 22 **MR HOWARD:** No.  
 23 **A.** I was talking about switching brands, so depending on  
 24 the brands within the category --  
 25 **DR SCOTT:** Yes, but what you say in here is:

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1 "Consumers of tobacco products are highly brand  
 2 loyal and price sensitive and will change their buying  
 3 habits, potentially switching to other retailers in  
 4 response to price increases, particularly if they are  
 5 sustained."  
 6 **MR HOWARD:** You are right. Let me just follow that.  
 7 There are different points being made. Brand  
 8 loyalty, you talked about brand loyalty and price  
 9 sensitivity and switching to other retailers. If we can  
 10 focus for a moment on switching brands, we know that  
 11 there are segments where there is a so-called luxury end  
 12 of the cigarette market and a low price and an ultra low  
 13 price, and no doubt there are others to the -- those who  
 14 are involved. But the propensity to switch brands,  
 15 according to a change in price, obviously will depend  
 16 upon brand loyalty and which end of the market you are  
 17 in?  
 18 **A.** Correct.  
 19 **Q.** So if you are in the low price and ultra low price  
 20 that's presumably the area that's more price sensitive  
 21 and price differentials will cause people to switch?  
 22 **A.** Absolutely.  
 23 **Q.** Now, I'll come back to this question of retailer  
 24 competition separately. I am just focusing on the  
 25 brand. Well, perhaps we can pursue it now. Just

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1 looking at your strategy for a moment, you also tell us  
 2 that you wanted -- I think it's in paragraph 6 -- to  
 3 keep your retail prices for tobacco competitive with  
 4 your other competitors, who I think are Asda and Tesco;  
 5 is that right?  
 6 **A.** And I would include at this stage Kwik Save, because  
 7 there was 1,000 stores and the profile of cigarettes was  
 8 very much their shopper, if I generalise.  
 9 **Q.** In relation to competitors, the reason you presumably  
 10 don't want potential customers to buy their cigarettes  
 11 in your rival is because you don't want to lose, one,  
 12 the sale of the cigarettes, but also the sale of other  
 13 products and the customer's loyalty?  
 14 **A.** The customer loyalty and cigarettes are hugely key when  
 15 you open a new store, within a couple of months most  
 16 categories settle down in their fair share of a normal  
 17 supermarket. The one that takes the longest to settle  
 18 down is tobacco, so they continue to habitually shop  
 19 where they used to, and eventually they like the  
 20 shopping environment, they switch. So there is  
 21 a loyalty. But if you upset them, as we suggest here,  
 22 in terms of price of tobacco, they are unhappy, then  
 23 it's safe to say that you would lose the grocery shop at  
 24 the same time and it could be a considerable time before  
 25 you got it back.

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1 **Q.** I think what you are telling us is that part of your  
 2 strategy, an important part of Morrisons' strategy, is  
 3 to keep the tobacco customer in your store?  
 4 **A.** Absolutely.  
 5 **Q.** Providing you can do that, and providing you can obtain,  
 6 therefore, the sale of the tobacco product and earn your  
 7 margin -- I'll come back to the margin in a moment --  
 8 does it matter to Morrisons whether the customer buying  
 9 in the segment of the market in which he is interested,  
 10 does it matter to you whether he buys Gallaher's product  
 11 or Imperial's product?  
 12 **A.** None whatsoever.  
 13 **Q.** You tell us at paragraph 15 of your statement that the  
 14 differences in RRP's were already reflected in Morrisons'  
 15 pricing?  
 16 **A.** Yes.  
 17 **Q.** I just want to try and examine this in a little more  
 18 detail, if I can. In your experience, were the RRP  
 19 differentials reflected in the actual net wholesale  
 20 prices that Morrisons paid the manufacturers for their  
 21 products?  
 22 **A.** Yes.  
 23 **Q.** So was it the case that pricing in accordance with the  
 24 RRP differentials simply meant that Morrisons' margin  
 25 policy was to apply a common margin to the competing

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1 Gallaher and Imperial products so that the net effect  
 2 was that the selling prices reflected the RRP  
 3 differentials?  
 4 **MR LASOK:** Can I just intervene at this stage? We have  
 5 already had a discussion on previous occasions about  
 6 leading questions being put, even in the course of  
 7 cross-examination, by a party that has the same interest  
 8 as the party who has presented the witness.  
 9 **MR HOWARD:** I'll rephrase the question. It wasn't actually  
 10 a leading question, as it happens, but I don't mind  
 11 rephrasing it.  
 12 You have told us that the net wholesale prices  
 13 reflected the differentials. In relation to competing  
 14 products of Imperial and Gallaher, where you have  
 15 already told us that you are indifferent which one you  
 16 sell, what was your margin policy?  
 17 **A.** The margin policy was one of the whole category, not one  
 18 of a specific manufacturer.  
 19 **Q.** Right. So in terms of Morrisons' policy, if we are  
 20 looking at the position of the two different  
 21 manufacturers, how did your policy then operate insofar  
 22 as one manufacturer might be concerned about whether he  
 23 was going to be disadvantaged in some way, what was  
 24 actually your internal position about that?  
 25 **A.** We took a base cost and reflected a retail that we were

1 happy with the output of the margin.  
 2 **Q.** Right. But your commercial strategy as to how you  
 3 treated the different manufacturers, was that something  
 4 confidential or was that something that you would have  
 5 told the manufacturers?  
 6 **A.** No, clearly not, it was something that was confidential  
 7 to ourselves.  
 8 **Q.** Right.  
 9 **DR SCOTT:** Sorry, just to be clear about that, the schedules  
 10 we have seen of costs, prices and margins do show the  
 11 margins that you are achieving?  
 12 **A.** Based on actual selling price in the store, yes, and the  
 13 current cost.  
 14 **DR SCOTT:** So that ITL could see the margins that --  
 15 **A.** ITL would know their own margin, but they certainly  
 16 wouldn't know what Morrison's margin was, because of the  
 17 mix factor. We didn't sell EPOS data, so they wouldn't  
 18 know what Gallaher brands sold or Rothmans' brands, and  
 19 then you also had the mix of the tobacco, as in hand  
 20 rolling tobacco and pipe tobacco, which generally --  
 21 **THE CHAIRMAN:** They knew the margins that you were earning  
 22 on their brands, because they saw those schedules?  
 23 **A.** Yes, correct, but they would have no idea of Morrison's  
 24 final margin, and indeed there was all of the internal  
 25 costs that were associated with the final margin that

1 I looked at.  
 2 **DR SCOTT:** Presumably the internal costs were equivalent  
 3 between an ITL cigarette and a Gallaher cigarette?  
 4 **A.** Correct.  
 5 **DR SCOTT:** So that, given that everybody knew the RRP's,  
 6 everybody knew the Q6 pricing, they knew the margins  
 7 that had been made on their own brands, there seems to  
 8 be quite a lot that people know.  
 9 **A.** The bit they didn't know was the other monies that --  
 10 **DR SCOTT:** The bonuses, yes.  
 11 **A.** Yes, and they wouldn't know to the extent and clearly  
 12 the bit that Morrisons took into account with Gallaher  
 13 is specifically the merchandising equipment which they  
 14 invested many millions of pounds. So that equation,  
 15 they definitely wouldn't know.  
 16 **DR SCOTT:** That's what enabled you to gain between the  
 17 manufacturers, as I understand it?  
 18 **A.** Yes.  
 19 **DR SCOTT:** Thank you.  
 20 **MR HOWARD:** You have told us already that the net wholesale  
 21 price that you were paying for the Imperial products and  
 22 for Gallaher products reflected the RRP differentials,  
 23 but can we just then consider how that operates for  
 24 a moment, and pick up a point that Dr Scott made: we  
 25 know that there is a list price; correct --

1 **A.** Correct.  
 2 **Q.** -- for cigarettes? We also know that, against the off  
 3 the list price, people like Morrisons can get a bulk  
 4 drop discount, which is basically just a discount for  
 5 buying a lot; correct?  
 6 **A.** Correct.  
 7 **Q.** That's common knowledge what that is, because it's in  
 8 the price list --  
 9 **A.** It's on the schedule.  
 10 **Q.** Right. The third element is that there is a bonus  
 11 element that effectively is a further discount which is  
 12 a discrete discount which each supermarket or whoever it  
 13 is tries to negotiate?  
 14 **A.** Yeah.  
 15 **Q.** What I want to consider is that position. Let's assume  
 16 we are looking at Richmond and Dorchester, where  
 17 Imperial is aiming to achieve at least parity in selling  
 18 prices. Let's assume -- and the RRP differential is the  
 19 same for them, which I think was the case -- that as  
 20 a result of your negotiations with Gallaher you manage  
 21 to negotiate a situation where the net wholesale price  
 22 of the Gallaher product, Dorchester, is let's say 5p per  
 23 pack less than the net wholesale price of the Imperial  
 24 product, Richmond. Let's assume that.  
 25 Now, how, in that instance, where you have the price

1 of one down and you have told us that you applied  
 2 a common margin across the board, how in that instance  
 3 would you regard your freedom to price and how would you  
 4 price the two products?  
 5 **A.** If you are saying there was a 5p differential between  
 6 the two products --  
 7 **Q.** Yes.  
 8 **A.** -- firstly we would look at the competition, as in  
 9 Asda, Tesco, Kwik Save, to see where they -- if -- we  
 10 will assume at this point that the brands are already  
 11 there, and then it would be a simple calculation based  
 12 on the cost of our margin requirement, and then we would  
 13 reflect that as a retail, trying -- in some cases we  
 14 would want to be more competitive than Asda and Tesco,  
 15 or in some others it would be parity. So it was really  
 16 just a cost base exercise.  
 17 **Q.** So to what extent was your decision to price in  
 18 accordance with the RRP differentials dependent on  
 19 whether the difference in net wholesale price, after  
 20 taking account of any discounts or bonuses, reflected  
 21 the RRP differentials?  
 22 **A.** Could you just --  
 23 **Q.** Yes. Sorry, could I explain?  
 24 **A.** Literally --  
 25 **THE CHAIRMAN:** I think what he is asking is: you say that

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1 you priced in accordance with the RRP --  
 2 **A.** Differential.  
 3 **THE CHAIRMAN:** -- differentials. Was that because that was  
 4 the factor that you took into account when deciding what  
 5 price to arrive at, or was that because generally the  
 6 cost to you of the product reflected those RRP  
 7 differentials?  
 8 **A.** It was the latter, it's the cost.  
 9 **MR HOWARD:** If we take the case of a tactical bonus, the  
 10 tactical bonus one can see -- and again there is no  
 11 magic in it so I can just say what it is -- is  
 12 effectively reducing your net wholesale price, isn't it?  
 13 **A.** Yes.  
 14 **Q.** So in that instance, where there is a tactical bonus --  
 15 we can see, we can turn up the documents, but we know,  
 16 for instance, that sometimes Gallaher would provide  
 17 a bonus and you would reduce the price of the Gallaher  
 18 brand?  
 19 **A.** Absolutely.  
 20 **Q.** Right. Now, so we can see how you operated in that  
 21 situation, where there is a tactical bonus. My question  
 22 was just looking at it as, as it were -- well, I suppose  
 23 the way to approach it is this: is there any magic in  
 24 the label "tactical bonus" as opposed to simply bonus  
 25 that reduces the net wholesale price?

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1 **A.** It was net cost; it was just a pure net cost.  
 2 **Q.** So insofar as Gallaher gets its net cost below the net  
 3 cost of the Imperial product, where Imperial had been  
 4 seeking to have parity or better, if Gallaher's product  
 5 is actually cheaper for you, what's the effect on your  
 6 pricing decision?  
 7 **A.** Assuming -- well, the margin was a set margin, then the  
 8 Gallaher brand would be cheaper than the competing  
 9 brand.  
 10 **Q.** So in that event, where you then price the Gallaher  
 11 brand below the Imperial brand, if Imperial wants to  
 12 gets its brand down to the same level or lower, what  
 13 does Imperial have to do?  
 14 **A.** Fund the movement via an additional bonus on net cost.  
 15 **Q.** To what extent is what we are talking about any  
 16 different in relation to tobacco than it is in relation  
 17 to baked beans, tomato soup or washing up liquid?  
 18 **A.** There's none whatsoever, it is the same principle  
 19 applied.  
 20 **Q.** Thank you. If we can just look at a couple of other  
 21 points. Could you, just so we can get this clear, look  
 22 at the agreements, please. You will need file 17. You  
 23 were asked a lot of questions over the course of your  
 24 evidence about how the agreement operated. Can we look  
 25 at tab 4 and tab 85. Perhaps go to tab 85 first.

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1 {D17/85}.  
 2 We see on the third page of the trading agreement  
 3 the differentials expressed in terms of things being no  
 4 more expensive than and at least so much less expensive  
 5 than. You see that?  
 6 **A.** Yes.  
 7 **Q.** Or sometimes no more expensive than.  
 8 Can you tell us: is there any reason, as far as you  
 9 are concerned, why we should not understand the  
 10 agreement in the way that it's actually written there?  
 11 **A.** Not at all.  
 12 **Q.** Did you in any way, as far as you were aware, change  
 13 this agreement?  
 14 **A.** No, not at all.  
 15 **Q.** If you would go back to tab 4, {D17/4}, at tab 4 you can  
 16 see that in a couple of cases, the way the language was  
 17 expressed here, if you take Superkings, it's expressed  
 18 as "level with on equals", and that same language  
 19 I think appears a couple of times. Can you tell us  
 20 what, in terms of ITL's strategy did you understand that  
 21 they were seeking to achieve?  
 22 **A.** I think grammatically it's poor, but it was the same as  
 23 or less for ourselves.  
 24 **Q.** Right, okay. I just want to then consider how the  
 25 opportunity to respond clauses operated. If you look at

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1 tab 4 on the second page, we can see what's been called  
 2 the opportunity to respond clause:  
 3 "William Morrison to confirm instore promotional  
 4 activities which may affect the pricing strategy. ITL  
 5 agree to maintain the bonus levels, should we elect not  
 6 to respond to other manufacturers' pricing initiatives."  
 7 Just clarify this for me: so Gallaher, let's say,  
 8 decides to have a promotion of minus 5p or 5p off,  
 9 I suppose one should say, a pack of Mayfair. Right?  
 10 **A.** Yes.  
 11 **Q.** Firstly, as far as you were concerned, were you, on  
 12 behalf of Morrisons, entitled to participate in that  
 13 promotion?  
 14 **A.** Absolutely. It was a Gallaher/Morrisons conversation.  
 15 **Q.** Yes. So would you participate in that without reference  
 16 to Imperial, or did you think it was subject to  
 17 Imperial's agreement?  
 18 **A.** One hundred per cent just participate.  
 19 **Q.** Insofar as we see this says that you are to confirm  
 20 instore promotional activities, was that something that  
 21 you regarded as your being required to do prior to your  
 22 actually taking 5p off, or after or when?  
 23 **A.** This was as it hit the store invariably there was  
 24 a discussion to say, you know, as I previously  
 25 mentioned, you may have seen, because we know, or if you

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1 haven't, it's there and it's a 5p promotion.  
 2 **Q.** If we contrast tab 85, we don't, I think, find in that,  
 3 in the relevant opportunity to respond clause, any  
 4 obligation expressed for you to confirm the instore  
 5 promotional activities?  
 6 **A.** No.  
 7 **Q.** Insofar as Gallaher had a promotion, how in practice did  
 8 Imperial find out about it?  
 9 **A.** Either from going to the stores themselves on the  
 10 Monday, if it broke on the Monday, or once it was  
 11 instore, we would then have had that discussion.  
 12 **Q.** If we go back to tab 4 for a moment, I think, just so  
 13 I understand, you have told Mr Williams that -- let's  
 14 take it in stages. These trading agreements, were they  
 15 looked at by lawyers in Morrisons?  
 16 **A.** Absolutely not.  
 17 **Q.** So we can see the language that's used, and slightly  
 18 different language used in the two agreements, but  
 19 I think you told Mr Williams, he suggested to you that  
 20 these two agreements, as far as you were concerned,  
 21 basically operated in the same way, you didn't see any  
 22 great differential; is that right?  
 23 **A.** Correct.  
 24 **Q.** Okay. Now, what we also see is that ITL, in the first  
 25 agreement, was saying they agree to maintain bonuses

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1 levels "should we elect not to respond to other  
 2 manufacturers' pricing initiatives".  
 3 So if we go back to my example, Gallaher have a 5p  
 4 off a pack of Mayfair, you have told us that you were  
 5 entitled to participate, so you could reduce the price  
 6 of Gallaher. As far as you were concerned, was Imperial  
 7 under any obligation to do anything in response?  
 8 **A.** No. If it chose not to respond then it chose not to  
 9 respond and that was it.  
 10 **Q.** The price of Mayfair has gone from £3.60 down to £3.55,  
 11 because Gallaher have paid for that. Imperial chooses  
 12 to do nothing because it doesn't want to pay, and its  
 13 cigarettes are at £3.60, its Richmond brand. What did  
 14 you understand you were required to do in relation to  
 15 Imperial's £3.60?  
 16 **A.** Nothing. They had chosen not to elect to fund  
 17 additional bonus to compete with the Gallaher brand.  
 18 **Q.** Can we consider a different situation, it's very  
 19 similar. Are you aware whether Imperial sometimes took  
 20 price initiatives whereby it sought to reduce the price  
 21 of its brands to get below or to get an advantage over  
 22 a Gallaher product?  
 23 **A.** Clearly if you look at the period we are talking about,  
 24 certainly in the late 90s, Imperial's market share was  
 25 considerably less than that of Gallaher, so in the

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1 period we are talking about, yes, there were many  
 2 initiatives where Imperial would take the lead.  
 3 **Q.** If Imperial took the initiative, let's say they said --  
 4 and we know this happened -- "Right, we want to take  
 5 an aggressive strategy vis-a-vis Richmond and we are  
 6 going to reduce its price by 10p", and they paid you 10p  
 7 per pack effectively to do it, why were they doing that?  
 8 What did you understand the purpose of them paying you  
 9 this money was?  
 10 **A.** As I said, one, to reduce the retail, but two to  
 11 actually gain market share, because at that particular  
 12 point they had a poor second.  
 13 **Q.** Where Imperial have done that, what did you understand  
 14 Imperial required you to do with the Gallaher product?  
 15 **A.** Absolutely zero, nothing.  
 16 **Q.** The OFT says that in that event, although there seems to  
 17 be some disclaiming, but they appear to be saying in the  
 18 decision that in that event, Morrisons was required to  
 19 reduce the price of the Gallaher product, that's the  
 20 consequence of the trading agreement and that's what you  
 21 should have understood. I would like you to comment on  
 22 that, including your view as to the commercial sense of  
 23 that.  
 24 **A.** Categorically not, that was not the case, and why would  
 25 I then want to fund something down if Gallaher then

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1 chose not to come down, why would I fund it down?  
 2 **THE CHAIRMAN:** But your evidence is that sometimes Morrisons  
 3 did fund price reductions.  
 4 **A.** But that was more tactical based on my own decision.  
 5 This could be one --  
 6 **THE CHAIRMAN:** But if you had decided, without any prompting  
 7 from Gallaher, to reduce the price of Dorchester, for  
 8 whatever reason --  
 9 **A.** Yes.  
 10 **THE CHAIRMAN:** -- would you then regard this agreement as  
 11 requiring you to extend the similar advantage to  
 12 Imperial?  
 13 **A.** No.  
 14 **THE CHAIRMAN:** Well, what did you understand was the  
 15 function of the agreement, then?  
 16 **A.** The function of the agreement was it was reflecting, as  
 17 we said, the differentials in terms of the list price,  
 18 but it allowed Imperial to compete or the opportunity to  
 19 compete with the Gallaher brands if they went down, but  
 20 it also gave them the option not to should they choose  
 21 not to.  
 22 **THE CHAIRMAN:** But they had that without the agreement,  
 23 surely?  
 24 **A.** Yes.  
 25 **THE CHAIRMAN:** So just again putting on one side bonuses, as

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1 far as the decisions that you, Morrisons, took  
 2 regardless of bonuses moving about to alter the price of  
 3 Richmond, say, by reducing it because perhaps you saw  
 4 one of your retail competitors had or it was just  
 5 a strategy you had, did you not think that because you  
 6 had signed this agreement, you then had to treat  
 7 Gallaher and ITL equally in relation to that kind of  
 8 Morrisons inspired price move?  
 9 **A.** Not really. The agreement was purely with Imperial and  
 10 even though there was agreement then, we treated it as  
 11 though it was a normal trading relationship.  
 12 **MR HOWARD:** Let's just unpack that because there are two  
 13 different things I think we might have got confused  
 14 about. I was asking you about a situation where  
 15 Imperial has chosen to promote a product, Richmond, by  
 16 paying a bonus, to get the price of Richmond down.  
 17 So I was asking you to comment on the commercial  
 18 sense of the idea that Imperial, in that event, had  
 19 a requirement that, having paid you 10p to get the price  
 20 of Richmond down, Dorchester should come down to match  
 21 it, can you tell what you think of the commercial sense  
 22 of that?  
 23 **A.** None whatsoever, because it would have no competitive  
 24 advantage, so it wouldn't do it.  
 25 **Q.** Now, to pick up the separate point which I think

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1 the Chairman was asking you about, which is: if we take  
 2 it in stages, we have looked at the position, you have  
 3 explained to us why you felt comfortable pricing in the  
 4 way you did because of the reflection of the RRP  
 5 differentials. You have also explained to us that  
 6 Imperial didn't know about your strategy, and the way  
 7 you worked. So to respond to the Chairman's question:  
 8 what was the agreement achieving?, can you explain to us  
 9 in that context you understood the agreement would be  
 10 achieving from Imperial's point of view? What comfort  
 11 was it giving them?  
 12 **A.** It was giving them -- and I generalise -- the voice to  
 13 come and talk and make sure that we reflected a bonus  
 14 when they offered us a bonus.  
 15 **Q.** At the prior stage, before bonusing, what comfort would  
 16 it give them then about how you would margin the  
 17 products?  
 18 **A.** They had no -- they had less comfort.  
 19 **Q.** Now, picking up the point the Chairman was asking you  
 20 about, which is the position of competitors, your  
 21 competitors, as opposed to the cigarette manufacturers  
 22 slugging it out, let's take the situation where, at  
 23 let's Tesco, just explain to us the extent to which  
 24 Tesco (a) were one of your benchmark competitors and (b)  
 25 what they were doing at the time in the market in terms

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1 of low price strategy?  
 2 **A.** Tesco's were very aggressive in this particular time and  
 3 have been for the last ten years, so it was a very  
 4 competitive environment, and they could have well been  
 5 targeting us directly with direct mail in -- with  
 6 regards to promotions and mechanics, et cetera, so it  
 7 was a very aggressive and competitive time, and still  
 8 is.  
 9 **Q.** Let's assume Tesco in this competitive environment  
 10 decides, for whatever reason, in their internal  
 11 strategisation to reduce the price of, let's say  
 12 Dorchester by 2p. So prior to that, you have Dorchester  
 13 and Richmond, let's say, at the same price because the  
 14 RRP's were the same and the net price to you of the  
 15 products was the same, and you have applied the same  
 16 margin. But then you find, lo and behold, Dorchester in  
 17 Tesco next door is 2p lower. Now, what then would you  
 18 do if you found that Dorchester was 2p lower in Tesco?  
 19 **A.** The first conversation we would have was with Gallaher,  
 20 where we would pick up the telephone and suggest to them  
 21 that they have funded this and that we are being  
 22 disadvantaged and that we want a lower cost to remain  
 23 competitive. As ever, there would be a denial that they  
 24 haven't funded it, in some cases it was true and clearly  
 25 in some cases not. At that point if we had been -- if

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1 Gallaher agreed, you know, to fund ours, then we would  
 2 reflect that automatically the following week --  
 3 **Q.** Just stop there. So if Gallaher agree to fund you, then  
 4 presumably is that where, then, the opportunity -- you  
 5 would fund it and the opportunity to respond clause --  
 6 **A.** We would then take the funding and the following Monday  
 7 would reflect that 2p bonus we have just received. If  
 8 Gallaher chose not to, we would then have to make  
 9 a commercial decision based on the bigger picture to say  
 10 "Do we want to invest this, what commercial impact will  
 11 it have", et cetera, and then a different route would be  
 12 applied. It could well be that I had enough money in my  
 13 total pot that I said "We can afford to do it and we  
 14 should match", or it may well have been "I don't have  
 15 and therefore we remain out of line".  
 16 **Q.** To get back to the question I think the Chairman was  
 17 asking. Let's assume you have money in your pot,  
 18 whatever it is, and you say "We don't like the fact that  
 19 Tesco are 2p below us so we want to match it", so decide  
 20 to match it with the Gallaher Dorchester product.  
 21 **A.** Yes.  
 22 **Q.** Having done that, firstly, did you regard yourself as  
 23 free to do that, and insofar as you did, did you regard  
 24 yourself as under any requirement to do anything to the  
 25 competing Imperial brand, here Richmond?

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1 **A.** Answering the two questions, we are absolutely free to  
 2 do whatever we wanted with regards this scenario. Did  
 3 I have an obligation to do anything to the Imperial  
 4 brand, the answer is clearly no.  
 5 **Q.** Now, in relation to the background to all of this, the  
 6 agreements, to what extent would, as far as you were  
 7 concerned, Imperial understand that you were  
 8 benchmarking other supermarkets and needed this -- that  
 9 that was an important driver for you, this ability to  
 10 match what another supermarket did?  
 11 **A.** I think all manufacturers across all categories clearly  
 12 understood just purely demographically, geographically,  
 13 who Morrisons, or Tesco et cetera, were targeting.  
 14 **Q.** Thank you for that. Can we go back to just examine  
 15 a couple of different scenarios. First I would like to  
 16 ask you about the situation where what has happened is  
 17 you have priced your products, the products of the two  
 18 manufacturers, and you have applied your common margin  
 19 to the competing products and so the prices are  
 20 reflecting the differentials. You then find what  
 21 happens is Imperial has an MPI, let's say for 5p across  
 22 the board. Now, if Imperial has an MPI, firstly, were  
 23 you under any requirement from Imperial where it's put  
 24 up its prices to do anything?  
 25 **A.** No, but we still had the option, if they would pass the

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1 cost on, the ultimate price decision was made by  
 2 ourselves.  
 3 **Q.** If you decided to protect your margin and put up the  
 4 price of the Imperial product, as a result of the  
 5 Imperial MPI, in the event that Gallaher didn't have  
 6 an MPI which corresponded to the Imperial one, what  
 7 requirement did you understand you were under from  
 8 Imperial as to how you were to treat the Gallaher  
 9 prices?  
 10 **A.** None whatsoever.  
 11 **Q.** What we sometimes see happened is that there were MPIs,  
 12 say by Imperial, and then Imperial write to you saying  
 13 "We are going to have a price hold". Now, why did you  
 14 understand they would put up the price on the one hand,  
 15 so 8 September they say there is a price increase and  
 16 then a week later they say "we are going to hold the  
 17 price", why are they holding the price sometimes?  
 18 **A.** More tactical, or it could have been because of  
 19 competitive scenarios, but it's more tactical.  
 20 **Q.** Again, just tell us, as a man versed in the supermarket  
 21 world, this sort of situation where manufacturers put up  
 22 prices across the board on their products but then say  
 23 "Actually I am going to hold the price of certain  
 24 products", is that something that happens?  
 25 **A.** It's very normal.

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1 **Q.** Very normal.  
 2 Then could you tell me about this: so we looked at  
 3 an MPI, I would like to consider the position where what  
 4 has happened is Imperial has paid a tactical bonus in  
 5 order to rules the price of its product. Firstly,  
 6 without turning up all the correspondence, where  
 7 Imperial says "I will pay you this bonus for a shelf  
 8 price of £3.29, say, to go from say, £3.34 to £3.29",  
 9 can you explain to us why you say that you regarded that  
 10 as a maximum price rather than a fixed price?  
 11 **A.** Because on occasions that we have seen, if we went to  
 12 £3.28 or £3.27, that was extremely acceptable, and it  
 13 was --  
 14 **Q.** Sorry, I didn't mean to interrupt.  
 15 **A.** It's more a case of "I've given you 5p and you pass the  
 16 5p off as a minimum".  
 17 **Q.** Yes. Where what happens is Imperial pays you this  
 18 tactical bonus or bonus to get the price down, and then  
 19 it decides it's had enough because it's costing it too  
 20 much or whatever, it's just decided it's had enough and  
 21 it says "I am withdrawing part, so the price of my  
 22 product now if you want to retain your margin goes back  
 23 up to £3.34", in that instance, what did you understand  
 24 you were required to do vis-a-vis the Gallaher product,  
 25 where Gallaher had provided their bonus to get it down

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1 to 3.29?  
 2 **A.** The conversation was never to do with the Gallaher  
 3 product, it was always about the Imperial product, so  
 4 there was no requirement to do anything to a Gallaher  
 5 product.  
 6 **Q.** Assume conversely that Gallaher has an MPI, and again  
 7 a similar situation where you have your prices and,  
 8 let's say, Richmond had been priced at the same level as  
 9 Dorchester, Gallaher puts its prices up across the  
 10 board; firstly what would you expect to do there in  
 11 respect of the Gallaher product where it puts up its  
 12 prices?  
 13 **A.** Exactly the same scenario as I would with Imperial. The  
 14 cost would be passed on and it would be down to our  
 15 individual decision whether we reflected that cost  
 16 through the retailer.  
 17 **Q.** What about the Imperial product where Gallaher puts up  
 18 the prices of its --  
 19 **A.** As per my previous answer, it was a Gallaher discussion,  
 20 not an Imperial discussion, so there was no requirement  
 21 to do anything to an Imperial brand.  
 22 **Q.** In these two situations that we have been looking at,  
 23 for instance, Imperial having an MPI or Gallaher having  
 24 an MPI, did you ever find Imperial -- did you have any  
 25 conversations or communications with Imperial, where

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1 they said "because I put up my price, you, Morrisons,  
 2 must put up the price of Gallaher"?  
 3 **A.** Never in my career has that happened.  
 4 **Q.** Equally, where Imperial put down the price of its  
 5 product, did you ever have a conversation or  
 6 communication with them where they said "You have put  
 7 down the price of my product, you must put down the  
 8 price of the Gallaher product"?  
 9 **A.** Never at all.  
 10 **Q.** No. Perhaps we don't need to go through it.  
 11 Where Gallaher withdraws a tactical bonus and so the  
 12 price of its product goes up, I presume in the likely  
 13 answers you have given --  
 14 **A.** It's exactly the same principle.  
 15 **Q.** Okay. What the OFT says is that, as a result of your  
 16 entering into the trading agreements -- when you say  
 17 you, Morrisons -- with Imperial, that the effect of that  
 18 was that you precluded yourselves, Morrisons, from  
 19 favouring Gallaher. By that they mean that that  
 20 precluded you from implementing price reductions at the  
 21 instigation of Gallaher, where they reduced their  
 22 wholesale price, or that you were required to put up the  
 23 price of Gallaher's products notwithstanding that they  
 24 hadn't put up their wholesale products. Could you  
 25 comment on that?

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1 **A.** It would be commercial suicide, given that Gallaher was  
 2 the dominant manufacturer at that point, so if I chose  
 3 not to work with Gallaher in terms of remaining  
 4 competitive versus everybody else, Morrisons would have  
 5 been a considerably smaller supermarket at that point.  
 6 **Q.** Can I, I think, ask you about this: you have told us --  
 7 switching topics -- about the relationship with  
 8 Imperial. Your word was "tense", is that right?  
 9 **A.** Correct.  
 10 **Q.** I want to ask you about this question of the bonuses.  
 11 What we see in the correspondence is a lot of  
 12 correspondence about bonuses and across the different  
 13 brands. To what extent was it a complicated matter  
 14 ensuring that the bonuses that were paid correctly  
 15 reflected both the products and the timing of promotions  
 16 and things of that sort?  
 17 **A.** Could you just repeat that?  
 18 **Q.** Yes. How complicated was the whole accounting and  
 19 administration of all these bonuses?  
 20 **A.** Extremely complicated. I took the liberty last night  
 21 and the days before of counting the number of  
 22 manufacturers' price lists produced in this period. In  
 23 this period alone that we are talking, there was 24  
 24 price lists being produced, either to the manufacturers'  
 25 price increase or because of the Chancellor's Budget.

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1 Notwithstanding in the middle of all of this, there is  
 2 then the option where both manufacturers -- and  
 3 I include Rothmans as well -- then choose to either part  
 4 pass the budget on or half. This became a full-time  
 5 administrative job for any of the buying team.  
 6 **Q.** This question of following the bonuses and checking that  
 7 the right sums were being paid for the right periods in  
 8 respect of the right products, to what extent was that  
 9 a source of tension?  
 10 **A.** There is millions of pounds in bonuses going around  
 11 here, so it was a massive source, you know, we had to be  
 12 extremely methodical tracking the costs and the bonuses,  
 13 et cetera.  
 14 **Q.** I think you were asked a question by the Tribunal  
 15 earlier this afternoon about -- let me approach it from  
 16 a different angle. I have asked you about whether there  
 17 was tension. Were there periods where there were  
 18 disputes about, or were there occasions, I should put  
 19 it, where there were disputes about whether or not  
 20 bonuses had been properly claimed for the right periods  
 21 and right amounts?  
 22 **A.** Many occasions.  
 23 **Q.** Right, and how did that all get dealt with?  
 24 **A.** It manifested itself in, usually I would see or the  
 25 buyer would see in his margin report it would be

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1 a discrepancy, so I generalise now, so if the average  
 2 margin was 5 per cent and he sees one at 1 per cent,  
 3 it's normally a highlight there is something going  
 4 wrong. Then he would start digging to have a --  
 5 collected all the right bonuses, et cetera, and then it  
 6 would build into a big piece of accounting per se.  
 7 **MR HOWARD:** Thank you very much indeed.  
 8 **THE CHAIRMAN:** I think that's an appropriate moment to have  
 9 a short break. How long do you think you are going to  
 10 be?  
 11 **MR SAINI:** I have only one question.  
 12 **THE CHAIRMAN:** Perhaps you could ask that one question now.  
 13 Re-examination by MR SAINI  
 14 **MR SAINI:** Mr Eastwood, you may have annex 7 open still  
 15 there, the Gallaher bundle, it's the slim one, I think.  
 16 If you could please go to tab 11, which is a document  
 17 Mr Williams took you to. {D7/11}. I think you gave  
 18 evidence that these prices that we see under the heading  
 19 "Selling Price" were the prices that resulted from the  
 20 granting, taking away or privileging of a bonus. Do you  
 21 recall that?  
 22 **A.** Correct.  
 23 **Q.** It was put to you by Mr Williams that these were the  
 24 selling prices at which Gallaher wanted you to sell the  
 25 product. Do you remember that?

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1 **A.** Yes.  
 2 **Q.** What if you had sold below those prices, how would  
 3 Gallaher have felt?  
 4 **A.** Elated.  
 5 **MR SAINI:** Thank you very much.  
 6 Questioned by THE TRIBUNAL  
 7 **DR SCOTT:** Can I take you back for a moment to the beginning  
 8 of your involvement? Were you in court when Mr Good  
 9 gave his evidence?  
 10 **A.** I am not certain who was giving -- it was a Shell  
 11 representative. I don't know if it was Mr Good.  
 12 **DR SCOTT:** Don't worry. You said earlier on that, at the  
 13 beginning of all this, Gallaher were the leading player?  
 14 **A.** Correct.  
 15 **DR SCOTT:** As we understand it from the evidence that we  
 16 have heard so far, ITL were concerned that Gallaher were  
 17 being advantaged by retailers charging a higher margin  
 18 on ITL products than they were on Gallaher products. Do  
 19 you remember that happening in the early 1990s?  
 20 **A.** No, I think -- I certainly don't remember that. I think  
 21 Imperial were complacent and Gallaher were more  
 22 aggressive and their marketing support was considerably  
 23 better, their execution was better, professionalism. So  
 24 I don't recall it being an output of people favoured  
 25 margin, it was more I think the customer was choosing.

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1 **DR SCOTT:** Right. It's been put to us that the ITL were  
 2 seeking agreements of the sort that they made with you,  
 3 in order to try to ensure that they were not  
 4 disadvantaged.  
 5 **A.** I really can't comment. If I look back and you look at  
 6 the amount of sponsorship that Benson & Hedges and  
 7 Silk Cut -- they were sponsoring many, many sports  
 8 activities, I think the general awareness of Gallaher  
 9 products was more forefront of mind than Imperial  
 10 products.  
 11 **DR SCOTT:** Thank you, that's a help.  
 12 Two other small things. The first comes in tab 85,  
 13 17/85. {D17/85/464}. On page 464 you will see that  
 14 there is a passage after the differentials which says:  
 15 "Morrison will continue supporting Imperial  
 16 Tobacco's programme of price marked packs throughout the  
 17 period of the agreement."  
 18 Is there an understanding implicit in that?  
 19 **A.** This is a reference to what I would describe as one of  
 20 the most tense periods of our relationship.  
 21 I personally stopped price marked packs coming into our  
 22 business per se, not necessarily with Imperial, across  
 23 the whole piece. Logistically it was very difficult to  
 24 manage within our business, the IT system was not very  
 25 sophisticated and it forced inevitably to have two

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1 packs, two lots of stock within the business. Having  
 2 had several very tense conversations with Imperial,  
 3 eventually we agreed that when they introduced flash  
 4 packs or price marked packs we would allow them in the  
 5 business.  
 6 **DR SCOTT:** Was it implicit in that that they would provide  
 7 a bonus which would sustain your margin?  
 8 **A.** As it was a price marked pack, then it is implicit that  
 9 the bonus would be there, yes.  
 10 **DR SCOTT:** Thank you.  
 11 One other question in relation to the other bundle,  
 12 if you take 7, and it's in relation to tab 16. {D7/16}.  
 13 Who would have prepared this, do you know?  
 14 **A.** This would be -- it was prepared by Gallaher, but I am  
 15 not certain who the national account manager would be --  
 16 it would be Mark Rock, who was the national account  
 17 manager, as the top left-hand corner has his name.  
 18 **DR SCOTT:** Right. So it says "Prepared by Gallaher" and  
 19 sent to you, so that you could understand the margin  
 20 implications of what was proposed, including promotions?  
 21 **A.** Correct.  
 22 **DR SCOTT:** Right. I think those were the questions that  
 23 I had, thank you.  
 24 **THE CHAIRMAN:** Well, thank you, that's been a long haul for  
 25 you, Mr Eastwood, but it's been very helpful for us, and

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1 I am sorry that it's been rather interrupted by  
 2 exchanges amongst the lawyers involved, but again I can  
 3 release you from the witness box now, thank you very  
 4 much for your evidence.  
 5 (The witness withdrew)  
 6 We will come back in ten minutes' time, at which  
 7 point I would like to discuss the proposed direction as  
 8 regards the future witnesses, and I would also like to  
 9 revisit the question as to how the OFT's case now stands  
 10 in respect of paragraphs 40 and onwards of the skeleton  
 11 argument vis-a-vis the involvement of bonuses in  
 12 relation to the respective price moves.  
 13 So I think it would be worthwhile having a short  
 14 interchange on that when we return. We will come back  
 15 in ten minutes' time, at quarter to 4.  
 16 (3.35 pm)  
 17 (A short break)  
 18 (3.45 pm)  
 19 Discussion re Tribunal direction  
 20 **THE CHAIRMAN:** Now, as we discussed this morning,  
 21 the Tribunal and the parties are concerned that we are  
 22 falling behind on the timetable, and that is to some  
 23 extent because cross-examination is proving much more  
 24 time-consuming than was envisaged when the timetable was  
 25 drawn up. This is in part due to the fact that

1 witnesses have included in their witness statements some  
 2 general remarks about how issues such as how in practice  
 3 the arrangements were operated, where that remark seems  
 4 to apply to periods beyond the period when the witness  
 5 was directly engaged in the tobacco sector. Some of the  
 6 witnesses have also commented in their statements on  
 7 what they see as the proper interpretation of documents  
 8 on which the OFT relies, even if they were not a party  
 9 to those documents and cannot have had any direct  
 10 knowledge of the context of the document.  
 11 The time taken to put each document to a witness is  
 12 considerable, given the amount of background and context  
 13 that needs to be established before a question can  
 14 fairly be put.  
 15 In order to shorten this process, the Tribunal has  
 16 proposed making a direction which will limit  
 17 cross-examination to those parts of the witness  
 18 statements which concern documents of which the witness  
 19 was either an author or a recipient, but still enable  
 20 the party doing the cross-examination to submit at  
 21 a later stage that the facts in relation to periods  
 22 beyond those to which that witness can give direct  
 23 evidence were a certain way or inviting the Tribunal to  
 24 draw different inferences from documents from those  
 25 which the witness invites the Tribunal to draw.

1 We handed round at lunchtime a proposed wording for  
 2 such a direction, and we now invite any comments there  
 3 are on that wording before making an appropriate  
 4 direction.  
 5 Mr Howard, would you like to kick off?  
 6 **MR HOWARD:** I think my only comment would be this, I am  
 7 perfectly content with the order, it seems to me very  
 8 sensible, subject to one point which is really just  
 9 a matter of clarification. Let's assume a witness has  
 10 not in fact made it clear in his statement the basis on  
 11 which he or she is able to speak to documents, but in  
 12 fact he or she does have the knowledge. I think I would  
 13 ask that we could amend it in such a way whereby the  
 14 party calling the witness either produces a further  
 15 statement just to make it clear on what basis they are  
 16 talking about the further documents, or it's introduced  
 17 in-chief, because it would just be unfortunate if in  
 18 fact the position is, let's say, the witness says "I can  
 19 talk about this", then in the course of the  
 20 cross-examination they give an answer which indicates  
 21 that, we would be just in a sort of muddle. So we need  
 22 to deal with it.  
 23 **THE CHAIRMAN:** I think probably introducing it in  
 24 examination-in-chief is a little too late to give the  
 25 cross-examiner adequate notice.

1 **MR HOWARD:** I agree.  
 2 **THE CHAIRMAN:** On the other hand it doesn't seem to me that  
 3 the whole process of producing an additional statement  
 4 is necessary, but we could amend this to make it clear  
 5 that some notice needs to be given before the witness is  
 6 called as to whether other documents were in fact relied  
 7 on by the witness in making the statement, albeit that  
 8 the witness hasn't mentioned explicitly --  
 9 **MR HOWARD:** I mean, that sounds ideal, that would meet my  
 10 concern, so if we could come up with some wording which  
 11 would provide for it to be done in correspondence.  
 12 **THE CHAIRMAN:** Yes.  
 13 **MR SAINI:** Can I just say we are content with the order,  
 14 subject to the clarification that Mr Howard mentions.  
 15 **THE CHAIRMAN:** Mr Lasok?  
 16 **MR LASOK:** At this stage we are content with the order as  
 17 well. I will also make the same point as Mr Howard  
 18 about the first part of (a), because the difficulty is  
 19 that unless the witness statement does make clear that  
 20 not only the remark relates to the position outside the  
 21 period, but also it is based on some identified  
 22 evidential basis, the presumption must be that either it  
 23 does not apply outside matters within the direct  
 24 knowledge of the witness, or the statement has been made  
 25 without there being adequate evidential basis for making



1 it, and in fact we have encountered plenty of examples  
 2 of that already in the course of this hearing.  
 3 (Pause)  
 4 In relation to (b) and (c), we don't have a problem  
 5 with the wording in most instances, we will not feel the  
 6 need to go further than is indicated in (b) and (c).  
 7 There may be occasions from time to time in which  
 8 there will be a need to do so for some particular  
 9 reason, but I am sure that if the Tribunal considers  
 10 that we are pursuing a line of cross-examination that is  
 11 either unnecessary or inappropriate, the Tribunal will  
 12 draw that to our attention.  
 13 **THE CHAIRMAN:** Thank you. Well, I propose to add to the end  
 14 of (a) "or unless the party for whom the witness is  
 15 appearing has indicated giving as much notice as  
 16 practicable the documents on which the witness relied  
 17 when making the statement".  
 18 **MR FLYNN:** Madam, could I just make a remark from the cheap  
 19 seats? Or perhaps I should say the Every Day Low Price  
 20 seats.  
 21 **DR SCOTT:** The dress circle.  
 22 **MR FLYNN:** In relation to (a), it would seem to me  
 23 unfortunate if in fact a witness did have a perfectly  
 24 adequate knowledge base to make a general remark.  
 25 I don't frankly know that this does apply to the Asda

1 witnesses because we have been fairly careful simply to  
 2 track the correspondence that has been referred to. But  
 3 if in fact it comes out in cross-examination or  
 4 re-examination that they do have sufficient knowledge,  
 5 it seems to me that is something the Tribunal is  
 6 entitled to take account of.  
 7 I think on that, we should see whether it actually  
 8 comes up in the cross-examination.  
 9 **THE CHAIRMAN:** Well, the aim of this is to enable the OFT  
 10 primarily, as they are the ones doing most of the  
 11 cross-examining, to shorten the time that they feel they  
 12 need to take. If there are particular instances which  
 13 crop up, then we will deal with them either by amending  
 14 the direction or making some different direction, but --  
 15 **MR FLYNN:** I think that that's very fair, Madam, I merely  
 16 point out that (a) doesn't refer simply to  
 17 cross-examination, but is an approach to the witness  
 18 statements, whereas (b) and (c) specifically do refer to  
 19 cross-examination. That's simply my point on that.  
 20 The other matter, and this does apply very  
 21 specifically to the Asda witnesses, is that they  
 22 systematically went through every document that was  
 23 referred to in the decision, and, as I said, in a sort  
 24 of "whack-a-mole" effect, the OFT has then in the  
 25 defence and skeleton referred to a whole lot of other

1 documents of which they are the author or recipient, and  
 2 they of course have not referred to those in their  
 3 witness statement necessarily.  
 4 We say that those do need to be put to our  
 5 witnesses. I don't think that's precluded by this.  
 6 **THE CHAIRMAN:** No.  
 7 **MR FLYNN:** I merely point that out. Its not something on  
 8 which they have relied in making their statement, but  
 9 it's something the OFT is going to have to press home.  
 10 **THE CHAIRMAN:** No, (c) was directed at those parts of the  
 11 witness statements which comment on documents and draw  
 12 inferences which the Tribunal will eventually have to  
 13 decide are relevant or not, but are not based and do not  
 14 purport to be based on any direct knowledge of what was  
 15 meant by the document when it was written.  
 16 **MR FLYNN:** Yes. I think that's right, Madam, and I think  
 17 I have made my point.  
 18 **TRIBUNAL DIRECTION**  
 19 **THE CHAIRMAN:** I will then read this direction into the  
 20 transcript. So in the light of these discussions,  
 21 the Tribunal directs as follows:  
 22 First, where a witness makes a general remark in his  
 23 witness statement about an aspect of the case, it can be  
 24 assumed that he is limiting the scope of that remark to  
 25 the period when he had direct knowledge of the material

1 events, unless the witness statement makes clear that  
 2 the remark relates to the position outside that period,  
 3 and indicates the basis on which the witness asserts  
 4 that he has knowledge of the position outside that  
 5 period; or unless the party for whom the witness is  
 6 appearing has indicated giving as much notice as  
 7 practicable to documents on which he relied for that  
 8 purpose when making the statement.  
 9 Second, the party cross-examining need only put to  
 10 a witness documents of which he is the author or  
 11 recipient unless the witness statement makes clear that  
 12 there are other documents of which the witness had  
 13 direct knowledge at the relevant time and on which he  
 14 relied in making his witness statement.  
 15 Thirdly, the party cross-examining does not need to  
 16 put to the witnesses those parts of the witness  
 17 statement which set out the witness's interpretation of  
 18 documents of which he had no direct knowledge at the  
 19 relevant time or in which he suggests inferences  
 20 the Tribunal might draw from such documents, where those  
 21 documents have been shown to him for comment for the  
 22 purposes of the appeals.  
 23 Discussion re Tribunal direction (continued)  
 24 **THE CHAIRMAN:** Now, as far as the points that were made  
 25 about where the OFT's case stands in respect of

1 paragraph 40 of the skeleton argument, it seems to  
 2 the Tribunal that the cross-examination of the  
 3 witnesses, particularly the retailer witnesses, has  
 4 focused on the grant and withdrawal of bonuses and the  
 5 price decreases and increases at the retail level that  
 6 are linked with those changes in bonus levels. And it's  
 7 not entirely clear how that cross-examination or the  
 8 points which the OFT is putting to the witnesses in  
 9 relation to bonuses fit in with the OFT's case, either  
 10 in the decision or in paragraphs 40 and onwards of the  
 11 skeleton argument, or in the factual assumptions  
 12 underpinning Professor Shaffer's report and the theory  
 13 of harm.  
 14 In particular, if one looks at paragraph 40(d),  
 15 which is the point about if the retail price of  
 16 Gallaher's brands decreases, then the retail price of  
 17 ITL's brands also decrease, we would find it useful to  
 18 know whether the OFT's case, as I say, in the decision  
 19 and in the skeleton and underlying Professor Shaffer's  
 20 report, relies on that consequence of the agreement  
 21 being established, even if there is no corresponding  
 22 decrease in the net wholesale price of ITL's product,  
 23 either as a result of an increase in a tactical bonus  
 24 from ITL or not, or whether the case now does  
 25 acknowledge that prices of the competitor product moved

1 reflecting changes in bonusing and wholesale pricing.  
 2 If that is the OFT's case now, if the case has moved  
 3 since the skeleton was drafted or Professor Shaffer's  
 4 report was written, then it is important that  
 5 the Tribunal and the other parties are made aware of  
 6 that, so that everyone can understand the thrust of the  
 7 questions that are being put to the witnesses, and  
 8 ensure that they themselves put in cross-examination any  
 9 questions that they need to put having regard to that  
 10 case.  
 11 Mr Lasok, I don't know whether you want to respond  
 12 now or whether you want to consider the matter  
 13 overnight.  
 14 **MR LASOK:** Madam, can I first say that paragraph (a) of  
 15 the Tribunal's direction comes into operation in  
 16 relation to Mr Culham, who is going to give evidence  
 17 probably I would think, given the time now, tomorrow.  
 18 I just mention that for the sake of the record.  
 19 **THE CHAIRMAN:** Yes.  
 20 **MR LASOK:** Now, coming on to the Tribunal's point, what  
 21 I propose to do at this stage is to make some, I hope,  
 22 relatively short observations on the Tribunal's  
 23 comments. But it may be that I will think about them  
 24 further after the end of today and would prefer to come  
 25 back tomorrow morning and make any corrections to what

1 I say just now.  
 2 The basic position is this, as we see it: we don't  
 3 understand the OFT's position to have changed since the  
 4 decision, nor do we understand that the line of  
 5 cross-examination has gone off in a direction other than  
 6 that pointed to or signposted in the decision.  
 7 In our submission, it's important to bear in mind  
 8 the relationship between the decision and paragraph 40  
 9 of the skeleton argument. It will be observed that  
 10 paragraph 40 of the skeleton argument is nothing other  
 11 than a re-statement of four points that ITL have put in  
 12 their skeleton argument as their interpretation of the  
 13 main lines of the theory of harm espoused by  
 14 Professor Shaffer. Paragraph 40 in fact is the second  
 15 paragraph in a subsection of the OFT's skeleton argument  
 16 that is dealing with a riposte to a particular point  
 17 made by ITL, it is introduced by paragraph 39.  
 18 So what paragraph 40 is, is actually the OFT's  
 19 re-statement of a case put forward by ITL which ITL say  
 20 that they have derived from Professor Shaffer.  
 21 Now, what we do in the skeleton argument after  
 22 paragraph 40 is to address ITL's re-statement of  
 23 Professor Shaffer's theory of harm. It's at this point  
 24 that, in our submission, it's relevant to bear in mind  
 25 how Professor Shaffer's evidence fits into this appeal.

1 Professor Shaffer was brought along to provide an expert  
 2 report in answer to the expert evidence adduced by  
 3 certain of the appellants. So what he has done is to  
 4 take what can loosely be described as a paradigm  
 5 situation, and he has examined it, and identified that  
 6 from an analytical perspective the situation is  
 7 anticompetitive for the reasons that he has given in his  
 8 report, and that, as I understand it, is largely agreed  
 9 with by the appellants' experts.  
 10 What one then does is one takes Professor Shaffer's  
 11 report and drops it, as it were, into the factual  
 12 context of the present case, and that is where  
 13 Professor Shaffer's report comes, as it were, into the  
 14 decision, because the decision itself contains findings  
 15 of fact, and the setting out of a theory of harm  
 16 explaining why this particular case involves an object  
 17 infringement.  
 18 So what we do when we look at paragraph 40, was we  
 19 are looking at Professor Shaffer's theory of harm as  
 20 analysed by ITL, and we take Professor Shaffer's theory  
 21 of harm, drop it into the factual context of the present  
 22 case. What then happens, when one is considering the  
 23 validity of Professor Shaffer's theory of harm, is  
 24 whether or not there is some feature of the facts of the  
 25 present case that invalidates Professor Shaffer's theory

1 of harm.  
 2 Now, Professor Shaffer is not here to express  
 3 an opinion about that latter stage of the process; in  
 4 other words, he is not here to make findings of fact.  
 5 What he is here to do is to explain his theory of harm,  
 6 and it is the Tribunal's function, in our submission, to  
 7 scrutinise his theory of harm and also to carry out the  
 8 second stage of the exercise, which is to see whether or  
 9 not, when one places that theory of harm within the  
 10 factual context of the case, there is something in the  
 11 facts of the present case that invalidates his theory.  
 12 Now, if one looks at the facts of the present case,  
 13 one sees, in our submission, that there is no relevant  
 14 fact -- this of course is anticipating the conclusions  
 15 that the Tribunal will eventually come to -- that casts  
 16 doubt upon Professor Shaffer's theory of harm.  
 17 The major, if you like, factual difference in the  
 18 scenarios is the existence of the abnormally thin  
 19 retailers' margins. This is a fact relating to the  
 20 particular case that is before the Tribunal. What  
 21 the Tribunal is going to have to do is to consider  
 22 whether or not the existence of the abnormally thin  
 23 margins, with the consequences that they entailed, such  
 24 as the inclusion of an opportunity to respond clause in  
 25 trading agreements, has such an effect as to invalidate

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1 the theory of harm. That's something that the Tribunal  
 2 has to deal with.  
 3 But that aspect of the case, which is -- and it goes  
 4 to the more general question of what happens when there  
 5 is a price reduction, and is something that the  
 6 appellants place great weight upon, is not, in our  
 7 submission, anything that undermines the theory of harm  
 8 because what it actually is, is an additional constraint  
 9 that operates in the particular circumstances of the  
 10 present case on movements downwards.  
 11 **THE CHAIRMAN:** Perhaps I can ask what may, in your view, be  
 12 an oversimplistic question, which is: is it the OFT's  
 13 case that, as a matter of fact, the retailers were  
 14 required to reduce the price of an ITL brand at the  
 15 retail level when they had reduced the price of  
 16 a Gallaher brand, even if ITL did not adjust the bonus  
 17 so as to protect their margin?  
 18 **MR LASOK:** That question, in order to answer it,  
 19 necessitates a distinction to be drawn between  
 20 a retailer initiated price change and a manufacturer  
 21 initiated price change.  
 22 If you take the example of the ITL/Morrison trading  
 23 agreement that we have been looking at today, in our  
 24 submission it's quite clear from that agreement and from  
 25 the evidence given by Mr Eastwood in cross-examination

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1 by Mr Williams, that it was understood that in the case  
 2 of a retailer-initiated -- that is to say  
 3 a Morrisons-initiated -- price change to an ITL brand or  
 4 to a Gallaher brand, the parities and differentials  
 5 would be respected whatever they were.  
 6 That was the function of the agreement.  
 7 **THE CHAIRMAN:** But I think what is then confusing, slightly,  
 8 is that if you accept that the opportunity to respond  
 9 clause indicates that, where the reduction in the  
 10 Gallaher brand was the result of funding from Gallaher,  
 11 that then there was no obligation on the retailer,  
 12 Morrisons, to reduce the price of the ITL brand if ITL  
 13 decided not to respond to the opportunity --  
 14 **MR LASOK:** Yes.  
 15 **THE CHAIRMAN:** -- there seemed to be a lot of questions  
 16 asked, nonetheless, about movements in price resulting  
 17 from changes in the bonusing of Dorchester and Richmond.  
 18 **MR LASOK:** Well, could I separate those two points? If one  
 19 takes first the opportunity to respond clause, the  
 20 opportunity to respond clause which features expressly  
 21 in some of these trading agreements made it quite clear  
 22 that -- and we will take the ITL written trading  
 23 agreements -- where Gallaher was funding a promotion,  
 24 there was no obligation on the part of the retailer to  
 25 reduce the price of the ITL brand commensurately. What

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1 there was an obligation to give ITL the opportunity  
 2 to respond, and that factual situation is acknowledged  
 3 and dealt with in the decision. We have had, for  
 4 example -- I remember, I think it was yesterday --  
 5 something like 35 or 40 minutes of so-called  
 6 re-examination on that point, which is a point not in  
 7 dispute in this case. It's simply astonishing, the way  
 8 this case has been conducted in relation to that  
 9 particular part of the case.  
 10 If one goes now to the question of the bonuses,  
 11 the Tribunal will bear in mind the structure of pricing.  
 12 The pricing is structured in such a way by the  
 13 manufacturers as to enable them to influence directly  
 14 the retail pricing by --  
 15 **THE CHAIRMAN:** Let me stop you there, Mr Lasok, because  
 16 again that's a point which you make and is being put to  
 17 the witnesses, as is points about, "Well, were they  
 18 dictating to you the price which you ought to move the  
 19 brand to as a fixed price rather than a maximum",  
 20 whereas I am sure Mr Howard and the other appellants  
 21 would say, "Well, those are allegations which are not  
 22 allegations of infringement which are made in the  
 23 decision and to what does that cross-examination go?"  
 24 I don't wish to hear closing submissions at this  
 25 stage. What I am saying is, I think, both the Tribunal

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1 and the appellants would benefit from some greater  
 2 clarity as to what the OFT's case is in respect of each  
 3 of these bilateral agreements is the nature of the  
 4 obligation which the OFT asserts that the facts in the  
 5 documents support.  
 6 **MR LASOK:** In some instance it's a commitment. What occurs  
 7 is that the retailer --  
 8 **THE CHAIRMAN:** Well, I do not want you to say it now, but as  
 9 we come to the agreements, in some manner it would be  
 10 useful to understand what the OFT's case is about where  
 11 the bonusing fits in, where the opportunity to respond  
 12 fits in, so that we can better understand to what the  
 13 questions that you are asking the witnesses are  
 14 directed, and so that Mr Howard can be assured that the  
 15 case which the OFT is ultimately going to put to  
 16 the Tribunal, in respect of that particular agreement,  
 17 has been put to the witnesses so that we avoid -- when  
 18 we get to closing submissions -- appellants jumping up  
 19 and saying "That wasn't what was put to the witness".  
 20 **MR LASOK:** Yes.  
 21 **THE CHAIRMAN:** Is there anything anybody else wants to add?  
 22 **MR HOWARD:** I suppose what I ought to make clear is that my  
 23 concern goes far beyond the case being put to the  
 24 witnesses. My concern actually extends to what the case  
 25 is and whether that is within the decision. I have to

1 say -- I am not going to argue the point now -- that  
 2 I am astonished that Mr Lasok says that it's common  
 3 ground that, for instance, when the retail price of  
 4 Gallaher brand decreases there was no obligation to  
 5 decrease the price of Imperial, because that's what it  
 6 says here, that's what we see all over the place.  
 7 Now, it's nonsense, I agree with that, and it should  
 8 never have been part of the case, but we can only deal  
 9 with what's put forward.  
 10 **THE CHAIRMAN:** Well, what I am trying to achieve is  
 11 a reduction in astonishment on all sides as regards the  
 12 questions that are being asked, the submissions that are  
 13 made in future.  
 14 **MR HOWARD:** Absolutely. Perhaps if I take the heat out of  
 15 the battle for a moment. The point is it's not simply  
 16 the bonus point. It's also, for instance, is there  
 17 a case that where there is an MPI, Imperial has an MPI,  
 18 that there is an automatic or some obligation to put up  
 19 the prices? Is there a case if Imperial withdraws part  
 20 of its tactical bonus and its price goes up, Gallaher  
 21 has to go up? Is there a case where Gallaher -- it's  
 22 all the permutations.  
 23 Yes, I have explored it with the witnesses because  
 24 that does appear to be part of the case. If it's being  
 25 said "No, no, it's some different case" -- I do stress

1 the fact this is litigation where -- it is not normal  
 2 litigation, there is a regulator here who says Imperial  
 3 have done something wrong and very badly wrong, so they  
 4 are getting one of the biggest fines, as I understand  
 5 it, in history of this sort of thing.  
 6 They ought to be able to say very clearly on a piece  
 7 of paper what actually it is. The fact that we are all  
 8 -- Mr Lasok says we are floundering and we are not  
 9 reading it properly, well, he ought to be able to say  
 10 very clearly where we have got it wrong and what the  
 11 true case is.  
 12 **THE CHAIRMAN:** Well, conversely, Mr Saini and other  
 13 retailers, it's also become much less clear to us  
 14 whether the retailers and, to an extent, ITL are  
 15 accepting that there was an agreement or a restriction  
 16 accepted at all. In the pleadings some of the  
 17 appellants claim that they are entitled to an exemption  
 18 and the agreements were pro-competitive. You, in your  
 19 opening, Mr Saini, said "Well, Morrisons doesn't contest  
 20 the importance of this agreement", and yet Mr Eastwood's  
 21 evidence seemed to be he put the agreement in a drawer  
 22 and never thought about it. So there is a lack of  
 23 clarity on that side as well, as to how much of the  
 24 fundamentals of an article 101 infringement are being  
 25 contested, as well as the contest as to the nature of

1 the restraints accepted and their economic effect. In  
 2 my view, a lot of time taken up in cross-examination,  
 3 has been devoted to trying to get that kind of issue  
 4 clarified, which may not have been apparent from the  
 5 pleadings, that there was controversy about whether  
 6 these agreements had any effect at all on the parties.  
 7 Now, what the legal implications are of a party  
 8 signing an agreement and then saying "Actually we had no  
 9 intention of abiding by it and didn't abide by it" is  
 10 a separate question, which we might come to. But  
 11 I think on both sides it would be useful to have some  
 12 clarity about what is in issue as regards the individual  
 13 agreement.  
 14 **MR SAINI:** Madam, as far as Mr Eastwood is concerned, you  
 15 heard him say that he considered the agreement had to be  
 16 honoured, and he has given his own particular  
 17 description of why he put it away in a drawer.  
 18 I have a more basic point, which is that Mr Lasok  
 19 has tried to distance himself now from the OFT's case in  
 20 paragraph 40 by effectively saying "This is effectively  
 21 a response to an ITL case", but the Tribunal will not  
 22 have missed the point that paragraph 40 is supported by  
 23 very detailed references in footnotes to documents,  
 24 which the OFT says support its case as to these  
 25 restrictions.

1 Now, we are puzzled indeed, and what we would like  
 2 to see tomorrow morning if possible from Mr Lasok is  
 3 clarification as to whether or not the case in  
 4 paragraph 40 and a document said to support the case in  
 5 paragraph 40 is still being put. Just so that Mr Lasok  
 6 knows, we would also like to know whether, in the  
 7 decision, paragraph 6.212 to 6.214, which is where the  
 8 OFT sets out its substantial cases to the nature of the  
 9 restrictions, whether or not that case is still being  
 10 put. I'm not going to ask the Tribunal to turn that up  
 11 now, but unless I can't read English, which may well be  
 12 the position, it looks like in those paragraphs at  
 13 page 131 of the decision the OFT are putting the  
 14 handcuffing case; in other words, in the absence of  
 15 bonuses -- I emphasise that point -- the prices of the  
 16 two competing products had to move together, and we can  
 17 forget how the OFT puts its case in paragraph 40 for the  
 18 moment, the OFT has to explain whether or not those  
 19 paragraphs in the decision are still relied upon.

20 **THE CHAIRMAN:** I don't wish to set more homework for  
 21 Mr Lasok and his team, I am sure they have enough to do,  
 22 but I think that you have hit the nub of it, which is it  
 23 would be useful to know, as we come to the agreements,  
 24 whether the OFT's case is that, even absent changes in  
 25 the bonusing and movements in the wholesale price, is it

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1 the OFT's case that the restrictions accepted by signing  
 2 the agreement applied, required the movements, relative  
 3 movements to maintain the differentials, whether they be  
 4 maxima or fixed, even if there was no corresponding  
 5 change in the wholesale price.

6 **MR HOWARD:** I just think it is -- I am sorry to rise  
 7 again -- important that I just make something clear,  
 8 which is this: if you look at paragraph 41 of the OFT's  
 9 skeleton, they there make a point that, in the second  
 10 sentence, they say:  
 11 "The four permutations therefore do not reflect all  
 12 constraints which the infringing agreements place on the  
 13 retailers' prices."  
 14 Now, as I understand it, the only restraint which  
 15 they point to is in fact the one in the first sentence  
 16 of paragraph 41, so that in fact the way this is all  
 17 drafted is that there are these four restraints, which  
 18 are paragraphs 4(a) to (d), and then you can add in, as  
 19 it were, a fifth, which doesn't feature in the decision  
 20 which is the retailers independently moving their  
 21 prices.  
 22 Then when you go to paragraph 44, there is no doubt  
 23 about it, that this is the OFT's case, because if you  
 24 look at paragraph 44 --  
 25 **THE CHAIRMAN:** Yes.

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1 **MR HOWARD:** -- they explain in the second sentence:  
 2 "Where the agreements are parallel and symmetrical,  
 3 all four implications of the infringing agreements set  
 4 out above."  
 5 If the OFT's case is now that I'm pointing to some  
 6 different restraint, and you will remember I have asked  
 7 on a number of occasions: what is the restraint that you  
 8 say is being imposed?, because that's the fundamental  
 9 thing. Their complaint in the decision was that the  
 10 retailer is constrained from favouring Gallaher. That's  
 11 what it was all about. So not Gallaher the brands, but  
 12 Gallaher the manufacturer.  
 13 So we do need to know whether that remains their  
 14 case, and if it is, whether it is these constraints, and  
 15 (a), (b), (c), (d) are the ones which are the constraint  
 16 on Gallaher. If that is not the case, then we may well  
 17 want to say the whole thing has to be dismissed here and  
 18 there, and we don't need to carry on for another  
 19 eight weeks, or whatever it is, joy oh joy for all of  
 20 us, or we will just have to consider where we are.  
 21 But it is a very odd situation where we are  
 22 struggling at this stage to work -- well, we are not  
 23 struggling, we can actually see, that's the point, very  
 24 clearly what the case is, but we are really hearing from  
 25 the OFT -- although it was sotto voce, perhaps -- "this

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1 isn't our case".  
 2 **THE CHAIRMAN:** I had also underlined that sentence in  
 3 paragraph 44, because although, Mr Lasok, I understood  
 4 that paragraph 40 was expressing ITL's case,  
 5 I understood paragraph 44 of the skeleton as saying that  
 6 on the OFT's case all four implications applied. But  
 7 let me stress again, we do need to know how far that is  
 8 still the case in relation to each of these 15  
 9 agreements that we are dealing with in these appeals,  
 10 and also whether it's alleged that the restraints  
 11 applied independently of any movements in wholesale  
 12 prices, whether by bonusing or otherwise.  
 13 I think we should probably leave it there for today.  
 14 Mr Williams?  
 15 **MR WILLIAMS:** Only to come back to Mr Lasok's point about  
 16 Mr Culham and paragraph (a) of the Tribunal's direction.  
 17 You made the point earlier on, Madam, that finding out  
 18 in-chief what is going to be the answer to paragraph (a)  
 19 is later than is ideal, and --  
 20 **THE CHAIRMAN:** Let's have a look briefly at Mr Culham's  
 21 witness statement.  
 22 **MR WILLIAMS:** So tab 35 of core bundle 3, Madam. {C3/35}.  
 23 Mr Culham starts to deal with Safeway at paragraph 155.  
 24 You can see what he says at paragraph 155. Then I was  
 25 just going to suggest the Tribunal read paragraph 157

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1 and the last paragraph, 174.  
 2 (Pause)  
 3 **THE CHAIRMAN:** Well, thank you, Mr Williams, that's a very  
 4 good example of exactly what we are dealing with in the  
 5 direction that we have just made.  
 6 **MR WILLIAMS:** Can I just help the Tribunal with one further  
 7 observation, which is that the curiosity is then that  
 8 Mr Culham only deals with documents which relate to his  
 9 tenure from June 2003, so we have a strange mismatch  
 10 between the general evidence and the specific evidence.  
 11 **THE CHAIRMAN:** Well, Mr Saini, the effect of the direction  
 12 that we have made is, as I understand --  
 13 **MR HOWARD:** He is my witness, not Mr Saini's.  
 14 **THE CHAIRMAN:** Yes. This is in relation to Safeway.  
 15 **MR HOWARD:** I beg your pardon.  
 16 **THE CHAIRMAN:** Well, both Mr Saini and Mr Howard, that  
 17 unless there are some particular documents in the  
 18 annexes about which he can give direct evidence.  
 19 **MR HOWARD:** Can I help in this way: my understanding, having  
 20 spoken to Mr Culham briefly to actually seek to  
 21 understand this point, is I don't understand that he was  
 22 involved in the Safeway account prior to his takeover of  
 23 it, so if one is saying: was he involved in any of the  
 24 correspondence prior to that date?, my understanding is  
 25 no. When he took over the account, did he see the file?

1 I haven't gone through the file with him to understand  
 2 what he saw. My understanding is he would have seen the  
 3 file, and therefore at that stage become aware of some  
 4 of the documents in the file. I can't help you beyond  
 5 that, but it may well be in the light of that that the  
 6 OFT could take the view that it's not necessary to  
 7 cross-examine him about documents preceding that date,  
 8 since it will only be asking him what documents meant  
 9 which he had not been involved in at the time. So  
 10 I hope that's helpful.  
 11 **THE CHAIRMAN:** Yes, I think that's right, and I think that  
 12 the consequence of that is that if in due course the OFT  
 13 wish to submit that in the period before Mr Culham took  
 14 over, or in the period after Mr Culham took over, things  
 15 were a certain way which differs from the assertions  
 16 that Mr Culham has made in those two paragraphs, then he  
 17 won't be criticised for not having put all those  
 18 previous earlier or later documents to Mr Culham.  
 19 **MR HOWARD:** That's fair enough. If they want to say these  
 20 documents show Safeway being operated in some different  
 21 way, I am not going to be in a position to say they  
 22 can't make that submission because they didn't challenge  
 23 paragraph 157 of Mr Culham's statement.  
 24 **MR WILLIAMS:** The one further nuance which has occurred to  
 25 us is that Mr Culham may make an assertion about the way

1 things were during his tenure, but the best evidence to  
 2 contradict the proposition that the account worked in  
 3 that way may not date from the period of his tenure, and  
 4 we would not want to find ourselves in the position in  
 5 a sense of not having challenged his evidence because we  
 6 don't have -- I mean, he ran the account for two months  
 7 and we have four or five letters. We can I think put to  
 8 him in general terms that that's not the way the account  
 9 worked, but in a sense one is then at a stage of almost  
 10 formally putting the case when the evidence relates to a  
 11 different period.  
 12 I do not want to make this overinvolved.  
 13 **THE CHAIRMAN:** What we are trying to avoid is if you say  
 14 "Well, it didn't operate like that before you took over"  
 15 and he says "Well, I think it did", you then don't have  
 16 to put to him all those earlier documents to say "Well,  
 17 now I've shown you that, does that make you change your  
 18 mind?" That is the exercise which you are not now being  
 19 required to go through.  
 20 **MR WILLIAMS:** I understand that. I think we would also want  
 21 to make the point in due course that the way the account  
 22 was run during Mr Culham's tenure was probably  
 23 an extension of the way that it was run before, but the  
 24 difficulty we have, as I say, is that the best evidence  
 25 may relate to a different period. I am only making the

1 point now. I do not want this to become overinvolved,  
 2 but I did want to ventilate that, because if Mr Culham  
 3 states proposition X, and we can show that the way the  
 4 account was run in the preceding period was different  
 5 from that, then we would want to draw an inference about  
 6 the way the account was run as a whole.  
 7 **THE CHAIRMAN:** I think you must put to him documents on  
 8 which you rely which contradict how he says it ran  
 9 during the time he was actively involved in it --  
 10 **MR WILLIAMS:** We will certainly do that.  
 11 **THE CHAIRMAN:** -- even if those documents relate to  
 12 an earlier period, if you are relying on them in  
 13 relation to the period when he was directly involved.  
 14 What the direction we have made relates to is the more  
 15 general remarks that he makes about both before and  
 16 after he was responsible for the Safeway account.  
 17 **MR WILLIAMS:** I am grateful for that clarification, because  
 18 that's helped to indicate what we do and don't need to  
 19 put, Madam, thank you.  
 20 **THE CHAIRMAN:** Yes. Shall we start at 10 tomorrow morning  
 21 to ensure that we get through everything?  
 22 **MR HOWARD:** Yes.  
 23 Shall I say what we are proposing to do? I think we  
 24 will forego having a mini opening on Safeway. I can  
 25 just say this: there is a discrete issue about Safeway

1 as to whether or not there was an agreement which  
 2 provided for observing differentials. But then we and  
 3 Safeway say that doesn't appear to be the case; the OFT  
 4 says to the contrary. After that -- that's, as it were,  
 5 the discrete issue -- it's basically a very similar type  
 6 to other supermarket cases, and I am not sure you are  
 7 going to be assisted -- particularly bearing in mind  
 8 Mr Culham is only involved towards the tail end -- by my  
 9 having a discrete opening; that's one thing. The other  
 10 thing is I am keen, Mr Culham has been here, to get him  
 11 in the witness box and to deal with that and to get on.  
 12 **DR SCOTT:** It would be helpful to us, I think, to know where  
 13 you are now respectively on the fact that we thought  
 14 there was once an acceptance that there was a trading  
 15 agreement, we are now no longer quite sure --  
 16 **MR HOWARD:** In the case of Safeway?  
 17 **DR SCOTT:** In the case of Safeway. As I understand it, it  
 18 was not found, any trading agreement.  
 19 **MR HOWARD:** There is not a trading agreement which provides  
 20 for differentials.  
 21 **DR SCOTT:** That's right, so there isn't --  
 22 **MR HOWARD:** I don't think in fact there was ever -- there  
 23 may have been a trading agreement, but not one we say  
 24 that provided for observing the differentials.  
 25 **DR SCOTT:** But there seems to have been some uncertainty

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1 about whether people accepted that there had been one or  
 2 whether there hadn't been.  
 3 **MR HOWARD:** I think there remains some uncertainty about  
 4 that, although there are references to a trading  
 5 agreement in the correspondence. So it seems likely  
 6 there was some form of trading agreement. There is  
 7 certainly reference to a trading agreement, for  
 8 instance, where there was a bonus being paid for being  
 9 below RRP, quite a significant bonus of [redacted], and  
 10 you see it being explained on a number of occasions.  
 11 That's certainly something that can be explored with the  
 12 witnesses.  
 13 I ought to respond to the point that the Chairman  
 14 raised. We don't in any way resile from anything in our  
 15 case to the effect that there were agreements.  
 16 Obviously, you have witnesses who, to some extent say  
 17 "Well, we put it in the drawer" or "it wasn't  
 18 particularly important" and so on. All of that may be  
 19 right, it doesn't mean there wasn't an agreement. The  
 20 issue ultimately for you, once we have sorted out what  
 21 the OFT's case is, is whether these agreements contained  
 22 any relevant restrictions of the type alleged and also  
 23 when they fit in with whatever happens to be the theory  
 24 of harm that's being put forward.  
 25 **THE CHAIRMAN:** Yes, but it was just something we noted, that

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1 when you in either your cross-examination or your  
 2 re-examination have put the four propositions --  
 3 **MR HOWARD:** Yes.  
 4 **THE CHAIRMAN:** -- you have got the answer "no" to all of  
 5 them, even the two which are the maxima two as well as  
 6 "no" to the fixed two, if you understand what I mean.  
 7 **MR HOWARD:** No, I don't think I do.  
 8 **THE CHAIRMAN:** Well, it's accepted that if the parities and  
 9 differentials were fixed, then all four of those (a) to  
 10 (d) should pertain. If the parities and differentials  
 11 were maxima, only two of them would pertain.  
 12 **MR HOWARD:** Well, Imperial's case is that whether the  
 13 differentials -- we say the differentials are maxima.  
 14 **THE CHAIRMAN:** Yes.  
 15 **MR HOWARD:** But even if they were fixed, it doesn't  
 16 actually -- we say it doesn't mean that you answer "yes"  
 17 to any of 40(a) to (d). The answer is still no, because  
 18 everything is subject to wholesale price changes. We  
 19 say there is no obligation, but everything is subject to  
 20 wholesale price changes, so if the price of Imperial  
 21 comes down, there is no obligation, if there ever was,  
 22 or no incentive, to reduce the price of Gallaher. And  
 23 if Imperial's price goes up, equally there is no need to  
 24 move the price of Gallaher. We say it's all -- and  
 25 that's what we say is the complete fallacy in the OFT's

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1 case. It ignores the fact that -- and all this  
 2 evidence, that where the wholesale price changes whether  
 3 as a result of bonusing or otherwise, then there is no  
 4 expectation on anybody's part that you have any effect  
 5 on the competing brand. That's why the debate about  
 6 fixed or maxima, to our side, doesn't matter a great  
 7 deal, although we say in fact it's absolutely clear they  
 8 were maxima.

9 **THE CHAIRMAN:** Right, thank you. Well, we will reconvene,  
 10 then, at 10 o'clock tomorrow morning.

11 (4.45 pm)

12 (The court adjourned until 10.00 am  
 13 on Thursday, 20 October 2011)

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