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**IN THE COMPETITION**

**APPEAL TRIBUNAL**

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

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

20 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 17)**

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 Thursday, 20 October 2011  
 2 (10.00 am)  
 3 **THE CHAIRMAN:** Good morning, ladies and gentlemen. We  
 4 asked, a day or so ago, for a revised timetable to cover  
 5 the remaining factual evidence, and I understand that  
 6 that is well in hand.  
 7 **MR HOWARD:** Yes.  
 8 **THE CHAIRMAN:** We have another two weeks and a day or so of  
 9 factual evidence, and we really are going to have to be  
 10 somewhat stricter with everybody's timings in order to  
 11 make sure that we do get finished in time for the  
 12 experts to start in the second week of November.  
 13 **MR HOWARD:** Yes. We have prepared a revised timetable. We  
 14 have not yet circulated it. It will be circulated later  
 15 today. It's designed to ensure that the evidence is  
 16 finished on that timetable.  
 17 **THE CHAIRMAN:** Thank you.  
 18 Now, Mr Howard, are you kicking off with Safeway?  
 19 **MR HOWARD:** As I think I indicated last night --  
 20 **THE CHAIRMAN:** Oh, you want to call Mr Culham?  
 21 **MR HOWARD:** -- we want to call Mr Culham, yes.  
 22 Looking on the other side of the court, I think,  
 23 I wasn't sure whether anybody was anticipating, it's  
 24 obviously up to the OFT whether they were going to  
 25 amplify their response to the issues raised last night,

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1 or how one wants to deal with that. It's up to them  
 2 whether they --  
 3 **THE CHAIRMAN:** I think Mr Lasok said last night that he  
 4 would reconsider whether, having read over what was said  
 5 last night, he wanted to amplify it. As he is not  
 6 leaping to his feet, I thought that meant he was happy  
 7 with what occurred last night and we would get on with  
 8 Mr Culham.  
 9 **MR LASOK:** Well, I had noticed that I haven't answered all  
 10 the specific questions that the Tribunal have put. I am  
 11 quite happy to answer those questions now, if  
 12 the Tribunal wishes.  
 13 **THE CHAIRMAN:** Well, let's have Mr Culham's evidence, as he  
 14 has come here, and perhaps we can deal with that point  
 15 later on.  
 16 **MR HOWARD:** As I understand it, Mr Culham is still under  
 17 oath, so the position is he doesn't need to be re-sworn  
 18 or reintroduced.  
 19 **THE CHAIRMAN:** Yes.  
 20 MR KENNETH CULHAM (recalled)  
 21 **MR HOWARD:** So, Mr Culham, you are here to give further  
 22 evidence. You have given evidence before, so you will  
 23 now be asked questions by counsel for the OFT.  
 24 **THE CHAIRMAN:** Yes, please sit down, and as Mr Howard said,  
 25 you are still under oath.

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1 **A.** Okay.  
 2 **THE CHAIRMAN:** Yes, Mr Williams.  
 3 Cross-examination by MR WILLIAMS  
 4 **MR WILLIAMS:** Good morning, Mr Culham.  
 5 **A.** Good morning.  
 6 **Q.** You explained in your witness statement that you only  
 7 worked on the Safeway account from June 2003?  
 8 **A.** That's correct. George Byas, who had the account before  
 9 me, retired I think in June 2003, and I looked after the  
 10 account after that.  
 11 **Q.** I think you understand that only covers a period of two  
 12 or three months of the period which we are specifically  
 13 interested in in this case, which is the period until  
 14 some time in August 2003?  
 15 **A.** I believe that's the case. I did work with George from  
 16 1995 until he retired in -- not directly with him, but  
 17 in the same team as him, so some of the things he --  
 18 like Richmond tactical support and things that were  
 19 going on, which I've seen the correspondence from  
 20 George, Mr Byas, was similar to what I was doing with  
 21 other accounts at the time.  
 22 **Q.** When you say you have seen the correspondence, do you  
 23 mean you saw it at the time you were running the account  
 24 in which we are interested in, that is June to August  
 25 2003, or do you mean you have had seen it since as part

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1 of these proceedings?  
 2 **A.** As part of the handover from George, what we did do is  
 3 spend a day or two going through important aspects of  
 4 an account. I wouldn't say I saw every single document,  
 5 but the key things like the business plans, and things  
 6 like that, I would have seen from the time when George  
 7 was leaving.  
 8 **THE CHAIRMAN:** You will have to slow down a little bit for  
 9 the transcript writers to follow what you say.  
 10 **MR WILLIAMS:** What you have just been saying ties into some  
 11 comments that you make in your witness statement,  
 12 I think. Do you want to just read to yourself  
 13 paragraphs 157 and 174.  
 14 (Pause)  
 15 It's at tab 35 of that file. You start Safeway on  
 16 page 35. That's where paragraph 157 is.  
 17 (Pause)  
 18 **A.** Which paragraphs?  
 19 **Q.** 157 and 174, because I think they set the scene in terms  
 20 of what you are saying.  
 21 (Pause)  
 22 **A.** And 174?  
 23 **Q.** Yes.  
 24 (Pause)  
 25 **A.** I've read the paragraphs.

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1 Q. I think I took two general points from those paragraphs.  
 2 The first is that the Safeway account worked in broadly  
 3 the same way as First Quench and T&S, and not Shell.  
 4 You draw a distinction with Shell. And that secondly,  
 5 there was continuity in the way that you ran the account  
 6 relative to the way it was run by your predecessor?  
 7 A. There was no major changes when I took over, no.  
 8 Q. Or at least you believed that's the case?  
 9 A. I believe that's the case, yes.  
 10 Q. The first thing I want to understand is what you mean  
 11 what you say that "Safeway was much the same as the  
 12 other accounts that I worked on". You will understand  
 13 that in this case we are principally interested in  
 14 pricing differentials; you do understand that, don't  
 15 you?  
 16 A. I do understand that, yes.  
 17 Q. Could you turn back in your statement to paragraph 114,  
 18 which is a paragraph dealing with the T&S account, and  
 19 read that to yourself. If you want to read it in the  
 20 context of the previous paragraph, then that's fine.  
 21 (Pause)  
 22 A. Well, there is one difference that comes out of that.  
 23 Q. Well, I was going to ask you: when you say that Safeway  
 24 worked in much the same way as T&S, are you saying it  
 25 worked in this way?

1 A. No, Safeway was different. When I say much the same, we  
 2 would have ongoing relationships, trading agreements  
 3 with customers, although the Safeway one was different  
 4 to T&S because that actually didn't have any mention in  
 5 the trading agreement with Safeway of any differential  
 6 requirements, it was just for Safeway to sell below RRP.  
 7 So -- but we used to do tactical bonuses from time  
 8 to time with accounts, we would look at their account --  
 9 the price they were charging consumers, making sure our  
 10 brands were well displayed. So the one difference was  
 11 there was no actual differential requirement in Safeway  
 12 trading agreement.  
 13 Q. You said that that's the one difference?  
 14 A. That I can think of, yes.  
 15 Q. It's obviously a significant difference given that this  
 16 case is about pricing differential, and paragraph 157  
 17 says that the account was much the same as T&S?  
 18 A. It was 90 per cent the same, apart from that one aspect,  
 19 yes.  
 20 Q. When you spoke a few moments ago about the trading  
 21 agreement with Safeway, what trading agreement are you  
 22 talking about? Can you remember anything about that  
 23 trading agreement?  
 24 A. Yes. That --  
 25 Q. For example, when did it date from? When was it in

1 operation?  
 2 A. From the correspondence on file, the trading  
 3 relationship with Safeway started in 1995, and Imperial  
 4 had four elements, four requirements within that trading  
 5 agreement.  
 6 One was for Safeway to sell below RRP; the second  
 7 was to accept new products that we would launch the  
 8 market; the third was the distribution of our products;  
 9 and the fourth was the merchandising of our products.  
 10 That trading -- the 1995 correspondence I hadn't got but  
 11 I think it's in one of the tabs in the witness bundle,  
 12 I think it's tab 1, George refers back to: this is the  
 13 agreement and these are the four elements in it, and  
 14 that dates in 1999. So things just carried on from 1995  
 15 until the time I was handling the account.  
 16 Q. You are saying that there was effectively a long-term  
 17 trading agreement or a rolling trading agreement which  
 18 was still operating in 2003, having been concluded  
 19 sometime in the 1990s?  
 20 A. From the 1995, that same level of investment and that  
 21 same four elements carried through that period.  
 22 Q. Okay. We will come back to the trading agreement  
 23 position in a moment. Could you turn back to  
 24 paragraph 13 of your witness statement, then, which  
 25 deals with First Quench. Again, feel free to read this

1 in the context of the previous paragraph, if that's  
 2 helpful.  
 3 (Pause)  
 4 A. I've read the document.  
 5 Q. So would you say that the Safeway account was much the  
 6 same as the First Quench account in the respects  
 7 explained in paragraph 13?  
 8 A. No, because there was no differential requirements in  
 9 the Safeway agreement.  
 10 Q. Right.  
 11 DR SCOTT: Sorry, can you just look at paragraph 13 for  
 12 a moment. What it says is:  
 13 "ITL also offered additional promotional support to  
 14 retailers to not increase the retail prices of ITL's  
 15 products above identified differentials compared with  
 16 the prices of identified brands of competing  
 17 manufacturers. This is referred to as ITL pricing  
 18 strategy."  
 19 What that suggests is additional?  
 20 A. We would do tactical bonuses, as I mentioned earlier,  
 21 within Safeway as an account, when we would have -- if  
 22 a competitor ran a promotion or we wanted a promotion,  
 23 we would do tactical bonuses at that point, but the  
 24 ongoing trading agreement, there were no investments  
 25 linked to other -- to our competitors' products.

1 **DR SCOTT:** Just looking very carefully at paragraph 13,  
 2 would we be right in thinking that in fact you were  
 3 doing that with Safeway, except that they weren't  
 4 additional in quite the same sense?  
 5 **A.** We would do tactical promotions which could have the  
 6 effect of that, but that would be generally speaking  
 7 what was taking place across the market. So, for  
 8 example, we wouldn't -- and I can't remember, sorry,  
 9 ever going to Safeway and saying "We want to give you  
 10 a tactical promotion for this product because you are  
 11 completely too expensive on our product relative to  
 12 someone else". Where we are doing promotions across the  
 13 marketplace, obviously tactical promotions would come  
 14 into Safeway, but there are exceptions where I think  
 15 from memory there was a lot of activity regarding Drum  
 16 and Amber Leaf pricing, and so we were doing tactical  
 17 promotions across the marketplace, which Safeway were  
 18 included in.  
 19 **DR SCOTT:** Well, sticking with that point for the moment,  
 20 the last sentence is this is referred to as ITL pricing  
 21 strategy. Are we right in thinking that just as you  
 22 were applying ITL pricing strategy to First Quench, you  
 23 were also seeking to apply ITL pricing strategy to  
 24 Safeway.  
 25 **A.** It would be an objective of me or George as an account

1 manager, but there was no reward or penalty for Safeway  
 2 for doing it.  
 3 **DR SCOTT:** Unless it was an additional bonus.  
 4 **A.** Unless it was an additional thing where we would set  
 5 a maxima price or suggested price for a product.  
 6 **DR SCOTT:** Thank you.  
 7 **MR WILLIAMS:** You will appreciate the slightly puzzling  
 8 thing is you have given a witness statement in a case  
 9 which is about pricing differentials and you have said  
 10 that the accounts all worked in much the same way, but  
 11 in the one material respect you are saying they didn't  
 12 work in the same way.  
 13 **A.** The accounts worked the same, ie they bought products  
 14 from us, they sold products at a discount, we invested  
 15 in the accounts, the one aspect is in the trading  
 16 agreement or trading relationship there was no  
 17 differential requirements, that's the one difference.  
 18 **Q.** We are going to look at a number of documents from the  
 19 period when you were running the account, but I just  
 20 wanted, before we do that, to look at one document from  
 21 the period before you ran the account.  
 22 Could you turn to tab 9 in annex 28, and just read  
 23 tab 9 to yourself. {D28/9/18}. This is a letter to  
 24 Trevor Thomas, who I believe was the person you also  
 25 dealt with when you took over the account?

1 **A.** Yes, I dealt with Trevor as well. (Pause). There is an  
 2 earlier letter as well, isn't there?  
 3 **Q.** That's right, there is a letter before.  
 4 (Pause)  
 5 **A.** Okay.  
 6 **Q.** So I have chosen this letter just because the language  
 7 is very clear, and, as I read this letter, it reflects  
 8 an understanding between ITL and Safeway that ITL was  
 9 pursuing the strategy of maintaining appropriate  
 10 strategic pricing differentials in Safeway stores. So  
 11 do you agree with that?  
 12 **A.** The letter says that Imperial would like to achieve  
 13 these pricing differentials, but as I said, there was  
 14 nothing in the trading agreement with Safeway to  
 15 actually -- this was just, we were offering tactical  
 16 bonuses to achieve these strategic pricing levels.  
 17 **Q.** It's slightly jargonistic, isn't it, the way this letter  
 18 is written? It has the appropriate strategic pricing  
 19 differentials, it's not a phrase which I presume you  
 20 would just drop into -- when I say you, you mean ITL --  
 21 a letter with a customer unless the customer knew what  
 22 you were talking about?  
 23 **A.** I can't say why Martin Downham used those words. We saw  
 24 a move in the marketplace of Mayfair, which is  
 25 a Gallaher product, and Imperial Tobacco's strategy was

1 to try and reduce our brands so the consumer has got  
 2 a cheaper price relative to the price of Mayfair. Why  
 3 he has used those exact words I don't know, because on  
 4 the correspondence I saw when I had the account and  
 5 reviewing it afterwards, we weren't incentivising  
 6 Safeway to achieve pricing differentials at any time,  
 7 apart from tactical promotions, which this is one of  
 8 them.  
 9 **Q.** Would you agree with this: it does tend to suggest that  
 10 Safeway understood what ITL meant by "appropriate  
 11 strategic pricing differentials", Safeway was familiar  
 12 with that strategy?  
 13 **A.** I don't believe they were, because quite a lot of the  
 14 correspondence is where prices are more expensive than  
 15 we would like them to be.  
 16 **THE CHAIRMAN:** Do you accept that it's clear in this letter  
 17 that Safeway would have realised that the reason why  
 18 this promotion was being offered was because of ITL's  
 19 strategy with regard to Richmond and Mayfair?  
 20 **A.** Trevor would understand that, but I don't know if Trevor  
 21 in the year 2000 actually knew what our differential  
 22 requirements were, or our strategic needs were. At that  
 23 time, Safeway's pricing policy, which was set by them,  
 24 was broadly to track Tesco's and Sainsbury's. It  
 25 changed as we go through the period we are looking at,

1 because they became more expensive relatively than  
 2 Safeway and Tesco, but I don't know whether Trevor knew  
 3 exactly what the Imperial Tobacco strategy was or not,  
 4 I can't comment on that.  
 5 **MR WILLIAMS:** Presumably ITL wasn't in the habit of writing  
 6 letters to customers which it didn't expect them to make  
 7 head nor tail of?  
 8 **A.** I would sincerely hope not.  
 9 **Q.** I think the helpful thing to do is really to start off  
 10 by looking at documents from the period when you were  
 11 running the account. Do you want to turn to tab 77 of  
 12 the file you have there. {D28/77/308}. It's probably  
 13 helpful, I am interested in the section that says "MPI  
 14 23 June 2003", but if you want to look at that in the  
 15 context of the letter, please feel free to do that.  
 16 (Pause)  
 17 So this is a letter from you to the same  
 18 Trevor Thomas?  
 19 **A.** That's correct, yes.  
 20 **Q.** I think you were asked some questions about a document  
 21 a bit like this when you were here to deal with Shell;  
 22 am I right in that?  
 23 **A.** I think there was a similar document, I wouldn't say it  
 24 was word for word but similar.  
 25 **Q.** No, I wasn't suggesting that. The basic idea of

1 a pre-buy on conditions, I think you were asked some  
 2 questions about that sort of arrangement?  
 3 **A.** Yes, it was covered, yes.  
 4 **Q.** So we won't go into all of that again. But you will see  
 5 at the top of the second page it says that:  
 6 "One of the conditions of the pre-buy is all Safeway  
 7 stores retail selling prices when changed will continue  
 8 to reflect the differentials in recommended selling  
 9 prices between ITL and other manufacturers."  
 10 So "differentials in recommended selling prices  
 11 between ITL and other manufacturers", that's another way  
 12 of saying what we saw in the last letter, isn't it,  
 13 strategic pricing differentials?  
 14 **A.** It's a request to Safeway as part of the pre-buy for  
 15 them to recognise the differential in the RRP's of our  
 16 brands, yes.  
 17 **Q.** Sorry, I don't think that answered the question,  
 18 actually. Do you remember we were just looking at tab 9  
 19 and that we saw the phrase "appropriate strategic  
 20 pricing differentials"?  
 21 **A.** And that was in response to a tactical promotion we were  
 22 setting up at the time, yes.  
 23 **Q.** I am just focusing on those words now. In ITL's  
 24 strategy, strategic pricing differentials is another way  
 25 of saying differentials in recommended selling prices

1 between ITL and other manufacturers; do you agree with  
 2 that?  
 3 **A.** I wouldn't, because our strategic pricing differentials  
 4 do change at times when we are doing tactical  
 5 promotions, so it could be 2p at one point or it might  
 6 be 6p at another, so it would change.  
 7 **Q.** But you are familiar with ITL's strategy of maintaining  
 8 pricing differentials, you do understand that strategy,  
 9 don't you?  
 10 **A.** Our objective to reflect the RRP differential in the  
 11 retailers' shelf price, yes, as an objective.  
 12 **Q.** Yes, and elsewhere in the papers the words that are used  
 13 to summarise that strategy are "strategic pricing  
 14 differentials", aren't they? Is that a phrase which is  
 15 unfamiliar to you?  
 16 **A.** Well, they weren't, because that document you took me to  
 17 was regarding a tactical promotion at the time, that  
 18 wasn't our normal strategy. What was mentioned earlier  
 19 isn't the RRP differences.  
 20 **Q.** Sorry, when you say "wasn't our normal strategy", are  
 21 you talking about ITL's normal strategy or are you  
 22 talking about the way you ran the account with Safeway?  
 23 **A.** Our objective, across the marketplace, was to try and  
 24 ensure that our products were treated no worse than our  
 25 competing products. The document --

1 **THE CHAIRMAN:** Are we at cross-purposes here because this is  
 2 referring to recommended selling prices, the RRP,  
 3 whereas I think you are saying that as regards tactical  
 4 bonuses, when tactical bonuses were given, there may  
 5 have been a departure from the RRP?  
 6 **A.** That's correct, so it would be different. That's why  
 7 I am saying the document I looked at a while ago --  
 8 **THE CHAIRMAN:** As far as there being a policy of relating  
 9 ITL prices to the prices of competing goods, that seems  
 10 to be both reflected here and in that earlier letter.  
 11 **A.** Yes, well, that was an objective we had, all I was  
 12 trying to say was the earlier letter wasn't the normal  
 13 differences in RRP's that would occur.  
 14 **MR WILLIAMS:** Sorry, but it was trying to reinstate the  
 15 appropriate strategic pricing differentials, if  
 16 I remember rightly. Do you want to just go back to it.  
 17 I do not want to dwell on that letter, but I think it is  
 18 helpful to understand --  
 19 **THE CHAIRMAN:** Well, I am not sure whether he is actually  
 20 agreeing with you, subject to the fact that sometimes  
 21 the differentials change because of tactical bonusing?  
 22 **MR WILLIAMS:** Yes, and the point I am making is that that  
 23 letter is about reinstating the differential rather than  
 24 about departing from the differential, so it's actually  
 25 the same thing, that is really what I am getting at.

1 Do you want to just go back to tab 9. We are not  
 2 going to spend all morning on documents that Mr Culham  
 3 didn't deal with, but I think it's helpful to get the  
 4 terminology straight, that's all.  
 5 It says:  
 6 "In response to your price reduction on Mayfair [so  
 7 that's a Gallaher brand] and the subsequent equal move  
 8 of Richmond, I am confirming that the following price  
 9 reductions will be implemented to achieve the  
 10 appropriate strategic pricing differentials."  
 11 So this isn't a situation where, as Mr Culham was  
 12 saying, a tactical bonus might move the differentials  
 13 out of line, this is the opposite, this is a tactical  
 14 bonus to put the differentials in line.  
 15 Do you agree with that?  
 16 **A.** Well, I can't remember, it was a move --  
 17 **Q.** No, you didn't deal with it.  
 18 **A.** I didn't deal with it, I don't know -- reading this  
 19 document, it is suggesting that Mayfair was reduced to  
 20 3.39, and we were seeking to reduce Lambert & Butler to  
 21 3.59. If the differential at that time was 20p, then  
 22 yes, it would be restoring -- but I don't know what the  
 23 differential was at that time. That's what I am trying  
 24 to say.  
 25 **Q.** No, no, no, I am really just asking you about the

1 terminology, that's all, and the strategy.  
 2 Coming back to tab 77, {D28/77/308}, which is  
 3 a letter you wrote, so now we are not dealing with  
 4 a tactical bonus scenario here, are we, I don't think,  
 5 we are dealing with an MPI and the conditions of  
 6 a pre-buy. Do you agree with that?  
 7 **A.** Yes, that's correct, yeah.  
 8 **Q.** It says that the condition of the pre-buy is that your  
 9 retail selling prices continue to reflect the  
 10 differentials in recommended selling prices between ITL  
 11 and other manufacturers.  
 12 So just breaking that down, it must be the case that  
 13 Safeway was previously, as far as you understand it  
 14 anyway, reflecting those differentials in selling  
 15 prices?  
 16 **A.** Across many products, yes, but there were some out of  
 17 line as well. So when I've used the word "continue",  
 18 perhaps I have been overoptimistic but most of them  
 19 would have been in line, but some of them were out of  
 20 line.  
 21 **THE CHAIRMAN:** Yes, just answer the question, please.  
 22 **MR WILLIAMS:** So I am not putting an absolute proposition to  
 23 you, but what this is saying is that basically Safeway's  
 24 prices were, as far as you understood it, in line with  
 25 the differentials in recommended selling prices?

1 **A.** Many of their prices were, but some were not.  
 2 **Q.** So I think that presupposes that they were again  
 3 familiar with the concept of pricing in line with  
 4 recommended selling prices; do you agree with me? This  
 5 is not --  
 6 **A.** Sorry, we didn't recommended the selling price. Sorry,  
 7 you said there -- can you repeat the question?  
 8 **Q.** I don't think the question was very clear, I am sorry.  
 9 The way you have written this letter, it presupposes  
 10 that this idea, this approach to pricing in line with  
 11 pricing differentials, that's something they understand,  
 12 that's a concept which is familiar to them?  
 13 **A.** Oh, but they didn't always follow it, it's our  
 14 objective --  
 15 **THE CHAIRMAN:** You are not being asked whether they always  
 16 followed it, Mr Culham, you are being asked: were they  
 17 familiar with the concept of pricing to reflect  
 18 differentials in the RRP's.  
 19 **A.** I would hope so.  
 20 **MR WILLIAMS:** When you say you hope so, presumably that's  
 21 the reason you wrote the letter in this way. We talked  
 22 a few minutes ago about writing letters which they could  
 23 understand in terms which were comprehensible to them,  
 24 and what you are saying is that they have to continue to  
 25 reflected those differentials, that is what you are

1 saying to them?  
 2 **A.** That's what I am requesting, yes.  
 3 **Q.** So Safeway understood ITL's strategy of requiring  
 4 retailers to price in accordance with differentials in  
 5 recommended selling prices between ITL and other  
 6 manufacturers?  
 7 **A.** They knew what our objective was and we were happy for  
 8 them to sell at prices well below that, but Safeway,  
 9 I do stress, didn't actually follow the differential --  
 10 **THE CHAIRMAN:** That's not what you are being asked,  
 11 Mr Culham.  
 12 **MR WILLIAMS:** I am asking you whether you agree that this  
 13 letter shows that it's entirely clear that it was part  
 14 of the relationship between ITL that they were supposed  
 15 to price in accordance with differentials in recommended  
 16 selling prices between ITL and other manufacturers.  
 17 **A.** That was our aspiration, yes.  
 18 **Q.** That's not what I asked you. I asked you whether you  
 19 agreed this letter shows that it was part of the  
 20 relationship between you, part of the terms on which you  
 21 did business?  
 22 **A.** It was not part of the terms on which we did business,  
 23 because it wasn't even included in the trading  
 24 agreement.  
 25 **THE CHAIRMAN:** Well, do you accept at least that you were



1 setting it as a condition for this pre-buy --  
 2 **A.** Oh, it was in there but the correspondence post it  
 3 clearly shows they never actually followed it.  
 4 **THE CHAIRMAN:** You are not talking about whether they  
 5 followed it, Mr Culham, those are two separate things,  
 6 so do please try and focus on the questions you are  
 7 being asked, which is: do you accept that you made it  
 8 clear to Safeway that you hoped or you wanted them to do  
 9 that, and that they knew that you wanted to do that, and  
 10 that was at the least one of the conditions that were  
 11 set for this pre-buy arrangement?  
 12 **A.** They were clear it was our aspiration, that that's what  
 13 we wanted to achieve.  
 14 **THE CHAIRMAN:** Yes.  
 15 **MR WILLIAMS:** And this isn't a complete snapshot, because it  
 16 talks about continuing to reflect the differentials. Do  
 17 you agree with that?  
 18 **A.** The correspondence does mention "continue" and I wrote  
 19 the correspondence. However, just prior to this and  
 20 post this, they are not actually reflecting  
 21 differentials.  
 22 **DR SCOTT:** Mr Culham, you keep saying "aspiration". What  
 23 I actually read in the letter is three words "on  
 24 condition that". Can you explain to me what the words  
 25 "on condition that", at the bottom of page 308, mean in

21

1 the context of an agreement where you are offering them  
 2 pre-buy on condition that, followed by (a), (b), (c),  
 3 (d)?  
 4 **A.** They were the four objectives that Imperial Tobacco  
 5 would like to have achieved within the Safeway account.  
 6 So they were presented to Safeway, but ...  
 7 **DR SCOTT:** Are you suggesting that the words "on condition  
 8 that", to a normal recipient of a letter, means  
 9 something other than "on condition that"?  
 10 **A.** Well, hopefully it would mean that's our requirement,  
 11 that's our request, on condition, but what I stress is  
 12 Safeway didn't actually --  
 13 **DR SCOTT:** No, no. Stick with your letter.  
 14 **A.** Right.  
 15 **DR SCOTT:** You write this letter --  
 16 **A.** Yes, I did, yes.  
 17 **DR SCOTT:** You include the words "on condition that", and in  
 18 a normal contractual situation you are making an offer  
 19 which is conditional, and you are very clear what those  
 20 conditions are, and those conditions include at (b)  
 21 "will continue to reflect the differentials".  
 22 Are you suggesting to us that you didn't mean that?  
 23 Leave aside for a moment what Safeway did with it  
 24 afterwards, that's a different question. But the letter  
 25 seems fairly clear on the --

22

1 **A.** The letter is very clear, and that's what I, as the  
 2 account manager, was trying to achieve. It was my  
 3 request, my condition, however you want to phrase it.  
 4 **DR SCOTT:** Well, you phrased it as a condition.  
 5 **A.** It was, yes, I've written the letter, yes.  
 6 **DR SCOTT:** Thank you.  
 7 **MR WILLIAMS:** I think this was something that was explored  
 8 when you were giving evidence about Shell, but there is  
 9 a significant benefit to Safeway here, isn't there,  
 10 because you are offering them a pre-buy, so it's a good  
 11 opportunity for them to enhance their margin?  
 12 **A.** If (a) they wish to pre-buy and (b) they change their  
 13 shelf pricing when they want to.  
 14 **Q.** So all I am saying is there is a real incentive for  
 15 Safeway to do what you want them to do, that is comply  
 16 with the condition?  
 17 **A.** If they complied with the condition, there is  
 18 an incentive, yes, if they chose to put their prices up.  
 19 But I do stress, Safeway didn't comply, but they still  
 20 had the stock.  
 21 **THE CHAIRMAN:** Do you mean they didn't go forward with this  
 22 pre-buy?  
 23 **A.** No, they pre-bought the stock.  
 24 **THE CHAIRMAN:** They did pre-buy the stock.  
 25 **A.** But the differential objectives of Imperial were not

23

1 reflected in the Safeway account. That's what I am  
 2 trying to say here. I asked for it but they didn't do --  
 3 **THE CHAIRMAN:** Yes, I know what you are trying to say.  
 4 **MR WILLIAMS:** Can we turn on, then, to tab 79, two documents  
 5 forward. {D28/79/242}. This is another letter from  
 6 you to Trevor Thomas. It's probably useful for you to  
 7 read the whole letter. I am going to ask you questions  
 8 about the letter starting at "petrol filling stations"  
 9 for the moment.  
 10 (Pause)  
 11 **A.** I've read it, yeah.  
 12 **Q.** So the context of this letter is that there has been  
 13 an MPI, many brands suffered from a double MPI, and you  
 14 are identifying or commenting on certain errors that you  
 15 have identified in the shelf prices, and would that be  
 16 through visits of ITL personnel to stores?  
 17 **A.** I would assume so. This is -- we have identified errors  
 18 against what Safeway have told us was their pricing  
 19 policy.  
 20 **Q.** I just wanted to ask you some questions first of all at  
 21 the petrol filling stations section. So you have  
 22 identified as we say errors in the PFS, and Stephen --  
 23 is that Stephen Carroll?  
 24 **A.** Stephen Carroll was a trading assistant who worked for  
 25 me in Bristol, yes.

24

1 Q. He is going to send through details of those.  
 2 Underneath, there is a section dealing with 100s  
 3 multipacks, and you have been told that the position is  
 4 going to be as follows, and there is a sort of  
 5 calculation for how they have gotten to the price of  
 6 100s multipacks.  
 7 Underneath that, there are a number of examples of  
 8 particular brands. Do you see that?  
 9 A. Yes, that's highlighting some brands that weren't in  
 10 line with the pricing policy that Trevor had told me  
 11 they were adopting in petrol filling stations.  
 12 Q. Okay. We will come back to that in a minute. You see  
 13 the last three there are brand pairs, aren't they? When  
 14 I say brand pairs, there is one ITL brand and one  
 15 Gallaher brand. Richmond and Dorchester Kingsize and  
 16 then Superkings, and then Superkings and Berkeley?  
 17 A. Yes, they are, yes.  
 18 Q. Those are brand pairs that were linked under ITL's  
 19 differential pricing strategy, weren't they?  
 20 A. They were products which had the same RRP, so Imperial  
 21 Tobacco's strategy was to have our brand no more  
 22 expensive than the competing Gallaher brand, but Trevor  
 23 had told me, as it says here, their pricing policy in  
 24 petrol filling stations, RRP times five less 5p. So  
 25 they would naturally end up at the same price, as that

25

1 was Safeway's policy.  
 2 Q. Sorry, I didn't quite follow what you just said. Did  
 3 you say that they wouldn't end up at the same price?  
 4 THE CHAIRMAN: Yes, they would end up at the same price. So  
 5 what you are saying is that was Safeway's policy told to  
 6 him, not ITL's policy.  
 7 A. Which is what it says there. I have actually put "you  
 8 informed me".  
 9 MR WILLIAMS: Well, "you informed me that the correct price  
 10 position is now as follows", it doesn't actually say on  
 11 what basis this is the correct pricing position, does  
 12 it?  
 13 A. Well, it does, it says "Recommended retail price times  
 14 five less 5p". That was Trevor telling me what their  
 15 policy was.  
 16 Q. That's how they have calculated the prices. But it's  
 17 also right to say, isn't it, that Richmond and  
 18 Dorchester, Richmond Superkings and Dorchester  
 19 Superkings, and Superkings and Berkeley, those brands  
 20 were all at parity under ITL's pricing strategy as well?  
 21 A. No, our objective was to have our brands no more  
 22 expensive, I agree, but --  
 23 THE CHAIRMAN: Are those linked brands as far as the ITL  
 24 strategy is concerned?  
 25 A. They are, but Safeway have used the RRP to get to their

26

1 pricing policy, which is what this is highlighting.  
 2 MR WILLIAMS: Yes, and you would have been happy with those  
 3 prices on Richmond and Dorchester and Superkings and  
 4 Berkeley, wouldn't you, because they reflected ITL's  
 5 pricing strategy?  
 6 A. As a maxima, if ours had been cheaper than that, we  
 7 would have been very happy, but no worse than parity,  
 8 that would achieve.  
 9 Q. Can we then move on to the section of the letter that's  
 10 headed "Stores". It says:  
 11 "Most of the errors have now been corrected, thank  
 12 you. I've highlighted the few that still need  
 13 adjustment following our discussion."  
 14 Then we see three headings, "Brand", "Suggested  
 15 Price" and "Comments".  
 16 Underneath the three headings, I just wanted to look  
 17 at a number of the examples we see there. B&H Silver,  
 18 that's a Gallaher brand, isn't it?  
 19 A. Yes, produced by Gallaher, yes.  
 20 Q. It says:  
 21 "Same as L&B Kingsize?"  
 22 A. Question mark.  
 23 Q. We will come to the question mark in due course. The  
 24 correction of an error means putting B&H Silver at the  
 25 same price as L&B, from your point of view?

27

1 A. Our objective was for L&B to be no more than B&H Silver,  
 2 correct.  
 3 Q. It says "same as", actually, doesn't it?  
 4 A. Yes, but we have had a discussion nine -- eight years  
 5 ago. I don't remember what the discussion was, but  
 6 Trevor would have told me what his intention was, so  
 7 I was confirming whatever our discussion was.  
 8 Q. You aren't actually, because you say, "Most of the  
 9 errors have now been corrected, I've highlighted the few  
 10 that still need adjustment", so these are things they  
 11 haven't done rather than things they have done?  
 12 A. Correct, we had a meeting and these were prices that  
 13 were discussed at the meeting, and that's my suggestion,  
 14 only a suggestion to Safeway, following the discussion  
 15 we had at the meeting. I don't remember exactly what  
 16 the discussion was.  
 17 Q. The suggestion is that they should be at the same price.  
 18 A. Yes, or no more than, no more than would have been good  
 19 for us, yes.  
 20 Q. But you have suggested the same price?  
 21 A. In this letter, yes.  
 22 Q. Moving down, Drum, you are saying, should be at the same  
 23 price as Amber Leaf?  
 24 A. Yes, but I would also like to put, in the summary, the  
 25 prices that are highlighting are actually for them to

28

1 reduce the prices down in the stores --  
 2 **THE CHAIRMAN:** You are not being asked about that,  
 3 Mr Culham. Please just answer the question.  
 4 **MR WILLIAMS:** Yes. What you were suggesting is that Drum  
 5 should be at the same price as Amber Leaf.  
 6 **A.** Because --  
 7 **Q.** And --  
 8 **A.** Obviously I can't remember the exact prices from that  
 9 far back in time. I would assume Drum was more  
 10 expensive than Amber Leaf prior to this letter.  
 11 **Q.** We will come on to that point. I am really just reading  
 12 to you what the letter says. It says Drum should be at  
 13 the same price with Amber Leaf?  
 14 **A.** With a question mark to ask the question.  
 15 **Q.** Can we just turn over the page, because the summary  
 16 says:  
 17 "Hopefully you will be able to correct these  
 18 urgently."  
 19 And there is your point about customers being  
 20 overcharged compared to "your our price policy and your  
 21 competitors on most of the products highlighted". I am  
 22 not sure whether it's "your and our" or "your or our"?  
 23 **A.** I think it's a typo -- reading it back, it doesn't make  
 24 sense. I think it is "your own price policy" what  
 25 I should have put but I have mistyped there.

1 **Q.** But I suppose they are also being overcharged compared  
 2 to your price policy as well is the logic of that?  
 3 **A.** I can read it that way now, yes, but that wasn't what  
 4 was intended.  
 5 **Q.** But it is also true, isn't it? Whether or not that is  
 6 what you meant it is also true that you weren't happy  
 7 with these prices because they weren't consistent with  
 8 your price policy?  
 9 **A.** We were seeking to get the prices reduced, yes.  
 10 **Q.** Underneath that you say:  
 11 "Please confirm when these will be implemented.  
 12 I will advise you if other 'errors' appear over the ...  
 13 few days."  
 14 Although you have used the words "suggested price"  
 15 and you have dotted a few question marks around, the  
 16 message is pretty clear, isn't it, you are expecting  
 17 Safeway to move to the prices that you have put in this  
 18 letter?  
 19 **A.** We are asking them to reduce the prices down but as  
 20 always Safeway weren't the most efficient of companies  
 21 and some may have come down, some may not have come  
 22 down.  
 23 **Q.** It's more than a suggestion. You want them to do it?  
 24 **A.** I would have liked them to reduce the prices of our  
 25 brands to consumers, yes.

1 **Q.** Just carrying on down the list, if you just go back to  
 2 the previous page, the last one on that page is  
 3 Golden Virginia 4p below Old Holborn. Now, can you just  
 4 help me with this: it's right to say, isn't it, that at  
 5 one stage Golden Virginia and Old Holborn were  
 6 generally -- your strategy was based on parity and then  
 7 things move to minus 4 at a particular point in time.  
 8 Maybe you don't remember that?  
 9 **A.** Golden Virginia and Old Holborn traditionally were, had  
 10 the same recommended retail price, but at different  
 11 points in time, sometimes Old Holborn was dearer than  
 12 Golden Virginia, and sometimes Golden Virginia was  
 13 dearer than Old Holborn, but I don't remember exactly.  
 14 From reading this document, I am assuming that  
 15 Golden Virginia recommended retail price was 4p below  
 16 Old Holborn.  
 17 **THE CHAIRMAN:** And why do you assume that?  
 18 **A.** By the fact that my objective is to get 4p below  
 19 Old Holborn.  
 20 **MR WILLIAMS:** Just going back to your comment about  
 21 continuity in the way that the account was run, I would  
 22 just like to look at some parts of this letter in the  
 23 light of an earlier letter sent to Mr Thomas, which is  
 24 at tab 55, {D28/55/110} if you could turn to that.  
 25 I just want to take this in stages. Do you want to just

1 read the first paragraph to yourself.  
 2 (Pause)  
 3 So parity with Dorchester is the objective in all  
 4 stores and PFS, and that's the objective for Richmond;  
 5 you would agree with that?  
 6 **A.** George is asking them to bring Richmond Superkings down  
 7 to achieve, in this case he says parity, but the policy  
 8 was no more than, but he does say parity, yes.  
 9 **Q.** He says parity is the objective?  
 10 **A.** I said I am agreeing, that's what he said, yes.  
 11 **Q.** It's probably useful for you, while we look at this  
 12 letter, to keep a finger in tab 79, which is where we  
 13 were just a minute ago, and do you remember we looked at  
 14 Richmond and Dorchester in the multipacks, so parity is  
 15 the objective, and we see Richmond and Dorchester are at  
 16 parity; you would agree with that?  
 17 **A.** The recommended retail prices were both the same, and  
 18 Safeway had told us their pricing policy was RRP times  
 19 five less 5p.  
 20 **Q.** Just keep a finger in tab 79 and turn back, then, to 55.  
 21 Can you read the third and fourth paragraphs, please.  
 22 (Pause)  
 23 **A.** Okay.  
 24 **Q.** So in this, in the letter at tab 55, parity is the  
 25 policy between Drum and Amber Leaf; you would agree with

1 that?

2 **A.** The RRP's were the same and we were trying to achieve

3 a price of Drum no more than Amber Leaf, yes.

4 **Q.** Well, it doesn't say that, does it, it says "parity is

5 the policy"?

6 **A.** George has used the word "parity" and, as you can see,

7 quite a lot of George's letters are quite brief in the

8 words he uses, yes.

9 **Q.** I don't find it especially brief, it's in prose, isn't

10 it, this is a longhand letter? Anyway, a bit further

11 down, "Golden Virginia, we are paying for parity", in

12 relation to Golden Virginia and Old Holborn. This is at

13 the time when Old Holborn and Golden Virginia were at

14 parity, as we just discussed a few minutes ago.

15 So back to tab 79, 4p below. I think really the

16 point I am making to you is that the way that the letter

17 at tab 55 is expressed is really the same as the way

18 that the letter at tab 79 is expressed, which is that

19 you are talking about specific fixed differentials

20 rather than maximum differentials?

21 **A.** No, I would disagree. I don't believe they are. The

22 use of the word "parity", as George has used it in his

23 letter at tab 55 isn't perhaps the best way to express

24 the word, but it's not the same. We were looking at

25 what Safeway, in my letter in tab 79, Safeway had told

1 me what their policy was, if we used the PFS one as

2 an example because it's actually in the letter, their

3 policy was the RRP times something less 5p, Trevor would

4 have told me what their pricing policy was in the

5 stores, and all I was giving back to him was examples

6 where his pricing policy in stores didn't match up with

7 what his pricing --

8 **THE CHAIRMAN:** Well, suppose he told you that his pricing

9 policy was that Richmond would be 2p more expensive than

10 Dorchester. Now, would you then have written to him

11 pointing out all the instances in the shops where in

12 fact you found Richmond and Dorchester were priced the

13 same?

14 **A.** No, because we would have been getting a benefit, and

15 generally speaking, we would highlight where our

16 brands --

17 **THE CHAIRMAN:** No, if he had told you that their policy was

18 that Richmond should be 2p more expensive than

19 Dorchester, ie not your policy but disadvantaging you as

20 against Dorchester, but they had decided that was going

21 to be their policy, would you then have written to him

22 alerting him to instances where in fact Richmond and

23 Dorchester were being priced the same in the petrol

24 stations?

25 **A.** As a general rule, no, but I am sure there are

1 exceptions where it's happened. If that ... because

2 where Imperial was getting a benefit better than our

3 objective, we generally wouldn't highlight that to

4 retailers. I am sure there are examples where --

5 **THE CHAIRMAN:** No, no, let me just ask one more time.

6 **A.** Sorry.

7 **THE CHAIRMAN:** You wanted Richmond to be the same price as

8 Dorchester or less?

9 **A.** Correct.

10 **THE CHAIRMAN:** Suppose Mr Thomas had said "Well, regardless

11 of that, we are going to make Richmond more expensive

12 than Dorchester in our shops, that's just what we have

13 decided to do". Now, would you, if you had nonetheless

14 found that actually some shops were selling Richmond at

15 the same price as Dorchester, have pointed out that

16 error to Safeway to say "You told us you wanted Richmond

17 to be more expensive, therefore you should correct these

18 prices by increasing them because I know you want

19 Richmond to be more expensive"?

20 **A.** As a general rule I probably wouldn't highlight it, but

21 I probably have done on one or two occasions.

22 **MR WILLIAMS:** Well, I think document 79 is on your own

23 evidence an example of you doing that, isn't it?

24 **A.** Is it?

25 **Q.** I thought that's what you were saying document 79 was?

1 **A.** Sorry, saying what?

2 **Q.** I thought you were saying that document 79 was

3 an example of you writing to Safeway and pointing out

4 that your brands were being priced relatively

5 uncompetitively?

6 **A.** More expensive than the Safeway policy. That's what

7 it's pointing out.

8 **Q.** Just thinking about document --

9 **A.** Sorry, the Chairman was asking me if our brands were

10 priced better than we expected --

11 **Q.** No, the Chairman wasn't asking you that. The Chairman

12 was asking you if Richmond was being disadvantaged,

13 would you write --

14 **MR HOWARD:** I think this is unfair, quite frankly. The

15 question which Madam Chairman put was on the basis that

16 the policy was to disadvantage Richmond by putting it at

17 a higher price, and then you find that actually in

18 stores you are not being disadvantaged. The question,

19 as I understand it, to the witness was: what would you

20 do then? He answered "probably nothing, because", and

21 one can understand that. The other document at 79 is,

22 as he has said on a number of occasions, where Richmond

23 is being disadvantaged because their policy is not being

24 followed.

25 **THE CHAIRMAN:** Yes, the reason I asked my question was

1 because Mr Culham is saying that the purpose of this was  
 2 to correct errors in the policy that Safeway were  
 3 pursuing, not the policy that ITL were pursuing.  
 4 **MR HOWARD:** Yes, and I think what he has explained to you,  
 5 which personally I find seems a perfectly natural  
 6 explanation, is that he is interested in seeing that  
 7 they have followed their policy where that actually  
 8 accords with Imperial's interests. If they don't follow  
 9 their policy in a way which is to Imperial's advantage,  
 10 then he is saying "Well, I am not going to tell them  
 11 that, although occasionally I might".  
 12 **THE CHAIRMAN:** Well, that was what I was trying to find out.  
 13 **MR HOWARD:** Yes, and I think that's what he answered.  
 14 **MR WILLIAMS:** Would you agree that the document at tab 55 is  
 15 not about Safeway's policy? When it says, "Parity is  
 16 the objective, parity is the policy, and we are paying  
 17 for parity", that's about ITL's policy?  
 18 **A.** We were obviously doing tactical promotions on Drum,  
 19 Drum Milde and Golden Virginia to achieve a position in  
 20 Safeway pricing -- sorry, a position in the Safeway  
 21 stores, yes.  
 22 **Q.** Can we just take it in stages, Mr Culham, please. Do  
 23 you agree that the letter at tab 55 is not about  
 24 Safeway's policy, it's about Imperial's policy?  
 25 **A.** The start point for anything is Safeway have their

1 policy, we have then in this case -- are offering  
 2 tactical bonuses to achieve our objective, yes.  
 3 **Q.** So when we talk about parity being the objective and  
 4 "parity is the policy" and "we are paying for parity",  
 5 that's ITL's policy?  
 6 **A.** Imperial Tobacco's policy in the case of this was for  
 7 Drum to be parity or below versus Amber Leaf, yes.  
 8 **Q.** Well, it doesn't say "parity or below", but that's  
 9 a different point --  
 10 **THE CHAIRMAN:** Well, I think you have asked these questions  
 11 on this document.  
 12 **MR WILLIAMS:** I agree.  
 13 What we then see at tab 79 {D28/79/186} is Drum  
 14 should be the same as Amber Leaf, Golden Virginia, and  
 15 then there is a 4p below Old Holborn and we have talked  
 16 about that. So isn't this letter also about Imperial's  
 17 policy, not Safeway's policy?  
 18 **A.** No, because at this point we were doing no tactical  
 19 promotions. As I said, we had a discussion at the  
 20 meeting, which is where I took over the account.  
 21 I don't remember the exact conversations that took place  
 22 at the meeting. Trevor had clearly outlined their  
 23 policy at the petrol stations, which, as you can see,  
 24 I have repeated because it's a simple one. I don't know  
 25 what he said their exact policy at stores would have

1 been. He could have said "Our policy is to sell X below  
 2 RRP or Y", I don't know what he said. But this is  
 3 following the discussions that I had with him, we have  
 4 noticed things which don't seem to be in line with what  
 5 he thinks we should be doing.  
 6 **DR SCOTT:** Can I just understand one thing, and that is  
 7 this: you say that this letter is written in the context  
 8 of them not being tactical promotion?  
 9 **A.** I believe that's the case, yes.  
 10 **DR SCOTT:** Presumably that doesn't suspend the overall ITL  
 11 pricing strategy, you are still looking --  
 12 **A.** My objective, Imperial, would still be achieve our  
 13 pricing differential or better across the accounts, yes.  
 14 **DR SCOTT:** Thank you.  
 15 **MR WILLIAMS:** One thing we have not discussed in relation to  
 16 the letter at tab 79 is your comment on B&H Silver. No  
 17 doubt you would say that that is you commenting on the  
 18 fact that you believe that B&H Silver is not being  
 19 priced in accordance with Safeway's own policy?  
 20 **A.** Yes, I would, yes.  
 21 **Q.** Can I suggest to you an alternative interpretation,  
 22 which is that you are concerned about the price of  
 23 a Gallaher brand, because you are concerned in this  
 24 section of the letter about departures from ITL's  
 25 strategy, that is pricing differentials?

1 **A.** My objective is to achieve Imperial Tobacco's pricing  
 2 objectives, I agree. These brands were highlighted as  
 3 not being in line with what Safeway -- if Safeway had  
 4 told me, for example, they were going to do 10p off  
 5 Lambert & Butler and 20p off Benson & Hedges Silver,  
 6 that would have been their decision. I don't know what  
 7 the discussion was, that's what I'm trying to say.  
 8 **THE CHAIRMAN:** Yes, but would this be fair: you would draw  
 9 their attention to instances where their policy, as you  
 10 understood it, coincided with ITL's policy but that  
 11 actually the prices were not reflecting either their  
 12 policy or ITL's policy?  
 13 **A.** Correct.  
 14 **MR WILLIAMS:** Could we turn over to tab 81, please, and just  
 15 read that to yourself. {D28/81/190}.  
 16 (Pause)  
 17 We can deal pretty quickly with the line which says  
 18 "Richmond should be not more than Dorchester Kingsize  
 19 multipacks", that is you expressing concern that  
 20 Dorchester, Richmond and Dorchester aren't being priced  
 21 in accordance with ITL's strategic pricing  
 22 differentials, isn't it? Parity is the objective we saw  
 23 in tab 55.  
 24 **A.** It's highlighting that Richmond multipacks were more  
 25 than Dorchester, therefore I was seeking for him to

1 reduce Richmond multipacks.  
 2 **Q.** Because of ITL's pricing strategy?  
 3 **A.** And whatever Trevor had told me he was doing, yes.  
 4 **Q.** Now, the first line, "Classic 5s should be not more than  
 5 Hamlet 5s", that is again a reference to ITL's pricing  
 6 strategy, isn't it? It's a concern that brands aren't  
 7 being priced in accordance with ITL's --  
 8 **A.** I don't know what the price was, but Classic would have  
 9 been above Hamlet, so I was seeking to ask Trevor to  
 10 reduce Classic down to no more than Hamlet, yes.  
 11 **Q.** Are you aware that this is the first and only document  
 12 on the Safeway file in which differentials are expressed  
 13 in the sort of language we see here "should be not more  
 14 than Hamlet"?  
 15 **A.** If you say so. I am not going through the document.  
 16 **Q.** This letter dates from, I think, August 2003. When you  
 17 wrote this letter, were you aware that the OFT was  
 18 already investigating the matters that are now before  
 19 the Tribunal?  
 20 **A.** I can't recollect the date when I was -- I don't know  
 21 when it started. I know it was 2003 some time, but  
 22 I would have found out shortly afterwards, but I don't  
 23 know when it started, so I can't comment.  
 24 **THE CHAIRMAN:** You would have found out shortly afterwards;  
 25 shortly after what?

1 **A.** If the OFT had investigated Imperial, obviously it  
 2 wouldn't come to my level first, but at some point  
 3 I would have been informed. But I don't know, when did  
 4 the investigation start? I don't know.  
 5 **MR WILLIAMS:** It started in March 2003.  
 6 **A.** Okay, so I probably would have been aware, yes.  
 7 **Q.** Can I suggest to you that the reason this letter is in  
 8 different terms from the rest of the correspondence in  
 9 the Safeway file is precisely because you were aware  
 10 when you wrote it that the matter was now under  
 11 investigation by the OFT?  
 12 **MR HOWARD:** Just as a matter of record, in fact, it was in  
 13 August 2003 that the section 26 notices were sent,  
 14 15 August.  
 15 **THE CHAIRMAN:** 15 August before they were sent to anybody?  
 16 **MR HOWARD:** Sent to Imperial. So this letter, this email,  
 17 seems to pre-date that by about a week. The fact that  
 18 the OFT might have commenced its own enquiries  
 19 internally, I don't know when they did that, but  
 20 Imperial were informed in August.  
 21 **A.** So obviously I was not aware when I wrote this letter,  
 22 this email then.  
 23 Can I add to that, because I know I am questioning  
 24 other accounts as well. In other trading agreements we  
 25 had with other accounts. Since I think 2000 I had been

1 using the words "no more than" in other trading  
 2 agreements, but there wasn't one of those with Safeway.  
 3 **MR WILLIAMS:** I think while we are in this letter it's only  
 4 fair that I take you back to one other letter. Could  
 5 you just turn back to --  
 6 **THE CHAIRMAN:** Can I just ask, where it says "Both 18.75!",  
 7 is that your handwriting?  
 8 **A.** No, that's Trevor's. Sorry, I assume it's Trevor's,  
 9 because it's his little squiggle at the top of the  
 10 email.  
 11 **MR WILLIAMS:** It's right that I just show you another letter  
 12 while we are here. Could you turn back to tab 15,  
 13 please. {D28/15/26}. This is another fax to  
 14 Trevor Thomas which you won't have seen at the time.  
 15 I was interested in, just to draw your attention,  
 16 "BP/Safeway Pricing". It says:  
 17 "Following the rise, it would appear the following  
 18 ITL brands have been disadvantaged against the  
 19 competitive brands."  
 20 It then has, do you see the column "Target  
 21 Differential"?  
 22 **A.** Yes.  
 23 **Q.** On the second page:  
 24 "The target differential for Hamlet 5s and  
 25 Classic 5s is parity."

1 Is that's the way in which ITL had been  
 2 communicating with Safeway before the letter we see at  
 3 tab 81 about those brands, whereas you use for the first  
 4 time terminology which says "should be not more than  
 5 Hamlet 5s". So that is different from the way that your  
 6 predecessors had been communicating with Safeway about  
 7 the policy on those brands?  
 8 **A.** They had used different terminology, yes.  
 9 **Q.** They had used the language we have seen in the other  
 10 letters before this one, that is parity rather than "not  
 11 more than?"  
 12 **A.** As a quick way of writing "not more than", yes. Parity  
 13 was our -- or better was our objective, and obviously  
 14 they have just written parity on there or minus 6 or  
 15 minus 5 or minus 20.  
 16 **Q.** The rest of the differentials are all specific  
 17 differentials as well, they are specific target  
 18 differentials, aren't they?  
 19 **A.** Or better than those, yes.  
 20 **Q.** But that isn't what it says.  
 21 **A.** It isn't what the document says, but obviously if it had  
 22 got better than the target differential, that would have  
 23 been a better achievement by us.  
 24 **Q.** I just wanted to move to a slightly different topic  
 25 which we have already explored a bit. You are aware

1 that there was a trading agreement in place at some  
 2 point in the relationship with Safeway. I can't  
 3 remember whether you said that you saw it at the time?  
 4 **A.** No. When I took over the account from George it was  
 5 explained to me how our ongoing investment was with the  
 6 account, and that was based on investments that were  
 7 agreed in 1995, based on four elements that were  
 8 important to Imperial, ie --  
 9 **THE CHAIRMAN:** You went through those.  
 10 **A.** I won't repeat them again, but no differentials were  
 11 mentioned in that trading agreement.  
 12 **MR WILLIAMS:** I was just asking you, I can't remember  
 13 whether you said, when we talked about this previously,  
 14 that you saw it at the time you were running the  
 15 account, you saw the trading agreement that you thought  
 16 was rolling on at that point.  
 17 **A.** There wasn't actually -- it was an investment package  
 18 that was related to four elements, so yes --  
 19 **THE CHAIRMAN:** Was there a document in which it was  
 20 contained which you saw at the time?  
 21 **A.** I didn't, I just knew how the investments were made up  
 22 within the Safeway account to cover those four elements,  
 23 there wasn't actually a physical trading document, no.  
 24 **MR WILLIAMS:** Are you aware that, at least in 2001, before  
 25 you took over the account, there had been discussions

1 between ITL and Safeway about a new trading agreement?  
 2 **A.** Yes, we were very concerned because over the years the  
 3 level of our investment had stayed the same but Safeway  
 4 were delivering less for it, so we were looking at how  
 5 we could renegotiate a different trading agreement, but  
 6 that never came to anything.  
 7 **Q.** You know that, do you?  
 8 **A.** Yes, because the investments I was paying were still  
 9 based on the same basis they had been since 1995, with  
 10 the same four elements.  
 11 **Q.** Given that you have said that, I am going to have to  
 12 show you a document before your time, just to ask you  
 13 some questions about it. Could you turn to tab 33,  
 14 please. You are familiar with these sorts of documents,  
 15 aren't you? {D28/33/360}.  
 16 **A.** Yes.  
 17 **Q.** You wrote them I think for other accounts and probably  
 18 for Safeway in due course.  
 19 If you turn to the second page, do you see by the  
 20 second holepunch it says "In October 2000 ..."?  
 21 **A.** Sorry, second page?  
 22 **Q.** Yes, this has 361, bottom right. Yes?  
 23 **A.** Sorry, yes, apologies.  
 24 **Q.** Then down by the second holepunch it says:  
 25 "In October 2000 ..."

1 Then this just gives us a bit of context, a new  
 2 trading agreement is shortly to be discussed, and you  
 3 have already given some evidence about that.  
 4 **A.** There wasn't a new trading agreement, it carried on the  
 5 same.  
 6 **Q.** Yes. Could you just look on the next page at the  
 7 section headed "Ongoing Bonus Payments".  
 8 (Pause)  
 9 Now, as I read this passage, it's making two points:  
 10 first of all, ITL has been paying ongoing bonuses to  
 11 Safeway for certain things, and those things are listed  
 12 in the last line.  
 13 **A.** Can I correct you on that? We hadn't been paying on  
 14 those listed in the last line, we had been paying under  
 15 the four elements I mentioned earlier on. This was our  
 16 strategy, our objectives to go forward.  
 17 **Q.** What it says is that the investment needs to be  
 18 reconfirmed against specific measurable objectives,  
 19 because the concern that's expressed in the first line,  
 20 it says that the investment is in danger of being  
 21 treated as a prerequisite, and what it goes on to say  
 22 is:  
 23 "The investment needs to be reconfirmed against  
 24 specific measurable objectives. This will cover pricing  
 25 differential, merchandising, availability and

1 distribution."  
 2 Of those, do you agree that at least merchandising,  
 3 availability and distribution were all covered by the  
 4 trading agreement at the time?  
 5 **A.** There were four elements in the trading agreement at the  
 6 time, and those were three of them. The other one was  
 7 selling below RRP, not pricing differentials.  
 8 **Q.** What it says is that the investment needs to be  
 9 reconfirmed against specific measurable objectives. The  
 10 word "measurable" seems to reflect the concern in the  
 11 first line that the bonus is being treated as  
 12 a prerequisite. So this is saying that bonuses were  
 13 being paid for compliance with pricing differentials,  
 14 isn't it?  
 15 **A.** No, it isn't, it's our objective, we were -- the four  
 16 original elements that were in the trading agreement,  
 17 Safeway had put up their prices relative to RRP, so the  
 18 investment we paid for selling below RRP had been  
 19 eroded. We had taken -- at some point we had stopped  
 20 paying them any bonuses on the PFS, because they had  
 21 gone to RRP. The original agreement included new  
 22 product listing which at some point Safeway then said  
 23 they want more money for product listing. That's what  
 24 you're saying when it eroded. The four elements we  
 25 thought we were paying for had been eroded, and this was

1 George saying that going forward, perhaps we should have  
 2 these four elements in it, but it never did happen.  
 3 **Q.** We have seen a lot of documents now, and they are not  
 4 all the documents on the file, which show that ITL  
 5 expected Safeway to price in accordance with its pricing  
 6 strategy. What I am suggesting to you is that Safeway  
 7 wasn't doing that out of the goodness of its heart, it  
 8 was being incentivised to do that and this passage is  
 9 consistent with that.  
 10 **A.** I totally disagree. There was no incentive for Safeway  
 11 to follow our differentials. Where we had tactical  
 12 bonuses to achieve and specific requirements in reaction  
 13 to, say, a Gallaher promotion or something like that,  
 14 but on the ongoing business relationship with Safeway  
 15 there was no incentive for them to deliver  
 16 differentials. We would try and encourage them. We  
 17 would talk and ask, that there was no investment for  
 18 them against differentials.  
 19 **THE CHAIRMAN:** Except when there were those pre-buy  
 20 agreements?  
 21 **A.** Yes.  
 22 **MR WILLIAMS:** Just while we are here, could you turn over to  
 23 tab 34, {D28/34/75} please, and just read that to  
 24 yourself. Because this is a document which dates from  
 25 about the same time as the one we have just been looking

1 at.  
 2 (Pause)  
 3 This is another document which talks about errors in  
 4 the pricing, and then it says:  
 5 "The differential between L&B and JPS should be 16p  
 6 and 9p respectively."  
 7 Those are with reference to Mayfair and Sovereign.  
 8 Do you agree that this is a reference to ITL's pricing  
 9 strategy that shelf prices should reflect particular  
 10 pricing differentials?  
 11 **A.** I am assuming this is a reflection of our pricing  
 12 differential at that time, yes.  
 13 **Q.** So what the letter says is that "the differential should  
 14 be", and that's regarded as an error in Safeway's  
 15 pricing, and then it goes on to say:  
 16 "Could you please increase the prices. This  
 17 increase will then make their prices in stores at", and  
 18 I don't see any reference in this fax to a tactical  
 19 bonus or anything of that sort?  
 20 **A.** There isn't, and going through the correspondence  
 21 I think this situation carried on for many months  
 22 afterwards, ie Safeway didn't do what George was asking  
 23 them to.  
 24 **Q.** But you were asking them to do it, what, out of the  
 25 kindness of their hearts?

1 **A.** We were asking them to do it (a) because it was  
 2 an objective of us to hopefully achieve our  
 3 differentials or better, and (b) it may have been  
 4 against Safeway's policy at that time. I don't know  
 5 what -- I didn't write the letter, so I can't comment,  
 6 but there was no incentive from us if Safeway hadn't  
 7 chosen to do this.  
 8 **Q.** It's very hard to understand a letter like this, isn't  
 9 it, if there is no incentive, on Safeway?  
 10 **A.** It could be these prices were not what Safeway wanted  
 11 them to be. As I say, I don't know in what context the  
 12 letter was written. From Imperial Tobacco's perspective  
 13 we would have liked to have achieved at least those  
 14 differentials. George has outlined that to Trevor.  
 15 I don't know what the Safeway policy at the time was.  
 16 They could have been -- I don't know what their policy  
 17 was, so I can't comment.  
 18 **Q.** But you are experienced in dealing with retailers about  
 19 these matters, aren't you?  
 20 **A.** I have many years of experience, yes.  
 21 **Q.** I think you have direct experience of a number of  
 22 accounts under which Imperial paid retailers bonuses,  
 23 ongoing bonuses, when it wanted them to comply with its  
 24 pricing strategy, and then from time to time also paid  
 25 them tactical bonuses to make particular price moves?

1 Obviously you know that --  
 2 **A.** There are trading agreements that I've entered into with  
 3 other accounts, yes.  
 4 **Q.** And they provide for the retailer to receive a bonus for  
 5 application of your pricing strategy?  
 6 **A.** At no worse than the RRP difference, yes. Whether it's  
 7 a bonus or, in the case of Shell, we discussed last week  
 8 it was a -- two weeks ago -- fixed amount brand, yes.  
 9 But there wasn't for Safeway.  
 10 **Q.** You offered those bonuses because, when you were asking  
 11 a retailer to apply a particular pricing strategy, you  
 12 thought you needed to offer them an incentive to do  
 13 that?  
 14 **A.** It was part of our investment to make them consider it.  
 15 I wouldn't say -- I couldn't say how many retailers  
 16 actually actively made their business decisions on the  
 17 money we offered them. Some it may influence, some  
 18 would ignore it, some would take notice, some wouldn't.  
 19 **Q.** Would you agree that Safeway was no more likely to apply  
 20 a particular pricing strategy for you than any other  
 21 retailer if you weren't offered it an incentive to do  
 22 that?  
 23 **A.** Can I repeat, we weren't offering Safeway any incentive  
 24 for that differentials. There was nothing at for  
 25 Safeway in it.



1 **THE CHAIRMAN:** Why were you treating them differently, then  
 2 from First Quench and the others?  
 3 **A.** I don't know, because as I said the agreement went back  
 4 to 1995 --  
 5 **THE CHAIRMAN:** When you were in charge of the account,  
 6 didn't it strike you as odd that they didn't have this  
 7 pricing differentials aspect to their trading agreement?  
 8 **A.** Yes, and that's why the letter we referred to earlier on  
 9 when I brought about the MPI, when I was asking them to  
 10 reflect the differentials, I actually brought it to the  
 11 table.  
 12 **MR WILLIAMS:** Just to round off on this, what I am  
 13 suggesting to you is that we don't have a copy of the  
 14 trading agreement, we don't know exactly how the  
 15 relationship with Safeway worked --  
 16 **A.** Well, I think if --  
 17 **Q.** Sorry, I do need to ask you the question before you can  
 18 answer it, Mr Culham.  
 19 We don't have a copy of the trading agreement, but  
 20 looking at the correspondence that we see, looking at  
 21 the documents that we do have, it's clear that ITL  
 22 expected Safeway to apply its pricing differential  
 23 strategy and, on some basis or other, it's hard to  
 24 believe that Safeway wasn't incentivised to do that,  
 25 wasn't remunerated for doing that?

1 **A.** As I said, we don't have a copy of the 1995 trading  
 2 agreements, and I never saw it. However, on tab 1 of  
 3 the book, there is a letter from George in 1999  
 4 confirming the elements that are in the -- as he calls  
 5 it the bonus payment, which effectively means bonus  
 6 payment/trading agreement, that was the ongoing money.  
 7 So in tab 1 it clearly highlights the four elements that  
 8 were included.  
 9 **MR WILLIAMS:** I would like to move on to a new topic.  
 10 **THE CHAIRMAN:** How much longer do you have to go,  
 11 Mr Williams?  
 12 **MR WILLIAMS:** I am going to ask Mr Culham to look again at  
 13 a few of the documents we have looked at, just to  
 14 explore some of the points -- sorry, the documents from  
 15 before his time, just to explore some of the general  
 16 points he makes in his witness statement, but I don't  
 17 think it will take enormously long. I think it will  
 18 probably take another hour.  
 19 **THE CHAIRMAN:** That does seem rather -- how long is he down  
 20 to be cross-examined for?  
 21 **MR WILLIAMS:** I've tried to limit myself to a small number  
 22 of documents from the period before Mr Culham's time.  
 23 **THE CHAIRMAN:** Well, yes. We went through that exercise  
 24 yesterday afternoon to try and limit the number of  
 25 documents.

1 **MR WILLIAMS:** Yes, but as I explained to you yesterday,  
 2 Madam, the best evidence in relation to some of these  
 3 points is derived from the period before Mr Culham took  
 4 over the account. As I say, I've only got, I think,  
 5 three documents from before Mr Culham's time, and then  
 6 I wanted to go back to one of the documents that he  
 7 wrote.  
 8 **THE CHAIRMAN:** We will take a break, then, and come back at  
 9 11.30.  
 10 (11.20 am)  
 11 (A short break)  
 12 (11.35 am)  
 13 **MR WILLIAMS:** Mr Culham, just in order to test some of the  
 14 things you say in your witness statement, we are going  
 15 to look at two particular documents from the period  
 16 before you ran the account and look at them in a bit of  
 17 detail. One of them is 55, but before we get there  
 18 I want you to look at 54, please.  
 19 (Pause)  
 20 **A.** Okay.  
 21 **Q.** So this is another letter relating to errors in  
 22 Safeway's pricing.  
 23 There is a sort of generic explanation for this at  
 24 the bottom, which is systems problems, which seems to be  
 25 the context, or possible context, for the letter.

1 I wanted to focus on the first point, and then the  
 2 second half of the second point. Starting on the first  
 3 point, would you agree that this shows that ITL wanted  
 4 Richmond to match Dorchester in the context of its  
 5 pricing strategy when Dorchester went up in price, as  
 6 well as when it went down in price?  
 7 **A.** I think this shows we have reviewed our tactical bonuses  
 8 and are reducing the tactical bonuses by 2p, which would  
 9 then necessitate Safeway, if they wanted to maintain  
 10 their margins, putting the price up by 2p.  
 11 **Q.** The letter says "Please increase the price to match, the  
 12 bonus will be reduced accordingly". So it looks as  
 13 though what you want is the increase in price to match  
 14 and that the bonus is reduced in order to bring about  
 15 that result?  
 16 **A.** All we can do, we can obviously influence the level of  
 17 bonuses, and we are reducing the level of bonus and  
 18 making it simple for Trevor, that if he needs to  
 19 maintain his margin, he needs to go up by 2p. All we  
 20 can control is the 2p -- sorry, 2p reduction in our  
 21 tactical bonus.  
 22 **Q.** You can control in the sense that you were given the  
 23 right incentive to move to a particular price.  
 24 **A.** No, we can't encourage him to go up. We can say we are  
 25 taking away part of a tactical bonus, that's all we are

1 doing.

2 **Q.** But you are encouraging him to go up: you are saying

3 "please increase the price".

4 **A.** We are making, outlining for him that we are reducing

5 the bonus, therefore if he wants to maintain the same

6 margin for him, he has to go up by 2p, yes.

7 **Q.** Then moving down, you can skip over the bit about PFS,

8 I was not going to ask you about that. Sorry, you can

9 skip over the first three lines about PFS in the second

10 point. Then it says:

11 "In the PFS please correct the price of Superkings

12 down to 4.18."

13 I wasn't going to ask you about that either. I was

14 going to ask you about the bit starting:

15 "Also Dorchester Kingsize Superkings are 3.58, 3.67.

16 Richmond Kingsize Superkings are at 3.63, 3.65. These

17 brands should be at 3.63, 3.66."

18 So 3.63, 3.66, are those the tilt and non-tilt

19 prices?

20 **A.** I would assume so.

21 **Q.** Would you understand those prices to be the tilt and

22 non-tilt prices?

23 **A.** Yes.

24 **THE CHAIRMAN:** I would have thought they were the Kingsize

25 and Superkings prices.

1 **A.** Yes, you are right. Thank you.

2 **MR WILLIAMS:** Sorry, you are quite right. I have

3 a different document in mind, I am sorry.

4 So what you have in mind, I think, is that

5 Dorchester Kingsize should move from 3.58 to 3.63.

6 I say you, I mean ITL obviously, I beg your pardon.

7 Yes? So Kingsize moved from 3.58 we see in the middle

8 of the second line there, to 3.63. Yes?

9 **A.** I am assuming, looking at the date of this letter, it's

10 probably just after a Budget increase. There is usually

11 a Budget in March, so ...

12 **THE CHAIRMAN:** Can you agree that that's what the letter

13 seems to be saying?

14 **A.** Yes.

15 **MR WILLIAMS:** And Dorchester Superkings move from 3.67 to

16 3.66?

17 **A.** I think that's what the letter is saying, yes.

18 **Q.** And Richmond Kingsize stay at 3.63, and Superkings move

19 up a penny to 3.66.

20 **A.** Based on what the Safeway policy was in petrol filling

21 stations at that time.

22 **Q.** I think I am suggesting to you that this is not about

23 Safeway's pricing policy, it seems to be about brands

24 being priced at parity, because the first point we have

25 seen is about Richmond matching Dorchester, and this

1 really looks like it's about the same thing, Dorchester

2 and Richmond matching each other.

3 **A.** Well, it's whatever Safeway had told us was their policy

4 in the petrol filling stations, yes, so it was RRP and

5 this seems to be RRP plus 5p or 6p, which is what

6 Safeway have told us is their policy.

7 **Q.** I think you said earlier on that you wouldn't write to

8 Safeway in relation to errors in its application of its

9 own pricing policy, unless the errors were also

10 incompatible with your pricing strategy. Is that right?

11 **A.** I think what I said was I generally wouldn't but I think

12 there were one or two occasions when it may have

13 happened. I think that's what I said.

14 **DR SCOTT:** Just one small point of clarification, the budget

15 this year didn't occur until 17 April, so this is not --

16 **A.** Apologies, I don't know the dates of the Budgets.

17 **MR WILLIAMS:** What you actually do, on Superkings, when this

18 letter is written -- and I shouldn't keep saying "you",

19 because obviously it isn't you, I am sorry. What the

20 letter does is that on Superkings, Richmond has a 2p

21 advantage over Dorchester, but the letter suggests that

22 that 2p advantage should be cancelled out in, by doing

23 two things, moving Richmond up a penny and Dorchester

24 down a penny.

25 **A.** The letter suggests that, but I don't know what tactical

1 support was going on at that time. The letter you took

2 me to a few minutes ago showed we were reducing tactical

3 bonuses, I don't know what was going on at the time in

4 terms of bonusing, tactical bonusing.

5 **Q.** But the tactical bonus, if there was a tactical bonus,

6 would have been in order to make sure that the prices

7 were at the level you wanted to see, wouldn't they?

8 **A.** We would set an objective of our brands. In the case of

9 Richmond and Dorchester, our brands no more expensive

10 than Dorchester.

11 **Q.** In theory, if the differentials are maximum

12 differentials, if they moved the price to a level which

13 was more advantageous to you in circumstances where

14 a tactical bonus was being paid, then in theory that's

15 something that ITL would be pleased about?

16 **A.** If we are receiving a shelf price better than, for

17 Richmond, better than Dorchester, generally speaking we

18 would be pleased about that, yes.

19 **Q.** Yet what we see here is that, rather than rub your hands

20 in celebration and keep quiet, what ITL does is write

21 and say that Richmond Superkings should be moved to

22 a price point where it's 2p less competitive with

23 Dorchester Superkings?

24 **A.** And that goes back to what I said earlier on. We

25 generally would not bring this to retailer attention,

1 but petrol filling stations were selling at RRP and in  
 2 this occasion George has highlighted where a brand is  
 3 not at RRP.  
 4 **Q.** Isn't the reality that this letter is bringing this to  
 5 Safeway's attention because Superkings are not being  
 6 priced in accordance with ITL's pricing strategy, which  
 7 is what you would expect, given the evidence you gave  
 8 earlier on?  
 9 **A.** Our pricing objectives would remain that Richmond would  
 10 be no more than Dorchester. That's our objective. If  
 11 Safeway had said to us "our policy in petrol filling  
 12 stations is sell at RRP", that's perhaps what George has  
 13 highlighted here. I don't know what George has  
 14 highlighted. (a) I wasn't involved in the account then,  
 15 but (b), Safeway were charging more in their petrol  
 16 filling stations and we were looking to get our  
 17 Superkings brand reduced, Superkings down from 4.20 to  
 18 4.18, so I am assuming that's in relation to an RRP  
 19 position.  
 20 **Q.** You would assume that's because you want that brand  
 21 priced in accordance with ITL's pricing strategy?  
 22 **A.** And with whatever Safeway's policy was.  
 23 **Q.** One more question about this part of the letter. This  
 24 is one of many, many documents on the Safeway file where  
 25 what ITL does is suggest to Safeway they move in the

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1 price of a Gallaher brand. And we saw one of those in  
 2 your letter at tab 79 earlier on, B&H Silver. Isn't it  
 3 right to say that the reason why ITL was pointing out  
 4 errors in the price of Gallaher brands is because those  
 5 brands weren't being priced in accordance with ITL's  
 6 pricing strategy?  
 7 **A.** If our brands were being disadvantaged we would  
 8 highlight it. But there is another document in here  
 9 from, I think, Trevor's boss pointing out that it's  
 10 their pricing policy. One of the tabs in here somewhere  
 11 talks about he is stating to us Safeway set their own  
 12 pricing policy.  
 13 **Q.** But you didn't just highlight it, you suggested that the  
 14 Gallaher price should be moved?  
 15 **A.** It was highlighted in my case with a question mark after  
 16 it as a suggested price. I couldn't encourage them to  
 17 do it. It's their choice.  
 18 **Q.** Would you agree that you believed that ITL's pricing  
 19 strategy had implications for the price not only of  
 20 ITL's brands but the price of Gallaher's brands?  
 21 **A.** I can't comment on Gallaher's brands.  
 22 **Q.** But Mr Byas has commented on a Gallaher brand and you  
 23 commented on B&H Silver in the letter at tab 79.  
 24 **A.** As a point of reference where, if it's not -- if our  
 25 objective is not being met and we believe it's not in

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1 line with the retailer's objective, we would certainly  
 2 highlight it.  
 3 **Q.** Can we --  
 4 **A.** Because as I said, in this, it's saying, is it to do  
 5 with the systems problems, so we are highlighting things  
 6 that don't appear -- we go into the calls, we see some  
 7 pricing, it seems to be different to what the buyer is  
 8 telling us, we have highlighted it.  
 9 **Q.** Can we just then move over the page back to 55, which  
 10 you have already read, but please cast your eye over it  
 11 again if you want to.  
 12 (Pause)  
 13 This is another letter where, in the fourth point,  
 14 and I was going to focus on that at the moment, you  
 15 recommend that ITL's preferred differentials are  
 16 realigned by moving both Golden Virginia and Old Holborn  
 17 up to the common price of 2.28. The reason for doing  
 18 that is to make sure that, firstly, Old Holborn and  
 19 Golden Virginia are priced at the same price point; do  
 20 you agree with that?  
 21 **A.** Reading this, we obviously were doing tactical bonuses  
 22 on Golden Virginia so we are stopping tactical bonuses  
 23 on Golden Virginia and obviously I don't know whether  
 24 Gallaher's were paying tactical bonuses on Old Holborn  
 25 or not, but if they were, if we stopped it and then they

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1 eventually stopped it, that would be a benefit for us.  
 2 **Q.** Yes, but I was just talking about what's happening to  
 3 the prices and what outcomes ITL wanted to see, and  
 4 I think the first point that I was putting to you is  
 5 that you wanted to see Golden Virginia and Old Holborn  
 6 at parity at 2.28; do you agree?  
 7 **A.** We would like to see Golden Virginia no more than  
 8 Old Holborn and the price is suggested of 2.28, yes.  
 9 **Q.** And you also want Golden Virginia to be 10p more than  
 10 Drum --  
 11 **MR HOWARD:** When you say "you", do you mean Mr Byas?  
 12 **MR WILLIAMS:** Sorry, I keep doing this, but I have explained  
 13 I don't mean "you".  
 14 **THE CHAIRMAN:** The writer of the letter.  
 15 **MR WILLIAMS:** The writer of the letter.  
 16 Yes, ITL also wants to see Golden Virginia 10p above  
 17 Drum and Amber Leaf?  
 18 **A.** We had been, but then we were stopping that position.  
 19 **Q.** Is that right?  
 20 **A.** Yes, that's why were stopping --  
 21 **Q.** Golden Virginia is currently --  
 22 **A.** We were stopping the tactical bonus, so we had  
 23 a tactical bonus and we were stopping it.  
 24 **Q.** Yes, "We are paying for parity at 10p, 20p, 40p more  
 25 expensive than Drum/Amber Leaf", so you were going to

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1 maintain the differential with Old Holborn at 2.28, and  
 2 we can't actually tell what the relationship between  
 3 Golden Virginia and Drum and Amber Leaf would have been,  
 4 because I don't think this letter tells us?  
 5 **A.** Well, it says in the first sentence we are paying for  
 6 a position, and then the current GV bonus will end, so  
 7 we were paying, then were stopping paying.  
 8 **Q.** You are paying for parity at 10p, 20p, 40p more  
 9 expensive?  
 10 **A.** That was a tactical bonus, yes.  
 11 **Q.** And you are taking away the tactical bonus; is that  
 12 right?  
 13 **A.** Correct.  
 14 **Q.** And yet you still want to see Old Holborn and  
 15 Golden Virginia at parity at 2.28?  
 16 **A.** That would be an objective of ours, yes.  
 17 **Q.** So it's another example where your requests to Safeway  
 18 to achieve your parity and differential requirements  
 19 don't depend on the payment of a tactical bonus?  
 20 **A.** We are suggesting a price to Safeway of 2.28, and  
 21 obviously if Old Holborn is paying a tactical bonus at  
 22 the moment, which I don't know whether they are or not,  
 23 if they continue paying, obviously Old Holborn would be  
 24 cheaper than us.  
 25 **Q.** But what you say is that they should move both

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1 Golden Virginia and Old Holborn up to the common price,  
 2 so you expect to see both your brand and the Gallaher  
 3 brand move to a common price?  
 4 **A.** George is recommending that for Safeway to make  
 5 a decision.  
 6 **Q.** I think what he is recommending is that they move into  
 7 line with other grocers at the particular price point,  
 8 but he does expect to see parity at 2.28 or parity at  
 9 some particular price at least?  
 10 **A.** He has suggested it, but I don't know what did happen on  
 11 the pricing, but he suggested it to Safeway, whether  
 12 they did it or not I don't know.  
 13 **Q.** Underneath that he says:  
 14 "The current bonus on GV will cease from this date  
 15 of implementation. Can you please advise Gallaher of  
 16 this move."  
 17 Can you explain why he might have said that?  
 18 **A.** We were ceasing our tactical promotions, so therefore GV  
 19 would have gone up on -- the shelf price would have gone  
 20 up, we assume, and Gallaher would have either been told  
 21 by Safeway GV has gone up, or they would have seen it in  
 22 stores that GV had gone up themselves.  
 23 **Q.** Why would you suggest that he advise Gallaher of the  
 24 move? Sorry, why would Imperial suggest that Mr Thomas  
 25 advise Gallaher of the move?

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1 **A.** Because maybe they would have stopped their tactical  
 2 bonus, maybe they would have carried on with it, we  
 3 don't know.  
 4 **Q.** Presumably if he was asking Mr Thomas to have that  
 5 conversation with Gallaher, that was because he wanted  
 6 Safeway and Gallaher to have a conversation about  
 7 whatever they needed to talk about in order to get to  
 8 the price point of 2.28; do you agree with that?  
 9 **A.** He's putting here "can you advise Gallaher"; whether  
 10 Trevor did speak to Gallaher about it or not, I don't  
 11 know.  
 12 **Q.** No, no, of course you don't know.  
 13 **THE CHAIRMAN:** The point is, Mr Culham, is he saying, "Can  
 14 you tell Gallaher that we are ceasing our bonusing of  
 15 GV" because he hoped that Gallaher would then respond by  
 16 stopping their bonusing if they were bonusing  
 17 Old Holborn, which would make it more likely that they  
 18 would re-establish at the same level price more quickly  
 19 than they might if it was just left to Gallaher to  
 20 notice in the shops that this was happening.  
 21 **A.** It could save a couple of days, yes, because you would  
 22 notice the price change in a store, say for example on  
 23 a Monday --  
 24 **THE CHAIRMAN:** But the suggestion that he advise Gallaher of  
 25 the move, that's based on the assumption, do you think,

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1 that that might prompt Gallaher to stop --  
 2 **A.** It could do, yes.  
 3 **THE CHAIRMAN:** -- bonusing Old Holborn if they knew that  
 4 ITL was stopping the bonusing of Golden Virginia?  
 5 **A.** That could, it would give them the information and  
 6 Gallaher would decide whether to carry on with it or to  
 7 cease it or to change it.  
 8 **MR WILLIAMS:** I just want to be clear why I am raising this  
 9 point. You had an understanding with Safeway that your  
 10 brand, Golden Virginia, would be at parity with  
 11 Old Holborn, and you didn't really care whether Safeway  
 12 achieved that strategy by going off and having a word  
 13 with Gallaher behind the scenes, if that was what  
 14 Safeway needed to do to achieve that price point. What  
 15 you were interested in is Safeway complying with your  
 16 strategy, complying with the understanding between you  
 17 that they would price these brands at parity?  
 18 **A.** The same paragraph you are referring to, Golden Virginia  
 19 was 1p or 8p more expensive than Old Holborn, so we  
 20 weren't achieving our objective. We decided to stop our  
 21 tactical bonus and Safeway would decide what to do with  
 22 Gallaher.  
 23 **Q.** I am just going to move to a different topic now, if  
 24 I may. Do you have your witness statement there? You  
 25 deal with Safeway's own pricing --

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1 A. Which paragraph are you in?  
 2 Q. In various paragraphs. It's probably useful if you read  
 3 158, 159, 167 and 169. Then I'll ask you some questions  
 4 about what I think is the point that all of them make.  
 5 A. Can I write down which ones?  
 6 Q. If you want to read them one by one, I am happy to tell  
 7 you.  
 8 A. 158 first?  
 9 Q. 158 first, yes, and then 159.  
 10 (Pause)  
 11 A. 159?  
 12 Q. And then 167 and 169, but they are not freestanding  
 13 paragraphs, actually, they relate to a letter, so the  
 14 discussion starts at 166.  
 15 (Pause)  
 16 A. 169 was the last one?  
 17 Q. That was the last one. I am sorry to have given you  
 18 a lot of reading to do there, but there is just a few  
 19 short questions that I think can cover this all off  
 20 together.  
 21 As I read the paragraphs, they are all concerned  
 22 with the point that Safeway shows the absolute level of  
 23 prices that it wanted to price at. Is it a particular  
 24 benchmark it wanted to price at?  
 25 A. They did, however when we introduced tactical bonuses we

1 would set a maxima benchmark price then.  
 2 Q. Subject to that -- the point I am making really is that  
 3 this is all about absolute price levels, it's not about  
 4 pricing relativities between -- I don't think you are  
 5 saying anything about Safeway's strategy as regards the  
 6 relativities between Gallaher and ITL brands, there is  
 7 no incompatibility between Safeway choosing this  
 8 absolute price level and then you having a strategy of  
 9 asking them to comply with pricing differentials between  
 10 the linked brands?  
 11 A. Well, we had our objectives, and the fact there are so  
 12 many letters where we have highlighted pricing confirms  
 13 that Safeway weren't actually setting their pricing in  
 14 line with what our objectives were.  
 15 Q. We have seen a lot of reference to errors which suggest  
 16 that you were working on the basis that they should be  
 17 implementing your strategy, but that is a different  
 18 point. The point I was --  
 19 A. Either our strategy or --  
 20 THE CHAIRMAN: Let's just try and get back to the point.  
 21 Could you put the first question again, Mr Williams.  
 22 MR WILLIAMS: Yes.  
 23 These paragraphs of your statement, they are all  
 24 saying Safeway chose the absolute level of its prices  
 25 where it pitched itself in absolute terms?

1 A. Yes.  
 2 Q. They are not saying anything about the relativities  
 3 between ITL brands and Gallaher brands, you are not  
 4 commenting on that in these paragraphs?  
 5 A. I don't think I am, no.  
 6 Q. In fact, it's perfectly possible for Safeway to choose  
 7 whatever absolute price benchmark it wants to choose and  
 8 at the same time to achieve the pricing differentials  
 9 between ITL brands and Gallaher brands that formed the  
 10 basis of your strategy?  
 11 A. They chose their own pricing policy and some of the time  
 12 that was in line with our objectives and some of the  
 13 time brands were not in line with it.  
 14 THE CHAIRMAN: But their pricing policy that you are  
 15 discussing in these paragraphs was not of itself  
 16 inherently making it impossible for them to decide on  
 17 a pricing policy about differentials which in fact was  
 18 the same as ITL's with some of the brands?  
 19 A. If Safeway had -- whatever policy Safeway had was their  
 20 choice. If you use the petrol filling stations as  
 21 an example, because that's one common price, our  
 22 differential policy was in line with the differentials  
 23 in the RRP, and Safeway had told us their pricing policy  
 24 in the petrol filling stations was to sell at RRP. So  
 25 in other words the two would naturally, should be the

1 same most of the time. In the case of the stores where  
 2 they were doing more price activity it was going up and  
 3 down and they had the tilt and various premiums. So  
 4 it's not quite so easy to explain that one. But yes, if  
 5 Trevor knew exactly what the Safeway policy was and it  
 6 was adopted correctly across all brands, it could well  
 7 be that our objectives would be achieved as well. But  
 8 they weren't, and that's why all the letters referring  
 9 to pricing are in the file.  
 10 MR WILLIAMS: I think that's probably enough on that.  
 11 THE CHAIRMAN: Yes.  
 12 MR WILLIAMS: I am just going to move on to the last set of  
 13 questions I want to ask you. I am going to ask you to  
 14 read a letter that you weren't involved in, just to read  
 15 it for context, and then I am going to ask you some  
 16 questions about a letter you were involved in.  
 17 Could you read the document at tab 65, please,  
 18 {D28/65/138}, and you actually don't need to read all of  
 19 it, you can start with the words at the bottom of the  
 20 first page "At the MPI ..."  
 21 (Pause)  
 22 You can stop when you get to --  
 23 A. Sorry, I am just reading the bit above it because it's  
 24 relevant.  
 25 Q. Okay.

1 (Pause)  
 2 Now, I am not going to ask you questions about this  
 3 document, but I will tell you what I think it shows,  
 4 because I think that's relevant to the questions I am  
 5 going to ask you in a moment.  
 6 I think it shows that ITL expects that when it puts  
 7 its prices up, the price list differentials between, in  
 8 this case, Richmond on the one hand and on the other  
 9 hand Sterling and Dorchester, that those differentials  
 10 will be maintained by the prices of the Gallaher brands  
 11 being increased as well. That's what ITL expects to  
 12 see.  
 13 Now, you don't have to comment on that, but you can  
 14 comment on it if you want.  
 15 **A.** I think the background to this was Gallaher had had  
 16 an MPI several months, two or three months earlier than  
 17 Imperial. We announced an MPI for September. And  
 18 I believe between the Gallaher MPI, Gallaher had been  
 19 doing tactical bonuses on their brands. So that's  
 20 what's behind this, I think.  
 21 **Q.** I said I wasn't going to ask you questions about the  
 22 letter. Could you move to tab 79 again {D68/79/146} and  
 23 we will look at that bit of the letter that we didn't  
 24 look at before, the very short first two lines about  
 25 Cafe Creme.

1 (Pause)  
 2 There are only two lines there. So this is dealing  
 3 with your Cafe Creme brand. Would you agree that, under  
 4 ITL's pricing strategy, Cafe Creme was linked to Hamlet  
 5 Miniatures? Do you remember that?  
 6 **A.** I believe -- well, Cafe Creme wasn't actually  
 7 an Imperial Tobacco brand, we distributed it on behalf  
 8 of Henri Wintermans but we were the distributor of it.  
 9 so Henri --  
 10 **THE CHAIRMAN:** You need to slow down. Perhaps you would  
 11 give that answer again.  
 12 **MR WILLIAMS:** Sorry if you are taking your lead from me; we  
 13 are as bad as each other, perhaps.  
 14 **A.** Apologies.  
 15 Imperial Tobacco distributed Cafe Creme brands for,  
 16 I think, 20 or 30 years but they were manufactured in  
 17 Holland by Henri Wintermans. They set the pricing  
 18 policy and they set the retail price of it, but we acted  
 19 as their agent in the UK, and the RRP's for Cafe Creme  
 20 were set by Henri Wintermans which were the same as  
 21 Hamlet Miniatures.  
 22 **Q.** I will give you briefly a bit of context. Do you want  
 23 to turn back to tab 61, {D28/61/126}, corresponding  
 24 with Safeway about this. Very quickly, on the second  
 25 page, this is a slightly confusing letter because it's

1 written in the context of the June to September period  
 2 when everything was out of kilter, but on the second  
 3 page it says:  
 4 "Cafe Creme brands should be 6p against Hamlet  
 5 Miniatures but are currently the same price. Either you  
 6 have not applied the MPI or Gallaher are holding down  
 7 Hamlet Miniatures."  
 8 I think we can work out from that that absent the  
 9 MPI they would have been at parity, so that would have  
 10 been the normal position, and it goes on to say:  
 11 "On the multipack there should also be parity."  
 12 So that's the sort of normal relationship between  
 13 them?  
 14 **A.** Both RRP's were the same normally.  
 15 **Q.** Yes, I just wanted to put that in the context of that  
 16 letter if that was helpful.  
 17 Going back to tab 79, you say:  
 18 "Thank you for ensuring that the prices of  
 19 Cafe Creme were not increased."  
 20 So they have been held down with some form of bonus,  
 21 is that right?  
 22 **A.** I think the Imperial Tobacco MPI was in, was it June?  
 23 **Q.** I think you are right, I think it was.  
 24 **A.** Imperial Tobacco had an MPI on 23 June, but  
 25 Henri Wintermans decided to have their MPI on 1 August,

1 so they delayed it six weeks later for -- the MPI on  
 2 that product was later.  
 3 **Q.** Then it says:  
 4 "Don't forget to change these prices by 7p with  
 5 effect from 1 August 2003."  
 6 So that is reminding them they should put their  
 7 prices up on that date?  
 8 **A.** It's actually reminding him that the MPI for Cafe Creme  
 9 was on 1 August 2003 and his costs would go up on that  
 10 day, and if he wants to maintain his margin, he has to  
 11 put his prices up by 7p.  
 12 **Q.** Well, it doesn't say again if you want to maintain your  
 13 margin, put the price up by 7p, it says "don't forget".  
 14 **A.** I didn't write all that, but that's what it meant.  
 15 **Q.** If we go over the page, you can see at the top it says:  
 16 "Cafe Creme Filter should be 2.96."  
 17 Do you see that?  
 18 **A.** I do, yes.  
 19 **Q.** 20p above Cafe Creme. From that I think we can work out  
 20 that Cafe Creme Filter is at 2.76, because that's 20p  
 21 below 2.96?  
 22 **A.** Cafe Creme would be 2.76.  
 23 **Q.** Sorry, that's what I meant to say, Cafe Creme would be  
 24 at 2.76.  
 25 **A.** Reading this, yes.

1 Q. That's right. What I am suggesting to you is that when  
 2 you talked about Cafe Creme going up on 1 August, you  
 3 would have been confident in the same way that Mr Byas  
 4 was confident when he wrote the letter we were just  
 5 looking at that the linked brand, that is Hamlet  
 6 Miniatures, would also go up 7p?  
 7 A. I can't comment on what the price of Hamlet was at the  
 8 time. I don't know when the Gallaher MPI was, if there  
 9 was one at that time.  
 10 Q. I don't suppose you will remember, so I'll just tell you  
 11 what was happening on Hamlet, if that's the quickest way  
 12 to do it. If we look at documents we have in annex 26,  
 13 we can see that on the same date that -- perhaps I'll  
 14 just get it for myself to make sure that's correct.  
 15 A. Do I need to look at that document?  
 16 Q. It's a Gallaher document, so it's probably not  
 17 worthwhile. (Pause). Sorry, my file has just fallen to  
 18 pieces, I won't be a moment. (Pause). So we see that  
 19 on 1 July 2003 Hamlet Miniatures went to 2.76. We get  
 20 that from annex 26, document 56. {D26/56/129}. We see  
 21 that after Cafe Creme went up to 2.83, Hamlet Miniatures  
 22 also went up to 2.83. We get that from document 59. So  
 23 what I am suggesting to you --  
 24 THE CHAIRMAN: What's the question?  
 25 MR WILLIAMS: -- is that when you put up the price of

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1 Cafe Creme 7p, you expected Hamlet Miniatures to go up  
 2 7p, just as Mr Byas expected the price of Dorchester to  
 3 go up when the price of Richmond went up?  
 4 A. This was just a statement that we had an MPI on  
 5 Cafe Creme that was delayed and reminding -- the reason  
 6 for the sentence there was I didn't want Trevor coming  
 7 back to me in August saying "You owe me for a lower cost  
 8 price for these products". I do not recollect what  
 9 Hamlet was doing at the time or when Gallaher's -- did  
 10 they have an MPI?  
 11 THE CHAIRMAN: Well, if you don't recollect, then there is  
 12 no point going into it.  
 13 A. No.  
 14 MR WILLIAMS: Just looking again further down the page in  
 15 79, I just wanted to put to you, now that we have looked  
 16 at some other documents in the file, that the language  
 17 here of "suggested price" and the question marks, this  
 18 is not representative of the way that the Safeway/ITL  
 19 relationship worked, it's a very different sort of  
 20 letter, it's a letter written in this same summer period  
 21 in 2003, and it isn't reflective of the way in which ITL  
 22 dealt with Safeway. Safeway normally dealt with Safeway  
 23 (sic) in terms which made it clear --  
 24 THE CHAIRMAN: Sorry, what are you saying is the normal --  
 25 MR WILLIAMS: Sorry, ITL normally dealt with Safeway on

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1 terms which were absolutely explicit, that it expected  
 2 Safeway to price in accordance with its pricing  
 3 strategy.  
 4 A. I disagree. I think it's just the change of my style of  
 5 writing letters compared to George's style. The court  
 6 or the Tribunal saw various letters I wrote to Shell  
 7 a couple of weeks ago, and will see more in the  
 8 coming weeks. We are not told what to write in letters,  
 9 we all construct the letters and they were typed  
 10 invariably by ourselves as well and we used different  
 11 styles. But the policy from the company was the same,  
 12 it is just my style is different to George's.  
 13 MR WILLIAMS: Thank you very much.  
 14 THE CHAIRMAN: Mr Saini.  
 15 Cross-examination by MR SAINI  
 16 MR SAINI: I have just a few questions, Mr Culham. I am  
 17 counsel for Morrisons and Safeway.  
 18 Can I ask you just a general question? I am  
 19 obviously restricting myself to the period from which  
 20 you became in charge of the Safeway account.  
 21 We see in the file that we have been looking at,  
 22 that's annex 28, both when you were dealing with it and  
 23 Mr Byas, quite a substantial number of what I call error  
 24 letters being sent to Mr Thomas.  
 25 Was there something exceptional about the way

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1 Mr Thomas behaved that required so many letters?  
 2 A. I think diplomatically I can only refer to what George  
 3 wrote in his business plan, he was [REDACTED]  
 4 [REDACTED] [REDACTED] [REDACTED]  
 5 [REDACTED], but secondly Safeway's own pricing  
 6 policy across all their stores for all products was  
 7 actually, I think, being changed and the buyers didn't  
 8 actually know sometimes what was going on, because they  
 9 were -- they introduced the tilt pricing, premium  
 10 pricing, systems errors, things seemed to be going on  
 11 far more in this account outside the buyer's control, or  
 12 he told us they were outside his control.  
 13 Q. Can I ask you, please, to go to tab 77, in file 28,  
 14 {D28/77/181}, which is a document you have been asked  
 15 some questions about. This is your letter to Mr Thomas  
 16 of 16 June 2003. Do you have that?  
 17 A. I do, yes.  
 18 Q. You will recall it's the one about the MPI of  
 19 23 June 2003.  
 20 If you would please go to the second page and to  
 21 subparagraph (b) at the top, which was the focus of  
 22 certain of Mr Williams' questions.  
 23 Could you explain to me what the concern was on the  
 24 part of ITL which made you include this paragraph there?  
 25 What was your worry?

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1 **A.** Safeway, because they had changed their pricing policy  
 2 over the last two years, had a propensity to inflate  
 3 prices more than either a Budget increase or an MPI. So  
 4 I was trying to, if there was a 6p MPI increase on  
 5 products, basically asking Safeway not to increase the  
 6 price of that product by more than 6p.  
 7 **Q.** What actually happened after this?  
 8 **A.** Obviously there are various documents. My recollection  
 9 is several prices went up considerably more than were  
 10 reflected in the cost price changes, and there is  
 11 instances of products having a double MPI effect like  
 12 some brands that went up 6p went up 12p, some that went  
 13 up 8p went up 16p, so we were trying to keep the prices  
 14 down. Safeway, either through a deliberate policy or  
 15 inefficiencies, actually were increasing far greater  
 16 than the MPI.  
 17 **Q.** Was that the subject of discussions between you and  
 18 Mr Thomas?  
 19 **A.** Oh, very much so, because we were trying to keep the  
 20 prices down, and I don't know whether he actually  
 21 controlled the prices himself or it was at a more senior  
 22 level than him in the Safeway business.  
 23 **Q.** Can I please ask you to turn, finally, to document 79,  
 24 {D28/79/186}, which you were just being asked questions  
 25 about by Mr Williams, which is the suggested price

1 document, you may recall, 1 July 2003.  
 2 I think you had been informed that certain of the  
 3 suggested prices are suggested prices of Gallaher  
 4 products. You recall that?  
 5 **A.** I think there is -- yes, there are, yes.  
 6 **Q.** Before I ask you about that specific question, can you  
 7 explain why, from ITL's perspective, it paid bonuses to  
 8 Safeway and indeed any retailers, bonuses in respect of  
 9 tobacco products?  
 10 **A.** In the case of Safeway specifically, we paid ongoing  
 11 bonuses to encourage them to sell below RRP price, to  
 12 have our brands well displayed on their fixtures, and  
 13 encouraging distribution of our products, because we  
 14 wanted as wide a distribution of our products as  
 15 possible.  
 16 **Q.** Was any element of these bonus payments connected to the  
 17 price of a Gallaher product? In other words, did you  
 18 expect the Gallaher pricing to change depending on the  
 19 bonuses you paid?  
 20 **A.** Not in a long-term investment or even in the short-term.  
 21 We would increase -- sorry, we would introduce  
 22 a tactical bonus or remove a tactical bonus, depending  
 23 on what our brands were priced at, but ongoing certainly  
 24 there was nothing in the agreement with Safeway  
 25 regarding differentials at all.

1 **MR SAINI:** Thank you very much.  
 2 **THE CHAIRMAN:** Yes, Mr Howard.  
 3 Re-examination by MR HOWARD  
 4 **MR HOWARD:** Yes, just a few questions, Mr Culham.  
 5 I want to try and go through it in the order that  
 6 Mr Williams went through things. So go, please, to  
 7 tab 9. Asking you about this letter, although you were  
 8 asked about a lot of letters that you weren't party to,  
 9 but since you have been asked what was happening in  
 10 them, we should look at it.  
 11 You were shown tab 9, but I think your attention  
 12 wasn't drawn to the last paragraph. Could you just read  
 13 that to yourself. {D28/9/18}.  
 14 (Pause)  
 15 So in terms of bonuses and so on and tactical  
 16 bonuses, can you explain what's going on in this letter?  
 17 **A.** We have offered Safeway a tactical bonus to reduce the  
 18 price of Lambert & Butler and John Player Special across  
 19 their estate, and offered to fully fund it from their  
 20 normal chosen shelf price.  
 21 **Q.** Right. Interestingly, we can see that, I think the  
 22 questions were put to you on the basis -- you have been  
 23 asked a number of questions to the effect that there  
 24 were differentials and the differentials were, I think,  
 25 of a fixed amount. Now, if we look at the letter for

1 a moment, we can see that Mayfair 20s you are  
 2 suggesting, or Mr Downham was suggesting a move from  
 3 3.44 down to 3.39. Now, at 3.44, sorry, Mayfair --  
 4 sorry, he is not suggesting a move. Mayfair had moved.  
 5 Mayfair had been at 3.44, and we can see that L&B  
 6 Kingsize had been at 3.63, and JPS Kingsize and Lights  
 7 had also been at 3.63, which by my maths is a 19p  
 8 differential?  
 9 **A.** Yes, that's correct, yes.  
 10 **Q.** Right. Now, what I think Mr Williams said to you was  
 11 the differential that was part of Imperial's strategy at  
 12 this stage was 20p, and I think he says it's fixed and  
 13 it must only be 20p. What do we learn from this where  
 14 we see that here Safeway had themselves priced L&B at  
 15 a 19p differential?  
 16 **A.** They -- if the differential was 20p, they were not  
 17 achieving that in a store price whilst offering tactical  
 18 bonuses.  
 19 **Q.** Whose choice was it as to what differential they  
 20 actually applied?  
 21 **A.** Safeway set their own pricing.  
 22 **Q.** Right. So perhaps then we could go to 79, I would like  
 23 to ask you something about that. 79 you were asked  
 24 quite a lot of questions about. {D28/79/187}. Can we  
 25 go to the second page, where, in the summary, you say:



1 "Hopefully you will be able to correct these  
 2 urgently, as currently your customers are being  
 3 overcharged compared to your [and you say that should  
 4 read] own price policy and your competitors' on most of  
 5 the products highlighted."  
 6 Who are you trying to benefit by this paragraph?  
 7 A. (a) consumers by having lower prices, (b) Safeway that  
 8 hopefully would sell more if they were at lower prices,  
 9 and (c) Imperial because it has reduced the price of our  
 10 brands to make them more competitive so more people  
 11 might buy our brands.  
 12 Q. Then go back to tab 15, which is another one of these  
 13 letters that predates your involvement. You see at  
 14 tab 15 {D28/15/26} that this is, we see, you were shown  
 15 the bit under "BP/Safeway Pricing", as I understand it  
 16 Safeway are running petrol stations in some sort of  
 17 venture with BP; is that what it was?  
 18 A. Yes, they were BP petrol stations that then had  
 19 a Safeway little mini store on them, a bit like  
 20 Marks & Spencers do now with Simply Food. It was the  
 21 forerunner of that.  
 22 Q. We see that there is a complaint in the letter about ITL  
 23 brands being disadvantaged. What's the complaint in  
 24 terms of disadvantaged and why would Imperial be  
 25 concerned about that?

1 A. From the reports it seemed that the BP/Safeway pricing  
 2 position was not treating -- sorry, was treating our  
 3 brands worse than Gallaher brands, and we were seeking  
 4 at least parity or better treatment. So we were being,  
 5 in our mind, disadvantaged. So our brands were more  
 6 expensive on the shelf than our competitors' similar  
 7 products.  
 8 Q. Right. Then you mentioned on a number of times, but  
 9 Mr Williams didn't go to it, tab 1 of the bundle.  
 10 {D28/1/2}. I think we ought to turn to that. Can you,  
 11 first by reference to that letter, which is on  
 12 1 December 1999, which I think you have explained to us  
 13 that you would have seen contemporaneously when you took  
 14 over the account, what does that letter -- just taking  
 15 that -- tell us about the nature of the trading  
 16 relationship with Safeway?  
 17 A. It wasn't easy, because they kept increasing pricing.  
 18 Q. What does it tell us as to what you were paying for in  
 19 the trading relationship?  
 20 A. It was the four elements we were paying for them to sell  
 21 below --  
 22 Q. Point out to us in the letter, how you get that out of  
 23 the letter.  
 24 A. Okay. It's the fifth paragraph down.  
 25 Q. Take the third paragraph. What's that dealing with?

1 A. It's specifically for reduction below -- price reduction  
 2 below RRP.  
 3 Q. Right. Then the fourth paragraph seems to be  
 4 complaining about them selling the brand at full price,  
 5 notwithstanding that they are getting this RRP bonus; is  
 6 that right?  
 7 A. Correct.  
 8 Q. To what extent was that a problem, as far as you  
 9 understood it, at Safeway, where they had said they  
 10 would be below RRP but actually were pricing at RRP or  
 11 above?  
 12 A. Sorry, I am not quite sure --  
 13 Q. To what extent, when you became involved, were you aware  
 14 that there was a problem of Safeway getting a bonus to  
 15 price below RRP, then proceeding to price at RRP or  
 16 above?  
 17 A. Okay. The action we took when I had -- prior to me  
 18 taking over the account and when I had the account was  
 19 we deducted from the bonus payment an amount which was  
 20 equal to the volume that was going through at RRP or  
 21 above. So, for example, we only got paid on a certain  
 22 percentage of their volume for the cut price element, so  
 23 the stores that were selling at RRP, ie petrol filling  
 24 stations, received no money for cut price. They only  
 25 received money for availability, distribution, new

1 products. So there was only three elements paid to  
 2 petrol filling stations.  
 3 Q. So we have seen this RRP element. Then the fifth  
 4 paragraph refers to a bonus of so much per thousand, and  
 5 containing additional payments for other factors such as  
 6 availability, merchandising and listing of brands, and  
 7 then there is a breakdown of the payment for  
 8 merchandising, listing and availability as so much per  
 9 thousand, and the remaining element is RRP.  
 10 So at this stage, does it appear that there is any  
 11 other element in the trading arrangement, any other  
 12 element of investment in the trading arrangements other  
 13 than these four categories?  
 14 A. No, there wasn't, and at the time I was managing the  
 15 account, later on in the file there is a price file and  
 16 the same amount that's shown in this document is  
 17 repeated in early 2003.  
 18 Q. Then if you go to tab 33 --  
 19 A. Sorry, apart from tactical bonuses.  
 20 Q. Yes, apart from tactical bonuses. If you then go to  
 21 tab 33, you were shown tab 33, page 361. {D28/33/361}.  
 22 Mr Williams showed you the paragraph that reads:  
 23 "In October 2000 Safeway moved to RRP."  
 24 But he didn't show you the preceding two paragraphs.  
 25 Could you just read those to yourself.

1 (Pause)  
 2 Do those paragraphs reflect what we have just seen  
 3 in the letter in December 1999 as to the nature of the  
 4 trading arrangement?  
 5 A. Yes, in sentiment and actually the values as well.  
 6 Q. Yes. Let's get the position absolutely clear. As far  
 7 as you were aware, was any other trading arrangement  
 8 other than the tactical bonuses and the situation of the  
 9 pre-buy, just leave that pre-buy on one side, other than  
 10 that, are you aware of any other trading arrangement  
 11 with Safeway that was entered into other than what we  
 12 see on page 361?  
 13 A. The only exception is when, in 2001, we entered into  
 14 negotiations over a unit contract(?), supplying the  
 15 units for the store, which I don't think is relevant to  
 16 what we are talking about. So that was another  
 17 different arrangement but ongoing, this was the only  
 18 investment apart from tactical bonuses.  
 19 Q. Mr Williams has suggested, oh, well, an incentive of  
 20 some sort must have been paid, didn't tell us what it  
 21 was, he just says there must be something, we don't know  
 22 what it was, unfortunately. But let me ask you this: if  
 23 this unidentified incentive of some unidentified sum had  
 24 been paid, in other words if an incentive had been paid  
 25 to Safeway, when you took over as national account

1 manager for Safeway, would you have known about it?  
 2 A. Yes, certainly.  
 3 Q. Would it be possible for sums of money to have been paid  
 4 to Safeway to do things in relation to this account  
 5 which you as national account manager would be ignorant  
 6 of?  
 7 A. Certainly not. Each national account manager wrote  
 8 a business plan for each account, and estimated the  
 9 budget or the funding throughout the year, and every  
 10 invoice that came in from a national account manager had  
 11 to be agreed and signed off.  
 12 Q. Now a separate point, can we go to tab 54. {D28/54/109}  
 13 This is a letter, you were asked some questions about  
 14 the petrol filling station paragraph, but I am afraid  
 15 again your attention wasn't completely drawn to all  
 16 aspects of the letter, which I need to do.  
 17 Just before I do that, look at paragraph 2, where we  
 18 see it says:  
 19 "I note that prices of cigarettes in the petrol  
 20 filling stations have also been increased by 5p/6p for  
 21 20 in line with the stores in the superstores. They are  
 22 now therefore premium priced by 5p/6p."  
 23 Stopping there for a moment, so at this stage what  
 24 did you understand Safeway's pricing policy was at the  
 25 petrol filling stations?

1 A. To sell at -- well, we thought their policy was to sell  
 2 at RRP, but obviously this is highlighting they have  
 3 actually gone to a premium price position.  
 4 Q. This Safeway policy where it's RRP plus, did you  
 5 understand when they were doing that whether they  
 6 applied that across the board, so all cigarettes, RRP  
 7 plus 5p, or did they have a policy which differentiated  
 8 between different cigarettes so that some cigarettes are  
 9 RRP plus 5p and some are at some different level?  
 10 A. Well, I wasn't managing the account at this time --  
 11 Q. No, but insofar as you had knowledge of the way the  
 12 account was done --  
 13 A. They would have done it across the board.  
 14 Q. Yes. Now, we see that the letter is in fact relating to  
 15 systems problems, and pointing out or asking whether  
 16 this is the reason for errors. I think you were asked  
 17 questions which were about Mr Byas here making reference  
 18 to the price of Dorchester Superkings coming down.  
 19 Can we look at what he actually says. What he  
 20 points out is that Dorchester Kingsize/Superking size  
 21 are at 3.58/3.67, Richmond Kingsize/Superking size are  
 22 at 3.63/3.65. These brands, by which I think he must be  
 23 meaning Dorchester and Richmond, applying the policy of  
 24 premium price plus, should be 3.63/3.66.  
 25 Now, what we see is he is pointing out a discrepancy

1 in relation to the paired brands. What I wanted to ask  
 2 you is: if you were pointing out a discrepancy, for  
 3 instance in relation to the price of Richmond Kingsize  
 4 against -- sorry, let me start again.  
 5 The Kingsize and the Superking size, to what extent  
 6 are they looked at as a pair that go together?  
 7 A. The Kingsize was a cheaper brand than the Superking  
 8 size, and the price difference between the two, Kingsize  
 9 and Superkings, has changed considerably over the years.  
 10 I think originally it was a penny, and then it is 2p,  
 11 3p. I don't know what it was at this time, but I am  
 12 assuming it was 3p at this time.  
 13 Q. What you can see is he is pointing out that in respect  
 14 of Richmond Kingsize, Imperial is being disadvantaged  
 15 because Dorchester is 5p below it, and in the case of  
 16 the Superking size, it has an advantage. Is there  
 17 anything surprising to you in his pointing out the  
 18 position on the Kingsize and Superking size as  
 19 a package? Would it have made any sense to have simply  
 20 told them, made a complaint about Kingsize or Superking  
 21 size without pointing out what the position was overall  
 22 in relation to these brands?  
 23 A. I think it would make sense to highlight that both were  
 24 wrong or both were -- need to be considered or for  
 25 Safeway to make a choice. Because if you are trying to

1 get -- if you are trying to encourage retailers, you  
 2 have to be honest, you can't withhold the true picture  
 3 from them, and that's why I said earlier on about  
 4 generally speaking we wouldn't identify if a product --  
 5 in a better position than we would like, but there are  
 6 occasions when the greater good, you know, in terms of  
 7 getting the Kingsize down is actually a bigger benefit.

8 **Q.** Then you were taken to tab 55, {D28/55}, and we see the  
 9 paragraph where Mr Byas recommended that Safeway move in  
 10 line with the other grocers, but not Tesco, Asda and  
 11 Kwik Save, and moved both Golden Virginia and  
 12 Old Holborn up to the common price of 2.28. Now, where  
 13 Mr Byas or anybody makes a recommendation in relation to  
 14 the account, as far as you knew, was there any  
 15 obligation on the part of the retailer to accept the  
 16 recommendation?

17 **A.** Never, no.

18 **Q.** You were then asked a question about tab 65, {D28/65}  
 19 about Mr Byas saying at the foot of the page:  
 20 "At the MPI, we wish to move the market up on  
 21 Richmond brands and bring greater profitability to this  
 22 end of the market, therefore on 2 September please  
 23 increase Richmond brands by 4p and 6p. We would  
 24 encourage you to follow on Sterling and Dorchester."  
 25 We see he says "encourage". Again, was there, as

1 far as you know, any obligation on Safeway to follow  
 2 George's encouragement?

3 **A.** None at all. He is just highlighting that with the  
 4 Richmond family there had been occasions where we had  
 5 introduced tactical bonuses to hold at MPIs and Budgets,  
 6 and on this occasion we were not doing that. So where  
 7 it's saying at the bottom to adjust the Richmond price,  
 8 it is basically saying, "We are not doing a tactical  
 9 bonus after the MPI."

10 **Q.** Now, Mr Williams suggested to you that this letter shows  
 11 that when Imperial's prices go up, then the price of  
 12 Gallaher's competing product is required to go up in  
 13 order to maintain the differentials. That's what he  
 14 says, and that's what appears to be the OFT's case.

15 Now, as far as you were concerned, was there ever  
 16 any agreement with Safeway that if you put up your  
 17 prices, that they were required to put up the price of  
 18 Gallaher's product, even if Gallaher didn't put up its  
 19 prices?

20 **A.** Never in Safeway and in the time I was an account  
 21 manager for the company, 20 years, not with any other  
 22 account either.

23 **Q.** Not with any other account either. Can you envisage any  
 24 commercial situation in which a retailer would accept  
 25 an obligation to put up the price of Gallaher's product

1 because you were putting up the price of Imperial's  
 2 product?

3 **A.** There was no -- I can't envisage it at all. There is no  
 4 incentive that we could offer that would encourage  
 5 a retailer to do that.

6 **MR HOWARD:** Right. Thank you very much indeed.  
 7 Questioned by THE TRIBUNAL

8 **DR SCOTT:** I just had a couple of areas I wanted to touch  
 9 on, Mr Culham. The first is you mentioned a price file  
 10 and I think we have not been taken to any price files  
 11 here. Which price file did you have in mind?

12 **A.** I have to thumb through this volume.

13 **DR SCOTT:** That's quite all right.  
 14 (Pause)

15 **A.** Tab 68. {D28/68/147}. If you go to page 2, this was  
 16 a document that was ongoing within the account. So if  
 17 we look down to line 7, so if we go across to column in  
 18 the middle that says "PDA bonus ITL to pay", and that's  
 19 a figure, the one to the right of that is a figure,  
 20 those two figures added together times 5, because that's  
 21 per outer, gets back to the figure that was in tab 1,  
 22 and that carried on throughout the whole time.

23 **THE CHAIRMAN:** What does PDA stand for?

24 **A.** It was promotional discount advice. It was an internal  
 25 document where we paid retailers money, and

1 an arrangement that was agreed with Customs & Excise it  
 2 was actually paid exclusive of VAT, so that's why it's  
 3 got a strange name.

4 **DR SCOTT:** Thank you. One of the things I noticed on this  
 5 price file compared to some of the others we have seen  
 6 is that it doesn't help us in relation to the margins  
 7 that were implicit in these figures. But we understand  
 8 from your evidence that there was considerable concern  
 9 the Safeway's about margin. Now, I do appreciate that  
 10 there was sometimes a certain amount of chaos with  
 11 Mr Thomas, but it does seem that Safeway's were very  
 12 concerned with margins, and as I think you put it, they  
 13 had a propensity for pricing up rather than pricing down  
 14 at the stage that you took over?

15 **A.** Yes, they did, and obviously I can't speak for the  
 16 internal reasons why in Safeway, but their business was  
 17 on the market, and Morrisons bought the business so they  
 18 wanted to make the figures look as good as they could  
 19 do.

20 **DR SCOTT:** Yes, we can understand that.  
 21 Earlier on you told us that you did not want Trevor  
 22 coming back and saying "you owe me for a lower cost  
 23 price", and that seems to reflect that margin point. Is  
 24 that right?

25 **A.** Yes, it's actually true with other accounts, in my

1 experience other buyers have come back and said:  
 2 I forgot to do this, can you pay me the bonus because  
 3 I forgot to put the price up, or for an MPI or something  
 4 like that or extend the promotions.  
 5 **DR SCOTT:** Can we go back for a moment, and this is my last  
 6 point really, to tab 9, please. {D28/9/18}.  
 7 You may remember Mr Williams took you to the  
 8 beginning of tab 9 and Mr Howard took you to the end of  
 9 tab 9, the paragraph:  
 10 "As always these reductions will be fully  
 11 funded ..."  
 12 I wanted just to focus for a moment on those words  
 13 "as always". What seems to be going on here in the  
 14 light of the concern about margins was some sort of  
 15 assurance from ITL to Safeways that as the prices moved  
 16 up and down the bonusing would be such that their  
 17 margins would be maintained, provided they accepted the  
 18 suggestions that were being made. Have I got that  
 19 right?  
 20 **A.** Yes, you have, yes.  
 21 **DR SCOTT:** Thank you very much indeed.  
 22 **THE CHAIRMAN:** Just going back to the price file at tab 68,  
 23 does that show what Safeway's shelf price is going to be  
 24 for those?  
 25 **A.** Ordinarily, no, apart from if there was a tactical bonus

1 that was introduced at a time. So I think on page 235,  
 2 at the top of that, we had offered a tactical bonus on  
 3 Raffles.  
 4 **THE CHAIRMAN:** So when you talk about the fact that the  
 5 letters that you send are pointing out errors so far as  
 6 Safeway's pricing policy is concerned, how did you know  
 7 what their pricing policy was?  
 8 **A.** They had told us, like in petrol filling stations it was  
 9 to sell at RRP, in their supermarkets it was generally  
 10 to be I think 2p or 3p more expensive than Tesco's, and  
 11 in the superstores to be 6p above that.  
 12 **THE CHAIRMAN:** So they told you in conversation or at  
 13 meetings?  
 14 **A.** Yes. That's also why you couldn't put the price on  
 15 a price file because there's at least three different  
 16 prices ongoing at any time. You have the tilt stores as  
 17 well, so it could be seven different prices in Safeway.  
 18 Further re-examination by MR HOWARD  
 19 **MR HOWARD:** Just to be clear, the way the price file  
 20 operated here, this is not a price file where you are  
 21 setting out a calculation of the retail price and what  
 22 the margin would be; that's right?  
 23 **A.** It's just effectively their cost price.  
 24 **Q.** It's their cost price and it's setting out essentially  
 25 their discounts -- sorry, not the discounts, it's

1 setting out such bonus arrangements as there are, plus  
 2 where there is a tactical bonus, it then specifically  
 3 sets out that?  
 4 **A.** Yes, but nothing to do with their selling price, unless  
 5 there was tactical bonus.  
 6 **Q.** The suggestion, just going back to the point that  
 7 Mr Williams made, of this unidentified incentive, if  
 8 there was any incentive, any other bonus being paid,  
 9 where would we find it?  
 10 **A.** It would have to be in there, or a lump sum allowance,  
 11 but there certainly wasn't.  
 12 **MR HOWARD:** Thank you very much.  
 13 **THE CHAIRMAN:** Thank you very much, Mr Culham, that  
 14 completes your evidence as far as Safeway is concerned.  
 15 I know that we are going to be seeing you again in due  
 16 course.  
 17 **A.** I should be staying here!  
 18 **THE CHAIRMAN:** But for the moment I can release you from the  
 19 witness box.  
 20 **A.** Thank you.  
 21 **THE CHAIRMAN:** Thank you.  
 22 (The witness withdrew)  
 23 **THE CHAIRMAN:** Mr Saini, are you going to talk to us about  
 24 Safeway and Gallaher?  
 25

1 Further opening submissions by MR SAINI  
 2 **MR SAINI:** There is no witness, I am not going to take you  
 3 through the correspondence, but I just wanted to make  
 4 two points before one moves on to the next witness, and  
 5 that's in relation to the agreements concerning Safeway  
 6 and Gallaher.  
 7 The position of Safeway is, in common with the  
 8 position articulated by Gallaher, that there is no P&D  
 9 agreement. There is, however, a trading agreement  
 10 between Gallaher and Safeway, and I think I should show  
 11 the Tribunal that, because I think I may not have  
 12 brought it to your attention in my original opening.  
 13 If you would please go to annex 26 and to tab 54(a).  
 14 {D26/54(a)/125}. This is the only signed trading  
 15 agreement that has been discovered, and it's  
 16 an agreement from 1 January 2003 to 31 December 2003.  
 17 Page 1 deals with volume and incentives but I wanted to  
 18 draw the Tribunal's attention, please, to the third  
 19 page, which is marked 259 in the bottom right-hand  
 20 corner. If I may read it, I quote paragraph 3:

21 [REDACTED]  
 22 [REDACTED]  
 23 [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED]

Confidential  
 Gallaher

Confidential  
Gallaher

1 [REDACTED]  
 2 [REDACTED]  
 3 Then at (ii):  
 4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 So the position is that there is no P&D clause in  
 10 the sense one has seen, for example, in the Morrisons  
 11 trading agreements, and some others, but we have a very  
 12 similar opportunity to respond clause.  
 13 In short, after here ITL have started a promotion,  
 14 Gallaher have to be given an opportunity to respond to  
 15 that.  
 16 From the perspective of Gallaher, I would ask  
 17 the Tribunal please to go to annex 3. We can put away  
 18 annex 26. If you could go to tab 17 in that document,  
 19 {D3/17/419} which I hope is a copy of a communication  
 20 from Gallaher to the OFT, and if you could please go  
 21 within that document to page 17, and to the middle of  
 22 the page after the bold typeface referring to PFS, if  
 23 I may quote, three paragraphs down:  
 24 "As explained at section (i) of the introduction, it  
 25 is Gallaher's objective to ensure that its brands are

1 priced competitively as against key competitor brands.  
 2 Safeway never had a 'parities and differentials' clause,  
 3 nor was there ever any understanding between Safeway and  
 4 Gallaher that Safeway would observe parities and  
 5 differentials, however Safeway knew this to be  
 6 Gallaher's objective and would not have wanted to price  
 7 differently in any event."  
 8 I won't ask the Tribunal now to go to  
 9 paragraphs 1.11 and 1.14 earlier in this document, but  
 10 there Gallaher provide an explanation of why retailers  
 11 generally would have wanted to price in a particular  
 12 fashion irrespective of P&D clauses, which is very  
 13 similar to some of the evidence the Tribunal has heard  
 14 in this case.  
 15 So standing back from that, the position of Safeway  
 16 as regards Gallaher is, yes we have a trading agreement  
 17 with an opportunity to respond clause, no P&D clause,  
 18 and that's common ground certainly between Gallaher and  
 19 Safeway.  
 20 The remainder of the case is a case to be argued  
 21 according to the documents, and I am not going to take  
 22 the Tribunal to those documents now because that's  
 23 a matter for closing submissions.  
 24 Thank you very much.  
 25 **THE CHAIRMAN:** Yes, thank you.

1 So that then completes the evidence and submissions  
 2 as regards Safeway. So then, after the short  
 3 adjournment, it's going to be you, is it, Mr Flynn?  
 4 **MR FLYNN:** Yes, Madam, it is. I think in agreement with  
 5 Mr Howard, I was proposing to do a short mini opening on  
 6 behalf of Asda. If Mr Howard has anything to add, no  
 7 doubt he will. Mr Jolliff apparently has just arrived,  
 8 so he is ready to come on this afternoon.  
 9 **THE CHAIRMAN:** Yes.  
 10 **MR FLYNN:** And we will see where we get to, because Mr Hall  
 11 of course has to be dealt with tomorrow.  
 12 **THE CHAIRMAN:** Is that Mr Jolliff at the back of the court?  
 13 **MR FLYNN:** It is not, Madam. Not that I met him, but I know  
 14 he would be escorted.  
 15 **MR SAINI:** Madam, I do not want to spoil the game plan, but  
 16 we don't want to remain in court while Mr Flynn makes  
 17 his opening -- without any disrespect to Mr Flynn -- or  
 18 the evidence that is given in relation to his clients,  
 19 but we would like to hear Mr Lasok's answers to the  
 20 questions from yesterday.  
 21 **THE CHAIRMAN:** I was just coming to that, Mr Saini.  
 22 Mr Lasok, is there something that you would like to  
 23 say as regards the exchanges that occurred at close of  
 24 business yesterday afternoon, as now might be  
 25 an opportune moment for you to do so.

1 Submissions re Tribunal direction by MR LASOK  
 2 **MR LASOK:** In the exchanges yesterday, the Tribunal put  
 3 certain specific questions to the OFT, and there are  
 4 direct answers to those questions that are best  
 5 understood in the context of the case set out in the  
 6 decision.  
 7 What I am going to do is to go to the first of the  
 8 questions that was put and dispose of that one. That  
 9 first question was the one that -- I am going to give  
 10 the references to the transcript: Day 16, page 152,  
 11 line 24, to 153, line 13.  
 12 This is a question about the focus of  
 13 cross-examination. The cross-examination focused on  
 14 grant and withdrawal of bonuses and the link changes in  
 15 the retail prices arises because those communications  
 16 commonly are expressed by the manufacturer in terms of  
 17 moving the retail price to a specified price point, and  
 18 the alteration of the bonus is a consequence of the  
 19 move, and therefore the OFT's contention is that such  
 20 communications are evidence of a P&D arrangement between  
 21 the manufacturer and the retailer. The reason for that  
 22 is that the specified price point to which the move is  
 23 made has been identified by reference to the  
 24 manufacturer's P&D strategy. In some instances, that  
 25 appears on the face of the communication, in other

1 instances it can be deduced by looking at other  
 2 evidence.  
 3 I come now to the second specific question that was  
 4 put, and this is at Day 16, page 153, line 14, to  
 5 page 154, line 1. This relates to paragraph 40(d) of  
 6 the OFT's skeleton. That paragraph refers to the  
 7 situation where, under an ITL P&D agreement with  
 8 a retailer, if the retail price of the Gallaher brand  
 9 decreases then the retail price of ITL's brand must also  
 10 decrease.  
 11 Now, the OFT's case as set out in the decision, and  
 12 indeed in its defence and skeleton, has never been based  
 13 on the premise that under such a P&D agreement -- that's  
 14 to say an ITL P&D agreement -- the retail price of the  
 15 ITL brand must or will decrease even if there is no  
 16 decrease in the net wholesale provides of the ITL brand.  
 17 That's dealt with specifically in paragraphs 6.223  
 18 to 6.224 of the decision. The decision recognises that,  
 19 in the case of a decrease in the price of a Gallaher  
 20 brand, there might not be a decrease in the price of the  
 21 linked ITL brand if ITL decided not to assist or  
 22 encourage the retailer to move the price of the ITL  
 23 brand down by reducing the net wholesale price in some  
 24 way or another, such as by increasing a tactical bonus  
 25 or whatever.

1 It's in relation to that, and before I turn to the  
 2 next specific question that was raised by the Tribunal,  
 3 then it's worthwhile going back to what the decision  
 4 actually says. Because what you have in the decision is  
 5 the following, and in part this has already been  
 6 mentioned by me in opening, but since it does not appear  
 7 to have been put by me in opening clearly, I am going to  
 8 have to try and remedy that particular defect.  
 9 Paragraph 6.213 of the decision describes a P&D  
 10 requirement. If you have 6.213, it's at page 131 of the  
 11 decision, the first sentence describes a P&D  
 12 requirement, and the second sentence describes what  
 13 happens if a P&D requirement is implemented.  
 14 6.213, when it refers to implementation, is not  
 15 limited to implementation by the retailer acting alone.  
 16 The OFT does not consider that the manner of  
 17 implementation is relevant. Accordingly, it simply  
 18 doesn't matter if the manner of implementation involves  
 19 action by the retailer alone or action by the retailer  
 20 acting in combination with the manufacturer, such as  
 21 where the manufacturer reminds the retailer to act, eggs  
 22 on the retailer or provides an inducement.  
 23 In decision paragraphs 6.223 to 225, the OFT  
 24 acknowledges the possibility that a P&D requirement may  
 25 not be implemented in full or at all times. And that is

1 it presaged, if you like, by the fact that 6.213 in the  
 2 second sentence says "if a parity or fixed differential  
 3 requirement is implemented."  
 4 So the position in the decision is based on  
 5 an analysis that focuses on the nature of a P&D  
 6 requirement and then it acknowledges points put to the  
 7 OFT by the appellants, and that arise from the  
 8 evidence -- we see this in paragraph 6.223 -- where the  
 9 OFT has to grapple with the scenario in which the P&D  
 10 requirement may not be the subject of full  
 11 implementation, that's to say implementation in every  
 12 respect and/or at all times.  
 13 So the decision is actually based upon a scenario in  
 14 which there may be partial implementation, and that is  
 15 why, in 6.223 to 6.225, we find the language that is  
 16 used there.  
 17 So we have, in 6.223, the OFT expressly recognising  
 18 that the manufacturers' uncertainty regarding the retail  
 19 price movement of a competing linked brand was not  
 20 completely eliminated. It is for that reason that the  
 21 OFT to say not assert that a P&D requirement in the  
 22 context of the particular cases or agreements that we  
 23 are looking at would have had all the features that are  
 24 described in paragraph 40 of the OFT's skeleton  
 25 argument. That in fact is made abundantly clear in

1 paragraphs 43 to 44 of the OFT's skeleton argument,  
 2 because, for example, the full panoply of the features  
 3 referred to in paragraph 40 of the skeleton argument  
 4 apply where there are parallel and symmetrical  
 5 agreements. That's what paragraph 44 says.  
 6 The case made out in the decision is, therefore,  
 7 that a P&D requirement is anticompetitive by object,  
 8 even if, in the particular factual circumstances in  
 9 which it operates or applies, it does not possess each  
 10 and every one of the features mentioned in paragraph 40  
 11 of the OFT's skeleton argument.  
 12 The question: just how many of the features in  
 13 paragraph 40 must exist for a P&D requirement to be  
 14 anticompetitive by object?, is essentially a matter for  
 15 expert evidence and submission.  
 16 The OFT considers that the number of features  
 17 referred to in paragraph 40 of the OFT's skeleton  
 18 argument present in the arrangement goes to the extent  
 19 of the harm to competition arising from the arrangement,  
 20 but not to its anticompetitive object.  
 21 That is, I think, a completion of the submission  
 22 that I've just made in response to the second question  
 23 put by the Tribunal yesterday and it also enables me to  
 24 move into the next question, which is the one at Day 16,  
 25 page 158, lines 12 to 17.

1 Now, here we move to consider the situation where  
 2 the retailer had agreed or concerted with ITL that the  
 3 retailer's prices would conform to ITL's P&D  
 4 requirements and in that scenario it was, we submit,  
 5 envisaged that the retailer would reduce the retail  
 6 price of the ITL brand when the retailer had, on its own  
 7 initiative, reduced the retail price of the Gallaher  
 8 brand, and that would be so even if ITL had not adjusted  
 9 the bonus so as to maintain the retailer's margin,  
 10 because that scenario was the one in which the retailer  
 11 has decided to suffer a reduction in its margin for the  
 12 linked Gallaher brand. The effect of ITL's P&D  
 13 arrangement with the retailer and, I might add, the  
 14 common sense commercially obvious effect of the P&D  
 15 arrangement is that the retailer cannot disadvantage the  
 16 ITL brand in those circumstances. So if the retailer is  
 17 willing to suffer a reduction in its margin in relation  
 18 to the linked Gallaher brand, the operation of the P&D  
 19 requirement is that it must do the same in relation to  
 20 the ITL brand because ITL fundamentally does not want  
 21 its brands to be disadvantaged.

22 Now, the position is different where the retailer  
 23 has reduced the retail price of the linked Gallaher  
 24 brand at the instigation of Gallaher, because there we  
 25 have the opportunity to respond clause in the trading

1 agreement with ITL where, of course, there is such  
 2 a clause. That's the scenario specifically envisaged in  
 3 paragraph 6.223 of the decision. Where there was no  
 4 formal opportunity to respond clause, the OFT envisages  
 5 that a commensurate reduction in the price of the ITL  
 6 brand would not occur for practical common sense  
 7 reasons. Because in that scenario Gallaher would have  
 8 assisted the retailer to reduce the price of the linked  
 9 Gallaher brand by reducing the real wholesale price,  
 10 whether by way of a tactical bonus or otherwise. But  
 11 ITL, on this hypothesis, would not have done so or would  
 12 not yet have done so. And due to the thinness of the  
 13 retailer's margin, the OFT assumes that the retailer  
 14 would be unwilling to reduce the price of the ITL brand  
 15 commensurately without assistance from ITL and therefore  
 16 we have the situation contemplated in paragraph 6.224 of  
 17 the decision.

18 If ITL decided not to give the support required to  
 19 enable or assist the retailer to reduce the price of the  
 20 ITL brand, the OFT assumes that the price reduction  
 21 would not take place, and that situation is, or that  
 22 possibility, is catered for in paragraphs 6.224 to 6.225  
 23 of the decision.

24 Now, that brings me to the last two questions that  
 25 were put by the Tribunal, which I can deal with in

1 a couple of minutes, and it's probably better if I deal  
 2 with them now, even though it means that there is  
 3 a slight delay before the flow of the gastric juices is  
 4 satisfied.

5 The next question is the one at Day 16 page 160,  
 6 lines 15 to 23. This was a point about communications  
 7 from a manufacturer to a retailer asking or instructing  
 8 the latter to move to a specific price point. Those  
 9 communications are referred to in the decision as  
 10 forming part of the infringing agreements and one  
 11 example of that, but not the only one, is  
 12 paragraph 6.225 of the decision.

13 So I come now to the last question, which is the one  
 14 at Day 16, page 165, line 23 to page 166, line 5. The  
 15 OFT's case is that, depending upon the terms of the  
 16 particular infringing agreement and the circumstances,  
 17 a P&D arrangement created the expectation that the  
 18 retailer would maintain the parity or differential in  
 19 question even if there was no corresponding change in  
 20 the wholesale price. So in the case of a P&D  
 21 arrangement between ITL and a retailer, the latter would  
 22 be expected to increase the retail price of an ITL brand  
 23 if the retail price of the linked Gallaher brand  
 24 increased, even if there was no increase in the  
 25 wholesale price of the ITL brand. That again makes

1 common sense and it makes commercial sense, and is  
 2 supported by the evidence of Mr Batty, because ITL's  
 3 policy was based upon parities and differentials since  
 4 they had concluded that the best place for them in  
 5 relation to these linked brands would be either a parity  
 6 or a differential. So for them, as Mr Batty says, the  
 7 best place for Richmond as against Dorchester was at  
 8 parity with Dorchester. Hence, in order to maintain  
 9 that best place, it was inevitable that under the P&D  
 10 arrangements if the Gallaher price went up they wanted  
 11 to take advantage of that because they didn't want  
 12 a situation in which a gap emerged or a gap widened  
 13 between the related ITL and Gallaher brands, subject of  
 14 course to the possibility that ITL might make  
 15 a strategic move altering the differential as occurred  
 16 when they repositioned Richmond by moving the parity  
 17 from a parity between Richmond and Mayfair to a parity  
 18 between Richmond and Dorchester.

19 If ITL increased the wholesale price of the ITL  
 20 brands, and we are now looking at the matter the other  
 21 way around, whether or not the retailer would be  
 22 expected to increase the price of the linked Gallaher  
 23 brand would depend upon the circumstances and why.  
 24 Because if ITL was altering the P&D requirement, the  
 25 retailer would not be expected to alter the Gallaher

1 price under the arrangement between the retailer and  
 2 ITL, because the instruction or the communication  
 3 between ITL and the retailer would such that the  
 4 retailer understood that the ITL price increase was not  
 5 connected with the maintenance of the pre-existing price  
 6 relativity between the two linked brands, but was  
 7 a change.

8 Now, obviously if the retailer had a P&D arrangement  
 9 with Gallaher, that might cause a change.

10 Now, if we move to the situation where ITL was not  
 11 altering the P&D requirement, the expectation would be,  
 12 we submit, that the price of the linked Gallaher brand  
 13 would also go up. However, the OFT does not say that  
 14 that would be inevitable, because that situation falls  
 15 within the scenarios envisaged in the decision in  
 16 paragraphs 6.224 to 6.225, because the OFT is actually  
 17 contemplating a factual scenario set out in the decision  
 18 that may have involved imperfect or incomplete  
 19 implementation of the P&D requirement.

20 As I've said earlier, it isn't the OFT's case, and  
 21 it's never been set out in the decision or anywhere  
 22 else, that in order for a P&D requirement to be  
 23 anticompetitive by object, you have to have each and  
 24 every one of the particular features identified in  
 25 paragraph 40 of the skeleton argument.

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1 Now, I am going to end the answer to that question  
 2 now because I've already dealt with the scenarios that  
 3 arise where there is a price reduction, and I don't need  
 4 to repeat them in dealing with this particular question.

5 **THE CHAIRMAN:** Yes, thank you very much, Mr Lasok.

6 We will come back at 2.15, and hear from Mr Flynn in  
 7 relation to Asda. Thank you very much.

8 (1.17 pm)

9 (The short adjournment)

10 (2.15 pm)

11 Further opening submissions by MR FLYNN

12 **THE CHAIRMAN:** Mr Flynn.

13 **MR FLYNN:** Madam, on behalf of Asda, then. Discussions in  
 14 the Tribunal over the last couple of days, may  
 15 I suggest, show that each case in this appeal needs to  
 16 be looked at on its own merits. You are going to have  
 17 to ask yourself in each of the retailer appeals whether  
 18 the retailer concerned accepted an arrangement, entered  
 19 into an arrangement of the kind alleged by the OFT with  
 20 each of the manufacturers.

21 Mr Lasok has answered some of your questions earlier  
 22 today, and obviously we hope that case will be put  
 23 clearly to the witnesses, and we will have our  
 24 opportunity later in the day to respond on whether that  
 25 case is well made out or corresponds with what is in the

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1 decision.

2 I think I should make clear what Asda's position has  
 3 been in its appeal throughout, in the light of certain  
 4 comments that the Tribunal has made. Asda's position is  
 5 that the OFT has not established that Asda was party to  
 6 any arrangement with either Gallaher or Imperial, in  
 7 which it accepted, became part of, if you like, the  
 8 manufacturers' parity and differential strategy. If you  
 9 want references to our pleadings, I've written them  
 10 down. If you look on the our notes of appeal,  
 11 paragraph 4, if you look at paragraphs 25 to 28, and 95  
 12 to 183 of the notice of appeal. Likewise in the reply  
 13 it's 4 to 15 and 99 to 164 in the reply and paragraphs 6  
 14 to 13 and 26 to 74 of the skeleton.

15 Exclusion and exemption case, which you have  
 16 mentioned, has always been put in the alternative, in  
 17 other words assuming against our principal position that  
 18 the OFT does convince you that there was such  
 19 an arrangement, so if you look, for example, at our  
 20 notice of appeal, paragraph 184, you will see that. Our  
 21 case on the object characterisation of the infringement  
 22 is likewise made without prejudice to the submission  
 23 that the OFT has not made out the alleged arrangement.

24 So where you said, Madam, that retailers seemed to  
 25 be saying yes, they had those arrangements but they were

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1 pro-competitive, that is not exactly Asda's position.  
 2 I can't speak for others, but it's certainly not ours.

3 I did say in my original opening, of course, that  
 4 our expert, Mr Dryden, says that depending on how you  
 5 characterise these arrangements, very little changes in  
 6 the structure of the arrangements may turn the predicted  
 7 effects to pro-competitive effects so they are very fact  
 8 sensitive, and that feeds into an argument as to whether  
 9 this is suitable for object characterisation.

10 I think you have also said that you had been  
 11 somewhat surprised at the extent to which retailers are  
 12 downplaying the written agreements. I think that  
 13 obviously depends on what's in the written agreements,  
 14 and I will come back to the detail of that shortly. But  
 15 it's important to bear in mind what, in each case, the  
 16 written agreements are. In the case of Asda, there is  
 17 no written agreement for any part of the relevant period  
 18 with Gallaher which makes any reference or provision for  
 19 P&Ds. It just isn't that sort of agreement. Likewise  
 20 with Imperial, the first agreement in the bundles which  
 21 we provided because the OFT didn't refer to it, likewise  
 22 makes no reference to P&Ds, and that I think more or  
 23 less coincides with the period for which Mr Jolliff was  
 24 responsible for the account, more or less.

25 We then have the two agreements which are in the

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1 bundles, one of which was signed in the middle of 2002,  
 2 and one which was signed after the infringement period  
 3 was over. Those have certain specific features which  
 4 I will come back to, but I make the initial point that  
 5 it's important to remember, when you say what did you  
 6 sign up to, then one really has to look at the  
 7 agreements.

8 And of course the OFT's case isn't limited and can't  
 9 be limited to the scope of the written trading  
 10 agreements, certainly it would be the end of its case as  
 11 regards Asda and Gallaher if it were to, and it would  
 12 have some considerable difficulties in the case of  
 13 Imperial. But all the more so because in the case of  
 14 Asda, it says the differentials were applied as fixed.  
 15 It doesn't put an alternative case on the basis that  
 16 they were maxima, and given the terms of the schedule,  
 17 even to the agreement that we signed, it would have to  
 18 prove that case by reference to conduct, context, rather  
 19 than to the written agreements.

20 I am not in this mini opening, as we are calling  
 21 them, going to go through the documents. That would be  
 22 time-consuming, and we are short of time. I think you  
 23 would say, well, we are about to hear from the  
 24 witnesses, so what are they going to say? But I do  
 25 repeat, of course, that we did go through such documents

1 as were cited in the decision in our evidence and we  
 2 expect those to be put to the witnesses and any new  
 3 documents, different documents that the OFT has relied  
 4 on without responding to our initial points.

5 Essentially all the permutations which are set out  
 6 in the famous paragraph 40 of the OFT's skeleton are in  
 7 fact answered in the evidence, and we will see what is  
 8 put to the witnesses on that.

9 Perhaps I could just say by way of a general point  
 10 that the Tribunal needs to be aware, this isn't  
 11 a criticism of anyone, this is just we are focusing in  
 12 on certain aspects of these dealings, so you are  
 13 influenced -- or the nature of the discussions which are  
 14 being had are influenced -- by the fact that we have  
 15 only one manufacturer here. Gallaher isn't here, that  
 16 mustn't be forgotten. You only have major retailers  
 17 here, whereas, say, MPi were introduced right across  
 18 the board and would generally apply and there might be  
 19 some specific and special arrangements for the  
 20 particularly important retailers.

21 More importantly, we are only talking about pricing,  
 22 we are focusing in on pricing, but there were many other  
 23 aspects of the relationship between, say, Imperial and  
 24 Asda, or Gallaher and Asda, that were extremely  
 25 important to the manufacturers: availability, listing,

1 range, and display.

2 There is quite a lot in our evidence -- we may not  
 3 need to discuss it, there may not be questions about  
 4 it -- about Imperial's obsession with the fact that  
 5 Gallaher was the category captain in Asda and so was in  
 6 charge of the planograms and so forth. Those are  
 7 extremely important matters to the manufacturers.

8 The other point is that we are focusing to  
 9 an obsessive level on the manufacturers' strategies, and  
 10 I think what needs to be borne very clearly in mind is  
 11 that the retailers have their own strategies.

12 Mr Lasok essentially, in his opening and in  
 13 cross-examination, is ignoring those, if I may  
 14 respectfully suggest. He goes so far as to say Asda,  
 15 and he specifically said it of Asda, was a compliant  
 16 instrument in the hands of the manufacturers, and he  
 17 asserted without reference to any specific part of the  
 18 evidence that Asda thought it had no bargaining power  
 19 vis-a-vis the tobacco manufacturers. We are talking  
 20 about Asda. He doesn't say where he got that from, and  
 21 no doubt he will put it to the witnesses.

22 The reality, in my submission, is that each party in  
 23 these retailer/manufacturer arrangements with which you  
 24 are concerned needed the other. Imperial had to be in  
 25 Asda. It would be inconceivable for Imperial not to

1 have its brands on Asda's shelves. Likewise Asda would  
 2 have to stock Imperial's leading brands, you wouldn't be  
 3 doing the job for the shopper if you didn't have those  
 4 brands on the shelves.

5 Now, that does not lead, in fact, to a cosy, happy  
 6 relationship. It leads, as the evidence shows, to  
 7 a testy and antagonistic relationship with each having  
 8 to deal, but playing each other off, and looking for  
 9 advantage.

10 Asda's own strategy, as I think you are well aware,  
 11 is not to be beaten on price. The evidence is that Asda  
 12 wanted to be a price leader, and certainly was not going  
 13 to be more expensive, if it could help it, in really any  
 14 line of any importance, than its chosen rivals. So  
 15 that's particularly Tesco but also Morrisons, for  
 16 example. It watches those very carefully and is watched  
 17 by them very carefully. Indeed, I think the evidence  
 18 is, particularly in that period, that Asda was the one  
 19 to watch.

20 Now, Mr Howard has already said, none of these  
 21 companies is a charity, and everyday low pricing doesn't  
 22 mean giving the goods away, it means offering the best  
 23 price that is available, whilst still making a profit,  
 24 whilst still making a margin, companies have duties to  
 25 their shareholders and so you have to look at margin as

1 well as price, and there is evidence on that which  
 2 I shall not take you to, but both from our witnesses but  
 3 also from Imperial. They had a pretty good idea what  
 4 Asda's strategy is, you see that in Mr Hall's witness  
 5 statement, you see Mr Batty also gives some evidence as  
 6 to what they understood Asda's strategy to be. And of  
 7 course it's pretty accurate, it's not accurate in every  
 8 respect, but they had a good idea about that.

9 Now, it's not in dispute in this case that the  
 10 manufacturers had internal strategies of trying to  
 11 position their brands as they thought best against the  
 12 competing manufacturers, and particularly, but not only  
 13 in this case, those of Gallaher. Those P&D aspirations  
 14 were not central at all to Asda's own strategy. The  
 15 reality for Asda was that it would decide its prices  
 16 according to its own strategy of being the best in the  
 17 market, and making a profit on the cost prices that it  
 18 could obtain. Every Day Low Prices, actually, as  
 19 I understand it, will also mean everyday low costs, so  
 20 you are always trying to chip away at the wholesale  
 21 price because otherwise you can't be the best in the  
 22 market, another reason for the constant difficulty.

23 The agreed evidence as between our expert and the  
 24 OFT's is that Asda's prices coincided with the  
 25 manufacturer aspirations only 40 per cent of the time.

1 In other words, the manufacturers, if they knew how to  
 2 read these things, could only have -- be a worse than  
 3 evens chance that Asda pricing would match with their  
 4 strategy. But to the extent of that 40 per cent or  
 5 whatever it may be, that's not, we say, evidence of any  
 6 agreement or consensus or joint expectation, it's just  
 7 where the strategies coincide. I pointed out in opening  
 8 and I don't repeat the point again, at least not in any  
 9 detail, that it is also established that Asda's  
 10 adherence in that sense of happening to match the  
 11 aspirations would have been higher if Asda had simply  
 12 priced according to the recommended selling prices,  
 13 which of course wouldn't raise any question of legality.

14 The idea that Asda's freedom to price in accordance  
 15 with its own strategy was or would be given up at the  
 16 beginning of the trading period by signing up to some  
 17 obligation or accepting it in the course of it, frankly,  
 18 to move its prices of competing brands irrespective of  
 19 any wholesale price change, is just completely  
 20 counterintuitive. How can it be expected that in this  
 21 market where things are changing, when you have Budget  
 22 increases, where you have manufacturers' increases once  
 23 or twice a year, can it really be seriously suggested  
 24 that they would give up in advance the freedom to price  
 25 as they thought appropriately in response to such

1 movements in the market?

2 In our submission, the issue of tactical bonusing to  
 3 achieve desired price levels, as a means of delivering  
 4 the manufacturers' pricing desires, doesn't close that  
 5 circle for the OFT, whatever its case exactly is on that  
 6 now.

7 That doesn't establish the necessary degree of  
 8 acceptance or agreement on the part of Asda to their P&D  
 9 strategies. For Asda it's simply a question of a cost  
 10 price reduction.

11 I think it's significant that the OFT hasn't given  
 12 a single reason why it might be in the interests of  
 13 a retailer such as Asda, what advantage it might  
 14 actually gain from agreeing to a sort of ratchet of  
 15 fixed P&D strategy. The reality is, the evidence is,  
 16 that Asda couldn't care less, frankly, what the  
 17 differentials were between the brands. It didn't matter  
 18 whether -- for Asda it wouldn't worry if Richmond was  
 19 priced 5p above or below Dorchester. The question was:  
 20 how was Richmond priced on Asda shelves as against  
 21 Richmond on Tesco shelves. How was Dorchester priced on  
 22 Asda's shelves against Dorchester on Morrisons' shelves.  
 23 The differential was a matter of complete irrelevance.

24 I do make this point again, the OFT may not confront  
 25 it, but it is significant that Tesco has not been found

1 to infringe. Because that shows very clearly it's not  
 2 simply enough, on the OFT's own case, assuming that it  
 3 had rational reasons for finding that Tesco didn't  
 4 infringe, it's not simply enough to accept these  
 5 tactical bonuses for the purpose of achieving desired  
 6 shelf price levels. There has to be something else to  
 7 establish the infringement, some X factor, some  
 8 limitation on pricing freedom.

9 Low margins have been mentioned as a feature of this  
 10 market. That, in my submission, is what they are. They  
 11 are a feature which are exogenous to the theory, because  
 12 the question is: what freedom, whatever room for  
 13 manoeuvre the manufacturer had, what restriction on that  
 14 room for manoeuvre did it accept? I am sorry, I am  
 15 talking about retailer, not manufacturer. That is the  
 16 question. The margins may be low, we know there are all  
 17 sorts of other difficulties with this market, the  
 18 impossibility of advertising, the impossibility of doing  
 19 deals, you can't sell a packet of cigarettes with every  
 20 packet of cornflakes bought. This market is somewhat  
 21 different. The question is: within that margin of  
 22 manoeuvre did Asda, in my particular case, renounce any  
 23 freedom?

24 No doubt we will be going through it, but we say  
 25 there is plenty of evidence before you that Asda was not

1 simply a patsy giving up its freedom, a powerless tool  
 2 in the hands of the manufacturer.  
 3 One example that you raised yourself, Madam, in  
 4 questioning was: was there ever any push-back from  
 5 retailers about this rather complicated accounting  
 6 system of bonusing and, you know, yes, there most  
 7 certainly was, and it's in our evidence, Asda pushed for  
 8 and eventually secured what they called "net net  
 9 pricing" to make the pricing more transparent to reduce  
 10 the manufacturers' influence and ability to negotiate  
 11 towards the end of the period or whatever, simply to  
 12 give it as much freedom as possible to price as it saw  
 13 best, and that is in the evidence.  
 14 There are plenty of other examples of Asda using its  
 15 power to put pressure on the manufacturers, and a good  
 16 example of that is its own label, which you will see,  
 17 it's referred to in passages in the witness statements  
 18 which are marked "Confidential", I don't know to what  
 19 extent they still are. But you will see that  
 20 essentially the own label product was put there to be  
 21 the cheapest in store and to exert downward pressure on  
 22 the manufacturers for the cost prices of their ultra low  
 23 cigarettes.  
 24 So without going through all the permutations in  
 25 paragraph 40 or in Mr Lasok's revised theory, what

1 possible interest would Asda have in agreeing in advance  
 2 these sort of parallel movements, up or down? As I say,  
 3 evidence is given on those matters for each category,  
 4 I think, each permutation of the OFT's case.  
 5 There are also plenty of instances of Asda using its  
 6 knowledge that the manufacturers had these desires to  
 7 secure better terms from them. What Professor Shaffer  
 8 calls parlaying, playing it off, simply saying "this is  
 9 what we are charging for Gallaher, Imperial, are you  
 10 going to match it, are you going to beat it?" Plenty of  
 11 examples of that.  
 12 A particular example was mentioned by Mr Lasok in  
 13 opening, which is where Mr Lang made it absolutely plain  
 14 that he was not going to be funding any discounts.  
 15 Mr Lasok said -- I didn't fully follow this -- this  
 16 showed that there was some underlying expectation and  
 17 Mr Lang was looking for a sweetener. No, he wasn't  
 18 looking for a sweetener, he was looking for absolute  
 19 neutrality. He was not looking for any benefit for Asda  
 20 on that. He was simply saying "If you want to compete  
 21 with Gallaher at that level, well, you are simply going  
 22 to have to fund it". He wasn't taking a benefit for  
 23 Asda. We say that taking of the funding to achieve  
 24 those is simply no indication of buying into the P&D  
 25 strategies.

1 To take one particular example which Mr Lasok did  
 2 put before the luncheon adjournment, there is absolutely  
 3 no evidence that Asda felt under any constraint from  
 4 making an own initiative reduction of, say, a Gallaher  
 5 brand whilst leaving the Imperial brand at the existing  
 6 level. On the contrary, there are examples where  
 7 precisely that happened. An example is given by  
 8 Mr Mason at paragraph 36 of his witness statement. Such  
 9 a thing might be done to damage their competition, such  
 10 as Tesco, it might be done to incentivise Imperial to  
 11 offer better terms, but there was absolutely no sense of  
 12 restriction and no sense that that was something that  
 13 they couldn't do in pursuance of their own strategy; so  
 14 parlaying we haven't(?).  
 15 Focusing specifically on Gallaher, you may remember  
 16 that in his opening Mr Lasok dealt in a bit of detail  
 17 with Asda and Imperial and then at the end said: no,  
 18 I don't have the time, for reasons of time, but for  
 19 Gallaher it's the same picture.  
 20 Well, in my submission, it really isn't the same  
 21 picture at all. There isn't any P&D trading agreement.  
 22 There are very, very few documents -- I ran through this  
 23 in the initial opening and I shan't labour the point --  
 24 in annex 4, which is the statement of objection annex  
 25 for Asda/Gallaher. There are, I think, 19 of them.

1 There are internal Gallaher documents, there are  
 2 documents outside the infringement period, leaving about  
 3 a scant dozen documents which of course cannot amount to  
 4 much bombardment over the period of the infringement.  
 5 As Dr Scott pointed out, even bombardment is  
 6 essentially unilateral. I mean, that's usually the  
 7 position with bombing, actually; it's not necessarily  
 8 desired by the recipient. But this is not bombardment  
 9 or pestering. Most of those exchanges are completely  
 10 irrelevant to the OFT's case. They are "here is our  
 11 MPI, here are details of our MPI". So you have  
 12 something like five documents a year, which really don't  
 13 take the OFT anywhere, we say. Very little could, on  
 14 any stretch, be said to have anything to do with the  
 15 relative price of the competing brand, and none of them,  
 16 we say, show any agreed linkages to that brand.  
 17 As regards Imperial, as I have already said, the  
 18 first trading agreement that is on the file, although  
 19 it's not cited in the decision and it wasn't in the SO  
 20 annex as originally constituted, doesn't have any  
 21 reference to P&Ds at all.  
 22 The other two, one of them is outside the period and  
 23 the 2002 one signed in the middle of 2002 is, in my  
 24 submission, one of the loosest and the vaguest of those  
 25 that we have looked at during the course of these

1 hearings.  
 2 It applies without distinction to a number of  
 3 desiderata requirements that ITL would like to see  
 4 fulfilled, and as I have already said, those are  
 5 actually important, should not be taken as also-rans  
 6 listing availability, stocking range, display, these  
 7 things are of vital importance to the manufacturer.  
 8 There is no apportionment as between the many, as  
 9 between the pricing and the others.  
 10 The amount given by way of what I think we are  
 11 calling ongoing bonus under that trading agreement is,  
 12 in the Asda case, strikingly small compared with some of  
 13 the others that you have seen. It is extremely small.  
 14 There is no clawback provision for partial compliance,  
 15 that sort of thing has been mentioned before. There is  
 16 no opportunity to respond clause. As to that, I did  
 17 make submission in my initial opening. Firstly to say  
 18 that insofar as that is being used by Mr Lasok and the  
 19 OFT as saying "There is a sort of structural element  
 20 going to the linkages between the prices", that is  
 21 absent in the Asda case. But of course, as I said, it  
 22 doesn't preclude actual responses, and of course on  
 23 occasion Asda would seek such a response in pursuance of  
 24 its own strategy to get the prices down as much as  
 25 possible. The fact that it makes use of the

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1 manufacturers' pricing and differential desires in order  
 2 to secure that funding is pro-competitive, as I think  
 3 the OFT accepts, and certainly as Professor Shaffer did  
 4 in the famous paragraph 51 of his advisory report. To  
 5 coin a phrase: that paragraph is written in English, not  
 6 in Arabic, Chinese or Greek.  
 7 We also say very clearly that the ongoing bonus is  
 8 an incentive payment, the contract, if you want to look  
 9 at it as a contract, although I think the evidence is  
 10 that certainly in our case it wasn't looked at as  
 11 a document of vital importance, it's not referred to in  
 12 the daily correspondence, it is simply an additional --  
 13 and in our case relatively small -- ongoing discount off  
 14 the prices, but no obligations are placed on Asda to  
 15 secure that. It can comply or not, as it chooses. The  
 16 evidence is that it inevitably -- it always was paid and  
 17 there wasn't any discussion about it whatsoever.  
 18 Now, we have also said that the amounts in any  
 19 differential schedule are expressed as maxima, not as  
 20 fixed. I don't understand, but Mr Lasok can explore  
 21 that with the witnesses, the case that's being put  
 22 forward about the obvious commercial rationality of some  
 23 of the aspects of this that the OFT puts forward. It  
 24 will be seen that if Mr Batty thinks that it's good for  
 25 Richmond if it's priced the same as Dorchester, what he

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1 is saying is it's good, as long as it's no worse, we are  
 2 fine. If it's a penny off or 5p off in Asda, there is  
 3 no reason for Mr Batty to be upset about that, he may  
 4 think that will be even better. The products are one is  
 5 slightly better than the other, but if the price is even  
 6 better, that surely is something that Mr Batty would  
 7 welcome. It might not be something that Asda would  
 8 welcome because of the margin.

9 So there you may see a difference in the strategies  
 10 or the commercial appreciation of these situations as  
 11 between retailer and manufacturer. The commercial  
 12 rationality of the OFT's case is, in our submission,  
 13 highly questionable.

14 Now, I said I wouldn't go through and I won't go  
 15 through the documents as between Asda and ITL but no  
 16 doubt we will explore that with the witnesses. I just  
 17 point out that about a third of those are  
 18 pre-infringement period documents. So where the OFT has  
 19 said it relies principally on documents dealing with the  
 20 infringement period, that has not the case. These are  
 21 disproportionately cited, I should also say, in the  
 22 OFT's pleadings. So it's relying more heavily, it would  
 23 seem, on pre-infringement period documents than others.  
 24 I just make that point because that may come up in the  
 25 cross-examination.

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1 Now, unless Mr O'Donoghue thinks I should be saying  
 2 anything else, at that point I would be proposing to  
 3 call Mr Jolliff.

4 **THE CHAIRMAN:** Yes, let's have Mr Jolliff then, thank you.

5 **MR FLYNN:** Mr Jolliff has been dutifully waiting outside.

6 MR JOHN DAVID JOLLIFF (sworn)

7 Examination-in-chief by MR FLYNN

8 **THE CHAIRMAN:** Do sit down, Mr Jolliff.

9 **A.** Thank you.

10 **MR FLYNN:** Good afternoon, Mr Jolliff. Would you please,  
 11 just for the record, give the Tribunal your full name  
 12 and your address, please?

13 **A.** Yes, it's John David Jolliff of [redacted].

14 **Q.** Thank you. Could Mr Jolliff please be given core  
 15 bundle 10, which is the Asda file. Mr Jolliff, I think  
 16 if you turn to tab 109, {C10/109/373}, you should find  
 17 a copy of a witness statement?

18 **A.** That's correct.

19 **Q.** If you turn to nearly the end of that, to two pages  
 20 short of the end of that tab, you should see  
 21 a signature?

22 **A.** Correct.

23 **Q.** Is that your signature?

24 **A.** That is my signature, yes.

25 **Q.** The evidence that you make in that statement, is that

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1 your evidence before this Tribunal?  
 2 **A.** That's correct, yes.  
 3 **Q.** And is it true?  
 4 **A.** It is true, yes.  
 5 **Q.** There is nothing in it that you wish to change at this  
 6 point?  
 7 **A.** There is nothing in it that I wish to change at all.  
 8 **MR FLYNN:** In that case, Madam, that's Mr Jolliff's evidence  
 9 and Mr Jolliff, Mr Lasok will have some questions for  
 10 you on behalf of the OFT.  
 11 Cross-examination by MR LASOK  
 12 **MR LASOK:** Now, Mr Jolliff, am I right in thinking that Asda  
 13 did not stock tobacco products because Asda was getting  
 14 a good margin on them; the reason why you stocked them  
 15 was because they were a must-have product and a footfall  
 16 driver?  
 17 **A.** It was a must-have product and a footfall driver.  
 18 **Q.** I just want to deal with various miscellaneous matters  
 19 first. I think in your witness statement you say that  
 20 you were the buyer responsible for tobacco products from  
 21 1997 until the summer 2002?  
 22 **A.** That's right.  
 23 **Q.** Can you remember when in the summer?  
 24 **A.** Unfortunately not.  
 25 **Q.** I think the last document that I think that we have and

1 which you are involved is dated to 11 June 2002, so you  
 2 must have left sometime after June or sometime after  
 3 11 June but you can't --  
 4 **A.** That's right, I moved into a department which was  
 5 called -- well, I was already in a department called  
 6 Impulse. Tobacco went over to Petrol.  
 7 **Q.** I wonder whether you could turn to 64 of your witness  
 8 statement, please.  
 9 **A.** Where it says "On Richmond"?  
 10 **Q.** Yes. This, together with paragraph 63, deals with  
 11 a particular document, and the document is at annex 14,  
 12 if you have a look at that, at tab 9. (Pause).  
 13 {D14/9/27}. Just check that we are looking at the  
 14 same --  
 15 **A.** Concept tobacco.  
 16 **Q.** -- thing, it should be a letter dated 5 October 2000.  
 17 **A.** That's right, yes.  
 18 **Q.** The bit I am interested in at the moment is a bit on  
 19 page 2, and it's the paragraph under the heading  
 20 "Richmond Pricing".  
 21 **A.** Yes. (Pause). Right.  
 22 **Q.** What the letter says is that you had advised the writer  
 23 of the letter, who was Mr Graham Hall of ITL, that  
 24 Dorchester Kingsize was going to move to a particular  
 25 price on a particular date. Then he refers to

1 an agreement between you and him about a movement in the  
 2 price of Richmond.  
 3 **A.** Right, well --  
 4 **Q.** Can I just say, if we go to your paragraph 64 of your  
 5 witness statement, and look at the second line, you say:  
 6 "The suggestion is that I have told ITL when the  
 7 Gallaher price change will happen."  
 8 Then the sentence after that you say:  
 9 "I do not know whether I actually did tell  
 10 Graham Hall when we would be increasing the Gallaher  
 11 price, or it is just posturing by ITL but it would be  
 12 highly unusual, as I would not want to give ITL  
 13 an excuse to push up prices."  
 14 Is the truth that you don't actually remember the  
 15 circumstances surrounding this letter?  
 16 **A.** The only thing I can say in answer to that is that  
 17 I don't make common practice of giving information to  
 18 rival suppliers about other suppliers' brands.  
 19 **Q.** If you go to paragraph 67, you are now referring to the  
 20 next document, which is number 10 in annex 14,  
 21 {D14/10/29} and this is an internal ITL document which  
 22 obviously you wouldn't have seen at the time?  
 23 **A.** No.  
 24 **Q.** You are commenting on that in paragraph 67, and in the  
 25 middle of paragraph 67 of your witness statement, you

1 say:  
 2 "This seems unusual to me as I would not normally  
 3 discuss with him what we were planning to do with our  
 4 retail prices."  
 5 **A.** Yeah, that's right, that's what I just said.  
 6 **Q.** In the next sentence you have a "presumably".  
 7 **A.** Well --  
 8 **Q.** What I am asking you is: do you actually remember any of  
 9 all this?  
 10 **A.** The only thing I can say is that I never, ever --  
 11 I mean, I have been buying for 30 odd years, I have  
 12 never given a supplier another supplier's retail prices,  
 13 because that is just not ethics.  
 14 **Q.** Could you turn to paragraph 101 of your witness  
 15 statement, please. Now, if you have paragraph 101, this  
 16 relates to a document 40, and I am quite happy if you  
 17 finish reading your paragraph 101 and then we look at  
 18 document 40, but if you want to look at it first before  
 19 refreshing your memory, by reading your witness  
 20 statement, it's up to you.  
 21 (Pause)  
 22 **A.** Right, what am I looking at now?  
 23 **Q.** Could you look at tab 40, please. You have two emails  
 24 on that page, and we are looking at the moment at the  
 25 first email in point of time, which is the one that

1 starts in the middle of the page. It's an email from  
 2 Mr Hall to yourself, sent on October 1, 2001.  
 3 **A.** Yes.  
 4 **Q.** You see, in your paragraph 101, in the first line, you  
 5 have an "apparently", and if you look at the fourth  
 6 line, towards the end of the line you have  
 7 an "I imagine". Then if you go four lines below that,  
 8 you have again, towards the end of the line, a sentence  
 9 that starts "it may be", so you may:  
 10 "It may be that I told ITL when we would be  
 11 increasing Gallaher's Sterling, as I wanted the price  
 12 for ITL's Richmond to increase across the market so that  
 13 I could restore my margin. It may also be that the  
 14 information I had apparently given ITL was not true."  
 15 Then in the last sentence you start off by saying:  
 16 "This would suggest either ..."  
 17 Just how much about all of this do you actually  
 18 remember?  
 19 **A.** The only thing is that at the time when I made this  
 20 statement on 11 June 2010, it refers back to something  
 21 that happened in 2001, which is nine years previous.  
 22 I could only think that I wouldn't have told ITL that  
 23 Sterling was going to move, because that was a brand  
 24 that I brought in from Gallaher's, and that brand was  
 25 brought in sole as to Asda. So I wouldn't be telling

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1 those particular retails to ITL although they are  
 2 surmising that I did.  
 3 I mean, if they were looking at increasing the  
 4 Richmond brand, because the marketplace was ready to  
 5 take an increase, I would obviously look at it, provided  
 6 it was for the benefit of Asda and our customers if we  
 7 needed to move the retails.  
 8 But I think he is being a bit presumptuous saying  
 9 that I've told him they were Sterling retail because  
 10 I wouldn't do it.  
 11 **Q.** So what you are saying is that you now remember this  
 12 incident?  
 13 **A.** No. I don't actually remember the incident. The only  
 14 thing I can say is that trying to remember a way back to  
 15 2001 in 2010 I can only surmise that that was what  
 16 happened.  
 17 **Q.** Well, this is what I am trying to get at because the  
 18 reason why I've been taking you through this paragraph  
 19 is because you are using phrases like "this seems  
 20 unusual", "presumably", "apparently", "I imagine", "it  
 21 may be", and this gives me the impression that you don't  
 22 actually remember the circumstances surrounding these  
 23 documents.  
 24 **A.** I can only work on the information that I have been  
 25 given, and that is the reply that I gave.

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1 **Q.** Well, now, when you use phrases like the ones I've  
 2 mentioned, like "this seems", "presumably",  
 3 "apparently", "I imagine", "it may be", when we see this  
 4 appearing in your witness statement, are you really  
 5 saying that you have no recollection of the matters  
 6 covered by the document and you are just surmising?  
 7 **A.** The only thing I can say is that retailers moved up and  
 8 moved down, to actually recollect this actual event on  
 9 that specific day is difficult, but I am surmising what  
 10 was going on was the fact that they wanted to move the  
 11 Richmond brand, and they were trying to say that we,  
 12 being Asda, were trying to move the -- were going to  
 13 move the Sterling brand. Otherwise I wouldn't have even  
 14 moved the Richmond brand, I wouldn't have even looked at  
 15 the Richmond brand, and I wouldn't have even looked at  
 16 the Sterling brand. So it's a bit of supposition on  
 17 both sides, I think.  
 18 **Q.** Well, it doesn't appear to be supposition from Mr Hall,  
 19 because he is sending you an email and he says:  
 20 "Many thanks for your phone call."  
 21 **A.** But I've just said that I never ever gave retail prices  
 22 out, ie on Sterling brand, to another supplier. I mean,  
 23 I have been buying 31 years, not just in tobacco, but  
 24 throughout very big portfolios like beer and soft  
 25 drinks.

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1 **Q.** Could you turn to your paragraph 110, please. This  
 2 refers to document 49, and again it's up to you whether  
 3 you would like to look at 49 first before you read  
 4 paragraph 110 of your witness statement. centre.  
 5 49 is a single page, it has two emails. The one at  
 6 the bottom is the earlier of the two.  
 7 (Pause)  
 8 **A.** But this email here is an internal email, with no input  
 9 from myself, apart from what Graham is saying, that he  
 10 had called me this morning, which I am disputing.  
 11 **Q.** If you could turn to your paragraph 110, you start off  
 12 by saying:  
 13 "This is an internal ITL email chain in which  
 14 Graham Hall suggests I have told him the dates" and so  
 15 forth.  
 16 **A.** That's correct.  
 17 **Q.** Then there is a reference to document 40 and further  
 18 down the paragraph, and you say:  
 19 "I am not sure whether these price moves had not  
 20 actually happened or had reduced again in the interim or  
 21 whether I did actually give this information to ITL.  
 22 I cannot remember making this telephone call and it is  
 23 hard to believe that I ever made such a call."  
 24 **A.** I definitely didn't make the telephone call. I am  
 25 presuming there that if we had got this email here and

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1 these documents had been sent out to myself, that the  
 2 price increase would possibly have happened, if I had  
 3 had the deal sheets and the marketplaces had moved which  
 4 didn't disadvantage Asda's margin or disadvantage our  
 5 consumers.  
 6 **Q.** You see, the point I am putting to you, and I'll put it  
 7 to you again for the sake of clarity, is that you are  
 8 using language yet again in paragraph 110 that suggests  
 9 that you don't remember the event?  
 10 **A.** The actual date of the event, as I've already said,  
 11 could be a bit difficult. But certainly price increases  
 12 happened on and off throughout the trading period, which  
 13 will have been into a situation where Asda either moved  
 14 the prices of Richmond or didn't. I am not trying to  
 15 lie, I am trying to say that at that particular time,  
 16 definitely didn't tell them about Sterling, but the  
 17 situation could have been that we moved Richmond,  
 18 provided I got the deal sheets from Imperial Tobacco and  
 19 that the market was ready to take the move. You don't  
 20 just take price increases from suppliers willy-nilly, we  
 21 actually look at the marketplace, for example my brief  
 22 from Asda is to be equal to or better than the Big Five,  
 23 as it was in those days, ie Tesco, Sainsbury's,  
 24 et cetera, et cetera, and I wouldn't be moving retails  
 25 unless I knew that they were going to be moving their

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1 retails. And I used to go out every week price checking  
 2 to make sure that Asda was competitive, and used to get  
 3 many telephone calls from suppliers saying "Tesco's  
 4 reckon you are too cheap".  
 5 **THE CHAIRMAN:** Just focusing back on this email, are you  
 6 saying that you remember this incident or not, and are  
 7 you saying that it's hard to believe that you made this  
 8 call, or are you now saying you definitely didn't make  
 9 the call?  
 10 **A.** As far as I am aware, I have never ever given any  
 11 information out so I wouldn't have made that telephone  
 12 call.  
 13 **MR LASOK:** I think I would like to be precise about this,  
 14 because in many respects I was rather surprised when you  
 15 raised the question of lying, because I've not, up until  
 16 now, suggested that you were lying at all, I was trying  
 17 to help you out, because I was putting to you that the  
 18 impression I was getting was that you simply didn't  
 19 remember, and I was moving on to a different point,  
 20 which is that when we see in your witness statement  
 21 language like "this seems", "presumably", "apparently",  
 22 "I imagine" and so forth. Is it the case that you  
 23 simply can't remember? Because if you can't remember  
 24 and you are just surmising, there is no point in my  
 25 asking you questions.

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1 **A.** No. I cannot remember that exact thing. Prices used to  
 2 go up and down, and I was probably -- well, was  
 3 surmising that this was the case at that particular  
 4 time.  
 5 **Q.** Wait a minute. So in 110, paragraph 110, do we have  
 6 here surmise?  
 7 **A.** (Pause). I mean, yes, because I can't actually remember  
 8 because of so many prices moving --  
 9 **Q.** Right, you can't remember. So do I take it, therefore,  
 10 that in your witness statement, when we come across the  
 11 same kind of language that you use here -- you know,  
 12 "I am not sure", "I cannot remember", and other language  
 13 like "this seems unusual" and "presumably" and  
 14 "apparently" and "I imagine" -- when we are looking at  
 15 language like that, you are telling us that you can't  
 16 remember?  
 17 **A.** Yes.  
 18 **Q.** You are just surmising?  
 19 **A.** Yes.  
 20 **Q.** Right.  
 21 **DR SCOTT:** Mr Jolliff, I think we should say that if you  
 22 can't remember, that's not a reflection on you, it's  
 23 just a fact that you can't remember.  
 24 **A.** Yes. I understand. I mean, the fact of the -- I mean,  
 25 I know I shouldn't be saying this, but it is very

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1 difficult to remember something that went on in 2001, so  
 2 to try to give you an answer, you give the answer to the  
 3 best of your ability, and to the best of my ability  
 4 that's what happened at that particular time.  
 5 **THE CHAIRMAN:** What's taken Mr Lasok by surprise is that you  
 6 seem now, in the witness box, to be being rather more  
 7 categorical that you were in your witness statement by  
 8 saying, if it is what you are saying, "Graham Hall must  
 9 have been incorrect in saying to Roger Batty in this  
 10 email 'John Jolliff has advised me of the following  
 11 prices'. That must be wrong because I would never have  
 12 discussed prices with Graham Hall"?  
 13 **A.** I would never ever give competitor prices out to another  
 14 supplier.  
 15 **THE CHAIRMAN:** Well, these are retail prices.  
 16 **A.** Yes.  
 17 **THE CHAIRMAN:** These are the prices at which they, Asda,  
 18 was, it's said, going to sell these products on its  
 19 shelves. This is not talking about the price that you,  
 20 Asda, are going to be paying.  
 21 **A.** Yes, I understand that.  
 22 **THE CHAIRMAN:** So you are saying you wouldn't have discussed  
 23 retail prices?  
 24 **A.** No. I wouldn't discuss Sterling retail prices with  
 25 Imperial Tobacco, because Sterling is a Gallaher's

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1 brand, and not only that, Sterling was sold to Asda for  
 2 six months and then it went onto Tesco, so we were both  
 3 stocking it.  
 4 **DR SCOTT:** But would you expect them to discuss those prices  
 5 with you, bearing in mind that they can see them in the  
 6 store? I mean, imagine for a moment that I am the  
 7 national account manager, I have been to an Asda store,  
 8 I have observed something which I don't like, because my  
 9 competitor's product looks to be being advantaged  
 10 against mine, am I not likely to be on the phone to you  
 11 to say "What about the price of Sterling?"  
 12 **A.** Well, yes, I mean, they did phone up saying, you know,  
 13 "How come this price is that when we have agreed that",  
 14 but unfortunately from a supplier's point of view, the  
 15 Asda retail is Asda's policy, and if I am selling below  
 16 the recommended selling price, the reason for that is to  
 17 give the customers a good offer and to be beneficial to  
 18 Asda. But they would ring me up and say, you know, "how  
 19 come this price is so low", but you would say "it's got  
 20 nothing really to do with you, they are Asda's prices,  
 21 not your prices".  
 22 **DR SCOTT:** But if I am the national account manager, I am  
 23 not so much concerned with the absolute price, that's  
 24 down to your margin.  
 25 **A.** Yeah.

1 **DR SCOTT:** I am concerned to ensure that my product is not  
 2 disadvantaged against the rival's product.  
 3 **A.** I understand that. I understand that.  
 4 **DR SCOTT:** So you wouldn't be surprised if I am wanting to  
 5 discuss with you the relative price of the two products?  
 6 **A.** Yeah, but if it was another brand, I wouldn't give them  
 7 that answer. It's like when I was buying soft drinks,  
 8 if Coca-Cola phoned up and said, you know, "What's the  
 9 price of Pepsi", I am making this up, "How come the  
 10 price of Pepsi is 89p, and we are 99p, and Pepsi is  
 11 always 99p", I would say, "Well, it's got nothing to do  
 12 with you, what do you think it is?" So he would  
 13 probably say, "Well, I think it's probably a promotion".  
 14 I would say, "Well, you are right".  
 15 **DR SCOTT:** And you would look for a promotion in return?  
 16 **A.** Of course, yes.  
 17 **DR SCOTT:** Thank you.  
 18 **MR LASOK:** Right, well, now up to this point, we have had  
 19 four documents in which it is stated that you have  
 20 communicated to ITL the shelf price of a Gallaher  
 21 product. The very first one is a letter that's written  
 22 to you, and I think the last one is an email to you,  
 23 a couple of them are emails to you. The first and the  
 24 third and the fourth involve you.  
 25 **A.** Yes.

1 **Q.** We don't have any response from you in which you say to  
 2 Mr Hall "you have got it wrong"?  
 3 **A.** Well, no, because that's after the event. You know, the  
 4 event has happened. I have either put my prices up or  
 5 not. And it's got nothing really to do with Graham.  
 6 It's either happened or it hasn't happened.  
 7 **Q.** Well, I am not looking at --  
 8 **A.** Because they would be out price checking to see what's  
 9 been going on in the market anyway, because price really  
 10 is all that we have got on all sides to fight on.  
 11 **Q.** Well, you see, if you look at tab 40, you have the email  
 12 from Mr Hall to yourself on October 1, 2001, in which he  
 13 thanks you for your phone call confirming that Sterling  
 14 would move. We don't have a response from you saying  
 15 "I don't understand what you are saying". Is there any  
 16 explanation for that, that you can think of?  
 17 **A.** Because it's just a passing comment from Graham saying  
 18 that Sterling will be moving. I mean, I've no --  
 19 I can't understand why I should really reply to him  
 20 saying "put it in writing" or by telephone saying  
 21 something different. If he wants to think that, let him  
 22 think it.  
 23 **Q.** Think what?  
 24 **A.** Let him think that Sterling is going to rise back to  
 25 those prices.

1 **Q.** No, let him think that you had called him on the phone  
 2 on Friday confirming the Sterling move. He was under  
 3 a misapprehension, was he?  
 4 **A.** As far as I am aware, yeah. I mean, I have never given  
 5 any information about an own brand product to  
 6 a supplier.  
 7 **Q.** If you go back to 49, the second page, and the bit under  
 8 "Richmond Pricing", he has written to you saying that  
 9 you have advised him about the Dorchester move and you  
 10 never thought of writing back --  
 11 **A.** Sorry, which --  
 12 **Q.** It's at tab 9, page 2. It's under the heading "Richmond  
 13 Pricing". The first line:  
 14 "Subsequent to our meeting, you have advised ..."  
 15 If you didn't do this sort of thing, wouldn't you  
 16 have written back to him saying "You have got the wrong  
 17 end of the stick, there is a confusion here"?  
 18 **A.** No.  
 19 **DR SCOTT:** Mr Jolliff, why does this letter refer to  
 20 29 October?  
 21 **A.** Presumably he had a meeting with me on 29 October and  
 22 then he is trying to say that Dorchester Kingsize would  
 23 move on -- sorry.  
 24 **MR LASOK:** I think the meeting was on 3 October, though, if  
 25 you look at the first line --



1 A. The letter stated 5 October and --  
 2 Q. If you look at the first line of the letter after  
 3 "Dear John", does that help your memory?  
 4 DR SCOTT: Why is he wanting the price of Richmond to move  
 5 on 29 October?  
 6 A. I presume because the price of Dorchester Kingsize is  
 7 moving to 3.34 on 29 October.  
 8 DR SCOTT: How does he know that? Has Gallaher told him  
 9 that?  
 10 A. He is trying to say that it's me, but as I say, I don't  
 11 discuss other people's -- it could have come from  
 12 Gallaher's, it could have come from anybody, really, it  
 13 could have come from ...  
 14 DR SCOTT: But I thought you said that Asda chose its own  
 15 pricing, so it couldn't have come from Gallaher unless  
 16 Gallaher were telling you what to do.  
 17 A. Asda do choose their own pricing, as I say, we get the  
 18 price sheets down, and the Asda recommended, but that is  
 19 not necessarily Asda's price. So unless the margin is  
 20 quite correct, and it's beneficial to Asda --  
 21 THE CHAIRMAN: But if it was true that Asda was planning to  
 22 move to 3.34 on 29 October, suppose that that was true,  
 23 who would have decided within Asda to make that move in  
 24 Dorchester?  
 25 A. I would have done.

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1 THE CHAIRMAN: You would have done?  
 2 A. Yeah.  
 3 THE CHAIRMAN: Yes.  
 4 MR LASOK: Well, let's move on to a different topic. Let's  
 5 have a look at price lists, because you referred to the  
 6 price lists a moment ago. We will come back to that  
 7 file that you have with annex 14 in it later, but we  
 8 will not look at this document for a bit at any rate.  
 9 A. Right.  
 10 Q. So could you have a look at your witness statement?  
 11 A. Yes.  
 12 Q. I am going to draw your attention to particular bits of  
 13 the witness statement that concern the price lists. The  
 14 first one I'll look at is paragraph 9 of your witness  
 15 statement. Your witness statement is at tab 109, and  
 16 I'll just see whether I've got the story right.  
 17 If you look at paragraph 9, you say in the first  
 18 line after referring to the constant changes in tobacco  
 19 prices:  
 20 "... we would receive new price lists (showing  
 21 changes in cost prices, discounts and recommended  
 22 selling prices) every month from manufacturers to  
 23 reflect pricing changes, in particular promotional  
 24 discounts."  
 25 A. Yeah.

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1 Q. Then if you go to paragraph 19, you start off by  
 2 referring to the basic cost price, and that was in the  
 3 price list, wasn't it?  
 4 A. Yes.  
 5 Q. You say that that was set at a level which allowed Asda  
 6 to make a specified margin if it sold at the RSP  
 7 provided. The RSP provided is the RSP provided in the  
 8 price list; am I right?  
 9 A. Yes.  
 10 Q. Then you say:  
 11 "We did not have to sell at the RSP but the thin  
 12 margins available to us meant that often we would.  
 13 Asda's competitive pricing policy made it highly  
 14 unlikely that we would price above RSP."  
 15 Then after the bit in brackets you say:  
 16 "And discounting below RSP did not seem to lead to  
 17 increased volumes, only to reduced margins. It  
 18 therefore did not generally make sense for us to reduce  
 19 our retail prices only slightly below RSP as these would  
 20 not increase sales while larger decreases made the  
 21 product unprofitable."  
 22 Pausing there, it was the case, though, that if you  
 23 felt that you had sufficient headroom you would increase  
 24 prices?  
 25 A. No. We would, when we got these deal sheets down -- as

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1 I call them deal sheets -- look at the margin that was  
 2 available from the supplier, and if we required more  
 3 margin, we would get on to the supplier saying "You  
 4 know, this isn't good enough, we require a better margin  
 5 to get to this price" or whatever price we wanted to go  
 6 at, because it was actually Asda who was making the  
 7 decision on the actual retail prices that landed in  
 8 store.  
 9 Q. Well --  
 10 A. So because of the lack of margin available, if you look  
 11 at the situation because of the taxation, because of the  
 12 situation where we had literally very little margin to  
 13 play with, we couldn't sort of say "Well, we want to do  
 14 a "buy one get one free" on tobacco", because it would  
 15 never happen, to increase our sales, so we had to look  
 16 very closely at our margin to make sure we were going to  
 17 make the correct margin and the correct profit from  
 18 an Asda point of view. It may mean that some of those  
 19 recommended prices we adhered to, but it may also mean  
 20 that we didn't, depending on how it suited Asda's  
 21 competitive situation. [REDACTED]  
 22 [REDACTED]  
 23 [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED]

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Confidential  
Asda

Confidential  
Asda

1 [REDACTED]  
 2 Q. When did you do that?  
 3 A. I can't remember the exact dates, but it was initiated  
 4 when Allan Leighton was at Asda, where he wanted to --  
 5 he had been over to Wal-Mart and he had seen what  
 6 Wal-Mart were doing, and [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED] We had to report that, because we were  
 11 losing margin and not only we were losing margin, we  
 12 were also into a situation where we were losing money  
 13 and we weren't actually getting any more sales.  
 14 Q. Do you know approximately when it was?  
 15 A. No, I am sorry.  
 16 Q. Was it --  
 17 A. Certainly within my time as buyer. In fact, the  
 18 suppliers phoned up saying "How come you haven't told us  
 19 about this situation where these prices are very good  
 20 prices and everybody is complaining with them?"  
 21 I asked them to fund it because we were trying to  
 22 increase their sales and they wouldn't fund it.  
 23 Q. Was it before or after 2000?  
 24 A. It would be before 2000.  
 25 THE CHAIRMAN: Is that a good point at which to have the

1 short break?  
 2 MR LASOK: Yes.  
 3 THE CHAIRMAN: We are just going to have a break for ten  
 4 minutes, Mr Jolliff. As you are in the middle of your  
 5 evidence, you mustn't speak to anybody on your legal  
 6 team or anyone else about your evidence in the case.  
 7 That applies throughout any break where you are giving  
 8 your evidence.  
 9 A. Okay.  
 10 THE CHAIRMAN: We will come back at 20 to 4.  
 11 (3.30 pm)  
 12 (A short break)  
 13 (3.45 pm)  
 14 MR LASOK: Now, Mr Jolliff, what we were doing was going  
 15 through the witness statement picking up points that you  
 16 are making about the pricing and more particularly the  
 17 price files that were sent to you by both manufacturers.  
 18 We had just looked at paragraph 19, and I want now to  
 19 take you to paragraph 39 of your witness statement. If  
 20 we look at this, here you start off by saying that  
 21 parity requirements were not important to Asda. You say  
 22 that you would simply have considered the underlying  
 23 position and decided on the best pricing position for  
 24 Asda. Then you say:  
 25 "Indeed, the manufacturers' RSP was frequently the

1 commercially rational retail price for Asda to set,  
 2 regardless of whether it was also at parity with or at  
 3 a specific differential to the competing brands of the  
 4 other manufacturers."  
 5 Then if you go to paragraph 80, here you are  
 6 commenting on document 22, but I would like to draw your  
 7 attention to the last seven lines. It's the sentence  
 8 beginning "As I have said ..." Do you have that?  
 9 A. "As I have said" --  
 10 Q. This is paragraph 80?  
 11 A. Yes.  
 12 Q. Towards the bottom, there is a quote:  
 13 "Almost all stores continue to achieve strategy  
 14 pricing."  
 15 That's in italics. Then you say:  
 16 "As I've said, because we had such thin margins on  
 17 tobacco products, we would generally price at or close  
 18 to the RSP. A byproduct of this was that the  
 19 manufacturers' brand hierarchy and ITL's strategic  
 20 pricing objectives would often be met. This was not  
 21 through any conscious decision on Asda's part to observe  
 22 their strategic pricing, it was simply that through  
 23 moving cost prices and aware of our thin margin  
 24 position, ITL was able to have an influence on the  
 25 retail price we would decide to sell at."

1 So that's what you said there. I appreciate this is  
 2 a whole range of different bits of your witness  
 3 statement that I am taking you to, but you will see the  
 4 point that I am coming to when we get to the end of this  
 5 particular trajectory.  
 6 A. Right.  
 7 Q. If you go to paragraph 97, and look at the last sentence  
 8 of that, do you have that?  
 9 A. Yes.  
 10 Q. You say:  
 11 "On cigarettes where margins were much thinner, the  
 12 manufacturers would often match each other's price  
 13 increases to increase the profits on the sales rather  
 14 than maintain lower prices to try and increase market  
 15 share."  
 16 Okay? So now let's move back to paragraph 5,  
 17 towards the beginning of your witness statement. It  
 18 should be the second page of the witness statement.  
 19 A. Yeah:  
 20 "My pricing decisions were made on the basis of our  
 21 cost prices."  
 22 Q. So there you say that the pricing decisions were made on  
 23 the basis of cost price margin and competitors'  
 24 positions, but you go on to say:  
 25 "To the extent that the actual retail price we chose

1 corresponded with the manufacturer's recommendation,  
 2 this was because they set the recommendation at a level  
 3 they knew we would think to be the competitive level.  
 4 So we followed the recommendation because we decided it  
 5 made sense for us, not because we agreed the price with  
 6 the manufacturer. To the extent that this also  
 7 coincided with the manufacturer's parity or differential  
 8 aspirations, this was because the manufacturer set cost  
 9 prices at a level which would encourage that outcome.  
 10 Again, we were not agreeing to follow PDRs."  
 11 As I understand it, what essentially you are saying  
 12 is this, and you will correct me if I am wrong: It made  
 13 sense for Asda to follow the RSPs in the price files  
 14 generally, because the RSPs in the price files provided  
 15 you with a price that made commercial sense generally;  
 16 it wasn't a price you say that you agreed with the  
 17 manufacturer, it's just that when you looked at the  
 18 position generally, it made sense to follow the RSPs.  
 19 I'll just stop there. Do I have that wrong?  
 20 **A.** It had to be a commercial benefit for Asda. The  
 21 commercial benefit for Asda was the actual margin that  
 22 we had, and I was given a budgeted margin to aim for as  
 23 well as sales and as well as profit, and that is what  
 24 I would look at. The deal sheets that were given were  
 25 recommended retail selling prices, not actual selling

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1 prices. There are cases, for example, when you get  
 2 a manufacturers' price increase and I'll make this up to  
 3 make it easier, say for example -- not manufacturers'  
 4 price increase but the Budget, say for example they went  
 5 up by 10p from the Government, I would be expecting  
 6 there to be a 10p price increase on that, because we had  
 7 to pay the Government back. When you actually looked at  
 8 the recommended retail selling prices, if for example  
 9 Gallaher's or Imperial had actually put 11p on,  
 10 I wouldn't accept that, because it wouldn't be  
 11 commensible for the customers to expect the cigarettes  
 12 to go up 10p and then put 11p on. So the margin had to  
 13 be correct for me to achieve the requirements that Asda  
 14 would pay me for.  
 15 **Q.** Now let's move to the next stage. If the manufacturers  
 16 were setting these RSPs by reference to their own parity  
 17 and differential strategies, and then generally speaking  
 18 you adopted the RSPs because they made commercial sense  
 19 to Asda, which is what you say in your witness  
 20 statement, as I understand it, you would end up -- Asda  
 21 would end up -- unconsciously pricing in accordance with  
 22 the manufacturers' parity and differential requirements,  
 23 and that's what you appear to be saying in your  
 24 paragraph 80, last sentence. Is that right?  
 25 **A.** No, the only thing I can say is that I was pricing for

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1 Asda's benefit and not for any benefit --  
 2 **THE CHAIRMAN:** No, that's not the question you were asked,  
 3 Mr Jolliff.  
 4 **A.** Sorry.  
 5 **THE CHAIRMAN:** The question you were asked is: were you  
 6 saying that you chose prices which were most of the time  
 7 at the recommended retail prices, both in relation to  
 8 ITL and Gallaher, so if they were, unbeknown to you or  
 9 known to you, actually setting those prices with  
 10 particular differentials in mind, your prices would then  
 11 accidentally or unconsciously, as Mr Lasok put it,  
 12 reflect those?  
 13 **MR LASOK:** Could I just intervene before you answer, because  
 14 I think it's not recommended retail price, the RRP, we  
 15 are here looking at the RSP.  
 16 **THE CHAIRMAN:** Oh, I am sorry.  
 17 **MR LASOK:** It's my fault for not making it clear.  
 18 I think you confirmed this before, but in the price  
 19 list that you received from the manufacturer, you had  
 20 a recommended selling price, the RSP?  
 21 **A.** Yeah.  
 22 **Q.** That's not the same as the RRP?  
 23 **A.** No, it's not.  
 24 **Q.** So I think the Chairman's question is really directed at  
 25 your following, generally speaking, the RSP?

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1 **DR SCOTT:** I think you put it very nicely at the end of  
 2 paragraph 80 in your witness statement, and I think  
 3 Mr Lasok referred to that, and it may be helpful to you  
 4 to refresh your memory of that.  
 5 (Pause)  
 6 **A.** Yeah, I mean, it's because of the brand hierarchy. For  
 7 example, you had premium, subpremium, et cetera,  
 8 et cetera, and it may be for an example that somebody's  
 9 on promotion with a particular brand, an account manager  
 10 goes into our stores and sees that we have got  
 11 a particular product on promotion, and they may want to  
 12 match that. Now, to me, that makes good business sense,  
 13 because we are giving the customer the best value that  
 14 we can get, which is part of Asda's values, and also  
 15 it's giving Asda a good deal because we are not funding  
 16 it, the suppliers are funding it. And that's what it's  
 17 at all about, the suppliers funding their actual  
 18 products and looking after their products. Because the  
 19 only thing that we have, the only thing that suppliers  
 20 have, because of the taxation, et cetera, is the actual  
 21 product that's on sale, and they can either promote it  
 22 or not. So the only thing that we have is price.  
 23 **MR LASOK:** Now, would you agree with me that you actually  
 24 knew that the RSPs in the price files reflected the  
 25 manufacturers' parity and differential strategies?

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1 **A.** No, because you haven't got time to sit and look at  
 2 a Gallaher's price file or, as I call them, deal sheets,  
 3 and an Imperial deal sheet, both at the same time. And  
 4 you don't look, for example, at what price may be,  
 5 because that is the price. You know, if there is a deal  
 6 to go on, the product has gone up 3p, you put 3p on. If  
 7 the product goes up at manufacturers' price increase by  
 8 5p, you put 5p on, because that's what the consumer is  
 9 expecting. If it goes up 10p in the Budget, you put 10p  
 10 on. You don't go around comparing prices against  
 11 various manufacturers. What you would do, after a price  
 12 increase and what I used to do, was to go out myself to  
 13 check what the prices were out in the marketplace. So  
 14 I would go to Morrisons, Sainsbury's, Tescos, et cetera,  
 15 to make sure that I was competitive and that I was doing  
 16 the right thing.  
 17 If I was then out on price, I would come back and  
 18 get hold of the supplier and say "Look, this particular  
 19 product is being sold at such and such a store, I want  
 20 a deal to match that, because we just accepted your deal  
 21 based on the margin that's acceptable to Asda, but I am  
 22 out on price, so I need a deal."  
 23 **Q.** Could you look at tab 2 of annex 14, {D14/2/6}, please,  
 24 it's not the witness statement file, it's the one on  
 25 your right.

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1 **A.** Right.  
 2 **Q.** Could you read that to yourself, please.  
 3 (Pause)  
 4 **A.** Right.  
 5 **Q.** Now, you see that this is an instance in which ITL is  
 6 writing to you telling you about price changes, and the  
 7 price changes are listed there, and we have the parity  
 8 with Mayfair, we have, so far as L&B are concerned, it's  
 9 Mayfair 20s plus 20p, so far as JPS Kingsize Lights it's  
 10 Mayfair 20s plus 20p, and in the penultimate sentence  
 11 the writer of the letter, Mr Downham, says that  
 12 an updated price file will follow.  
 13 **A.** Yeah.  
 14 **Q.** If you look at the next tab, tab 3, could you read  
 15 tab 3, please.  
 16 (Pause)  
 17 **A.** Right.  
 18 **Q.** So that's the same thing. We also see that price  
 19 changes to ITL products in the case of Richmond to  
 20 achieve a parity with Mayfair 20s. In the case of L&B,  
 21 it's to achieve a plus 20 price versus Mayfair. In the  
 22 case of JPS Kingsize, again plus 20p versus Mayfair.  
 23 And the letter states that, because there is  
 24 an attachment to this, the revised figures are in the  
 25 price file.

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1 If you look at tab 7, {D14/7/25}, can you read that?  
 2 **A.** Yes. (Pause).  
 3 **Q.** Again, price changes in order to -- in pursuance of  
 4 ITL's parity and differential requirements, and the last  
 5 sentence says:  
 6 "Details will be confirmed in a price file update."  
 7 And tab 13. {D14/13/36}.  
 8 (Pause)  
 9 It's the same thing.  
 10 **A.** But what's probably happened here is that Imperial --  
 11 well, what has happened here is that Imperial Tobacco  
 12 are reacting against the Gallaher's brands, which they  
 13 are obviously Mayfair -- these are Gallaher's brand, and  
 14 the Richmond product is an Imperial Tobacco, and they  
 15 are looking at bringing the price down for the benefit  
 16 of their brands and also for the benefit of the consumer  
 17 who smokes those particular brands who won't be out on  
 18 price.  
 19 I wouldn't accept anything based on somebody saying  
 20 "Well, because I want them 20p different". When  
 21 I looked at my price file, provided the margin is  
 22 correct, and provided that I am in a situation where it  
 23 is of benefit to Asda, commercially viable to Asda and  
 24 I am not losing money, I would accept those particular  
 25 products.

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1 **Q.** Can we complete the picture by looking at annex 4,  
 2 please. It's tab 3, and if you have tab 3 you should  
 3 have at the top an email from Chris Halford sent to you  
 4 on 22 March 2001. Do you have that?  
 5 **A.** 22 March 2001, yes.  
 6 **Q.** Okay. That's a response to, or at least not a response,  
 7 it follows on from an email that starts just after the  
 8 second holepunch on that page. Could you possibly read  
 9 that email first and then the follow-on email.  
 10 (Pause)  
 11 **A.** Right.  
 12 **Q.** Now, if you look at the first email in time, not the one  
 13 that starts at the top of page 1, but the one that  
 14 starts just below the second holepunch, he starts off by  
 15 pointing out that he's attached the new Budget pricing  
 16 schedule covering costs and retails, and then he goes  
 17 into various details about holds and stuff like that.  
 18 If you go on the second page to the penultimate  
 19 paragraph, just above the first holepunch, it's the  
 20 single sentence that says:  
 21 "Our objective is to maintain price list  
 22 differentials at discounted prices, all extra discounts  
 23 for reduced retails are confirmed on the attached."  
 24 The first thing is when he talks about discounted  
 25 prices, is that discounted by reference to the RRP's?

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1 A. No, that's discounted that are put into your margin, so  
 2 it's your discounts that you receive to bring the price  
 3 down or up as the case may be.  
 4 Q. Okay, but he talks about the objective being to maintain  
 5 price list differentials and he is confirming  
 6 an attachment that sets out the price file. You can  
 7 look at the attachment.  
 8 A. I mean, all I can say to that is that coming out of the  
 9 Budget, obviously both Imperial Tobacco and Gallaher's  
 10 were suffering a shock from the price increase of the  
 11 Budget, and they were wanting to hold their prices down,  
 12 to keep people smoking, because they are all the cheap  
 13 brands, they are not premium brands. Normally if  
 14 premium brands could go up, they would hold the cheaper  
 15 ones down which these are, and there is also various  
 16 multisaves that are taking place, as well as some price  
 17 marked pack, and they then wanted to increase the price  
 18 after the Budget because they had exhausted whatever  
 19 monies they had available to keep on funding the brands.  
 20 Q. The point that I am putting to you, though, is that we  
 21 can see from these documents that time and time and time  
 22 again you are being informed by manufacturers of prices  
 23 that are included in the price files and that reflect  
 24 the manufacturers' pricing and differential policies.  
 25 So the point I am putting to you is that you knew that

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1 these RSPs that you were getting from the manufacturers  
 2 were oriented around the manufacturers' pricing and  
 3 differential strategies?  
 4 A. It doesn't necessarily mean that I moved to these --  
 5 **THE CHAIRMAN:** No, you are not being asked what it meant.  
 6 Just listen to the question again. You are being asked  
 7 about the state of your knowledge as a result of  
 8 receiving these letters that we have seen, or emails,  
 9 did you know that the prices that were being suggested  
 10 by the manufacturers were suggested pursuant to their  
 11 policies about how their brands should be priced in  
 12 relation to each other?  
 13 A. I mean, I would just take it that if they were saying  
 14 they were 11p below and what have you it makes logical  
 15 for them to go up by 11p because that's what the  
 16 supplier would be expecting and the retailer would be  
 17 expecting if that's what they had funded them down to or  
 18 whatever the Budget was.  
 19 So you wouldn't actually notice the actual parity or  
 20 the price differential, apart from him saying it in this  
 21 actual letter, which is obviously saying that he is  
 22 looking to hold them at those particular prices, which  
 23 I would make a commercial decision on, ask them to hold  
 24 them or not.  
 25 **MR LASOK:** You can put away that file. Could you look now

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1 back to your witness statement in paragraph 101, please.  
 2 You may remember, we have looked at this before,  
 3 this paragraph deals with document 40 in annex 14. If  
 4 you want to refresh your memory, please do so. It's 40.  
 5 (Pause)  
 6 If you want to read the email, it's the one in the  
 7 middle of the page, the email from Mr Hall to you.  
 8 (Pause)  
 9 A. Right.  
 10 Q. If we go back to your paragraph 101 in your witness  
 11 statement, and to a sentence in the middle, which is on  
 12 the right-hand side of the page and it starts with the  
 13 words "It may be that ..." Do you have it?  
 14 A. Yes.  
 15 Q. You say:  
 16 "It may be that I had told ITL when we would be  
 17 increasing Gallaher's Sterling as I wanted the price for  
 18 ITL's Richmond to increase across the market so that  
 19 I could restore my margin."  
 20 A. Well, I --  
 21 Q. You knew, didn't you, that there was a 5p difference  
 22 between Sterling and Richmond?  
 23 A. I knew that Sterling was our brand.  
 24 Q. Sterling was a Gallaher brand.  
 25 A. Was a Gallaher brand, but we used it for six months as

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1 an Asda only brand.  
 2 I mean, if they wanted to move the prices, move us  
 3 up and they were finishing the actual bonuses, for  
 4 whatever reason, I can see no problem in moving the  
 5 price up, because, you know, this Sterling brand was put  
 6 in there to keep Richmond on its toes, I must be honest,  
 7 so for it to increase in price wouldn't be of any  
 8 benefit to me because all I would be doing was to get  
 9 Gallahers to keep the Sterling down and fund that,  
 10 because I couldn't afford to fund it.  
 11 Q. The point I am putting to you is that in paragraph 101  
 12 you actually reveal that you knew that there was  
 13 a differential requirement in existence concerning  
 14 Sterling and Richmond, so that if Sterling went up,  
 15 Richmond would be pushed up; that's so, isn't it?  
 16 A. Well, that's what it says here, but I mean, you know --  
 17 Q. Well, it's your witness statement.  
 18 A. Gallaher's supplied us with Sterling, and I would've  
 19 been back onto Gallaher's straightaway stating that  
 20 I didn't want to do this because of various things that  
 21 had happened in the marketplace and I don't want to move  
 22 these prices.  
 23 Q. Could you go to tab 31, please. Just to be clear about  
 24 what we have, you should have at the top of the page the  
 25 name "Stephen Carroll", and you see that at the top of

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1 the page there, there is an email from Martin Downham --  
 2 **A.** Yes, that's right.  
 3 **Q.** -- dated 20 March. The bit we are interested in, again  
 4 it's a sequence of three emails, the first one starts  
 5 below the second holepunch, and it's from Martin Downham  
 6 to you on March 20, 2001.  
 7 **A.** Yes.  
 8 **Q.** So what he wants to do is he wants to increase the  
 9 retail prices of ITL's roll-your-own range following the  
 10 increase in the retail prices of Amber Leaf. Your  
 11 price, which is in the middle of the page, it may be  
 12 a bit difficult to read, but it's the first page.  
 13 Sorry, it's the tab.  
 14 **A.** Which?  
 15 **Q.** Tab 31.  
 16 **A.** Yes.  
 17 **Q.** The one we are looking at. It's a bit difficult to read  
 18 but in the middle of the page there is a "from  
 19 John Jolliff". Do you have that?  
 20 **A.** Yeah.  
 21 **Q.** You say:  
 22 "Martin, this will be okay."  
 23 **A.** Yeah.  
 24 **Q.** So you were confronted here with ITL's intention to  
 25 increase the price of its roll-your-own range following

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1 the increase in Amber Leaf, and the timing of  
 2 Mr Downham's email to you is 11.09 am, and the timing of  
 3 your reply to him is also 11.09 am, so you responded  
 4 pretty quickly, or it appears that you responded pretty  
 5 quickly, just by saying that it was okay?  
 6 **A.** Yeah.  
 7 **Q.** In other words, you were quite happy to go along with  
 8 such price changes, and you didn't try to negotiate  
 9 a continuation of the bonus or a move to a different  
 10 price or anything like that?  
 11 **A.** No, because if a competitor's brand like Amber Leaf had  
 12 gone up in price, one would assume that any other  
 13 competitive brand would be moving in price at a later  
 14 date. Now, you would be expecting if Amber Leaf went up  
 15 that Drum and Golden Virginia would be moving up as  
 16 well, because they would probably have been on promotion  
 17 against Amber Leaf.  
 18 **Q.** So the position was --  
 19 **A.** You see, you can't continually hold down your prices if  
 20 you haven't got the funding to do it, otherwise your  
 21 margin just disappears completely.  
 22 **Q.** The position was that you were in frequent receipt of  
 23 these price files and other communications from the  
 24 manufacturers like the one we are just looking at. The  
 25 RSPs in the price files were oriented around the

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1 manufacturers' pricing and differential requirements.  
 2 You knew that, and you went along with the prices  
 3 proposed to you by the manufacturers, because your  
 4 evidence is that generally, at least, you priced in  
 5 accordance with the RSPs. Isn't that so?  
 6 **A.** If you turn over the page, it actually states "these  
 7 prices will be achieved by withdrawing the bonus  
 8 support". If they are going to withdraw the bonus  
 9 support, I or Asda can't afford to be funding products  
 10 for suppliers, because, as I've already stated, we  
 11 haven't got any cash to spend, because of the margins  
 12 being so thin.  
 13 **Q.** That's why I pointed out that your response was  
 14 virtually immediate, and you made no attempt to  
 15 negotiate a continuation of the bonus, there was no  
 16 suggestion by you that the move should be a different  
 17 price?  
 18 **A.** Because we are in a situation where it would probably  
 19 have been those prices prior to the product being on  
 20 bonus. You see, if we can point this out to you as  
 21 well, we have what we call a system where you can  
 22 actually put bonuses in on various dates, and it will  
 23 trigger when that particular product's bonus has  
 24 finished. So you can sort of say Benson & Hedges being  
 25 on price at, say, £1, and now are going up 10p because

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1 of bonuses, so that date will trigger it.  
 2 So that's how basically they all work. But if, for  
 3 example, somebody extends it and you don't know how long  
 4 they are going to extend it for, you will have to hold  
 5 it with no date on it, they call it a cost and retail.  
 6 You understand what I mean? It's hard to explain, but  
 7 it's on the computer where you put it in, price bonus  
 8 from such and such a date to such and such a date.  
 9 **Q.** But the position was that in practice, in general, you  
 10 priced in accordance with the RSPs, and that  
 11 necessarily, I put it to you, built up an expectation on  
 12 the part of the manufacturers that in general your  
 13 pricing would follow their RSPs and therefore their  
 14 parity and differential requirements?  
 15 **A.** No, Asda pricing was based on the best margins that we  
 16 could get to get the best retails we could get to create  
 17 more sales for Asda, in difficult times.  
 18 **Q.** Can I move to tab 41 in this annex. {D28/41} This is  
 19 an internal ITL document that you commented on in your  
 20 witness statement, but obviously you would have seen it  
 21 at the time. I just wanted to look at page 3. We have  
 22 here a page which is headed "Asda prices effective from  
 23 1 October 2001 until further notice".  
 24 **A.** Yeah.  
 25 **Q.** Now, that's shelf prices that Asda communicated to ITL,

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1 isn't it?  
 2 **A.** I am not too sure. Are you sure it's not the other way  
 3 about, it's where they have been out and checked our  
 4 prices?  
 5 **Q.** Mr Hall says that they are the shelf prices communicated  
 6 to ITL by Asda. For the Tribunal's note, that's  
 7 Mr Hall's witness statement, which is core bundle 3,  
 8 tab 41, paragraph 28, penultimate sentence. He is there  
 9 referring to document 52(a) but it's the same type of  
 10 document we have just seen.  
 11 If you go to -- it will only take us about a minute  
 12 or two to deal with this -- tab 48, {D28/48} and this is  
 13 again another one of these internal ITL documents that  
 14 you have commented on in your witness statement, but if  
 15 we go to page 3 we have also another one of these  
 16 tables, Asda prices effective from 25 February 2002. Do  
 17 these ring any bells?  
 18 **A.** No.  
 19 **Q.** If you go to 52(a), page 3, this is another internal ITL  
 20 document which you wouldn't have seen at the time, but  
 21 at page 3 you have another table, Asda prices effective  
 22 from 27 May 2002.  
 23 **A.** I'll be quite honest with you, I've never seen one of  
 24 those before.  
 25 **Q.** These don't ring any bells?

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1 **A.** No.  
 2 **Q.** If Mr Hall says that they are shelf prices communicated  
 3 by Asda to ITL, you have no recollection of that?  
 4 **A.** If Mr Hall says that, I must believe him, but I can't  
 5 remember them, to be quite honest with you. Because how  
 6 I would be able to tell that we had price marked packs  
 7 listed on here in our stores, I don't know. I would  
 8 have to physically go out and price check our stores,  
 9 because price marked packs go in and come out. I am  
 10 presuming, I don't honestly know, I think this is  
 11 actually an internal one that has been checked by  
 12 Imperial Tobacco.  
 13 **Q.** Why does it say, for example, "effective from  
 14 27 May 2002"? All these ones that we have been looking  
 15 at say "effective from" a specific date, and then they  
 16 carry on with the words "until further notice".  
 17 **A.** I don't honestly know.  
 18 **Q.** That's fine, if you can't shed any light on these --  
 19 **A.** I can't shed any light on it.  
 20 **MR LASOK:** I have just observed the time. I have not yet  
 21 regrettably finished with Mr Jolliff. I probably would  
 22 have another 45 minutes' cross-examination. I don't  
 23 think that that is excessive by reference to the  
 24 estimate that was given previously. The problem that we  
 25 now face -- I am terribly sorry, Mr Jolliff, but we may

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1 be engaging in a kind of private conversation.  
 2 **A.** That's all right, no problem.  
 3 **MR LASOK:** There is, I think, an issue concerning Mr Hall.  
 4 **THE CHAIRMAN:** Yes.  
 5 **MR LASOK:** As I understand it, he needs to be finished  
 6 tomorrow. In those circumstances, I would prefer it,  
 7 because Mr Hall has to be finished tomorrow, if we just  
 8 dealt with Mr Hall tomorrow, because what I am slightly  
 9 concerned about is that if we carry on with Mr Jolliff  
 10 and then there is further cross-examination by ITL,  
 11 re-examination by Mr Flynn, we will cut far too much  
 12 into tomorrow so far as Mr Hall is concerned. He is  
 13 a very important witness so far as ITL's side of the  
 14 Asda case is concerned, and I will use my best  
 15 endeavours to ensure that Mr Hall will leave at the end  
 16 of Friday with everything done and dusted. But I don't  
 17 think it's realistic to suppose that we could do that if  
 18 we are dealing with Mr Jolliff as well tomorrow.  
 19 **THE CHAIRMAN:** Yes. So that would mean that Mr Jolliff  
 20 would need to come back on Tuesday morning.  
 21 **MR FLYNN:** An alternative which doesn't necessarily preclude  
 22 that anyway would be that Mr Lasok could at least finish  
 23 his 45 minutes or so tomorrow morning and then move on  
 24 to Mr Hall, rather than leave things hanging in this  
 25 way, perhaps he could complete his 45 minutes or so and

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1 then spend the rest of the day on Mr Hall, and Mr Howard  
 2 and I can concert as to whether we have more for  
 3 Mr Jolliff at that point. I just offer that as another  
 4 possibility.  
 5 **THE CHAIRMAN:** The only disadvantage for that is that there  
 6 may then be quite a squeeze on any questioning of  
 7 Mr Hall other than by Mr Lasok, and given some of  
 8 Mr Jolliff's answers, it may be that you have some  
 9 questions for Mr Hall, I don't know.  
 10 **MR FLYNN:** That is possible. My friend hasn't given  
 11 an estimate for how long he would ordinarily want for  
 12 Mr Hall anyway. I just suggest that if it's --  
 13 **THE CHAIRMAN:** How long do you think you will need? Do you  
 14 think if you finish Mr Jolliff tomorrow morning with his  
 15 cross-examination ...  
 16 **MR LASOK:** I am very doubtful whether we could fit Mr Hall  
 17 in comfortably tomorrow. As you know, one of the major  
 18 problems is giving a reasonably accurate estimate of  
 19 cross-examination, because sometimes, and Mr Jolliff,  
 20 with all due respect, this is not a comment directed at  
 21 you, but sometimes when you put a question the answer is  
 22 a speech and I take the view that it's inappropriate to  
 23 interrupt what the witness is saying.  
 24 **THE CHAIRMAN:** Well, in order to be sure of finishing  
 25 Mr Hall tomorrow, I think we should start with Mr Hall

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1 to make sure we finish.  
2 **MR FLYNN:** I am absolutely in your hands on that, Madam,  
3 I've made my suggestion.  
4 **THE CHAIRMAN:** Yes. The question is whether we would ask  
5 Mr Jolliff to wait here tomorrow outside the room on the  
6 off-chance that he would have time at the end of the  
7 day, but I realise that's rather awkward.  
8 **MR FLYNN:** With respect, Madam, and I am not casting any  
9 aspersions, it's no-one's fault, Mr Jolliff has messed  
10 around quite a bit already and I suggest we decide today  
11 whether he be on tomorrow or not. If he has to come  
12 back and postpone his holiday yet again, I think he  
13 should know that now.  
14 **THE CHAIRMAN:** I think we will devote tomorrow, then, to  
15 Mr Hall, and that, I am afraid, means that you will need  
16 to come back next Tuesday morning to finish your  
17 evidence.  
18 **MR LASOK:** Madam, might I raise the question of -- I think  
19 that Mr Jolliff doesn't need to continue to sit around.  
20 **THE CHAIRMAN:** If there are going to be some further  
21 logistics questions, I think I will rise briefly,  
22 Mr Jolliff, you can leave the witness box. Again,  
23 because you are in the middle of your evidence, you  
24 mustn't discuss this with your legal team between now  
25 and Tuesday morning when you come back.

1 MR HOWARD: No.  
2 **THE CHAIRMAN:** We will come back at 10.30 tomorrow morning.  
3 (4.30 pm)  
4 (The court adjourned until 10.30 am on  
5 Friday, 21 October 2011)  
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1 **A.** Right.  
2 **THE CHAIRMAN:** We will rise briefly because one of the  
3 members of the Tribunal has to leave now, so if there is  
4 further logistical matters I will come back in myself  
5 and deal with those.  
6 **MR LASOK:** Much obliged.  
7 **MR FLYNN:** Unless my friend has something specific, counsel  
8 can discuss that and we can raise it first thing  
9 tomorrow.  
10 **MR LASOK:** That may well be the better course then.  
11 **THE CHAIRMAN:** Very well. Is it all right to start at 10.30  
12 tomorrow or do you think we need to start at 10?  
13 **MR LASOK:** I would have thought 10.30 would be fine, but  
14 other people may take a more cautious view.  
15 **MR HOWARD:** 10.30 is fine. I just want to make one thing  
16 clear. I have told Mr Lasok on more than one occasion  
17 that Mr Hall has to be finished because he is going into  
18 hospital on Tuesday, and so I think 10.30 should be fine  
19 but I think Mr Lasok does have to make sure that the  
20 questions are put in such a way that he gets through in  
21 time and leaves time for re-examination.  
22 **THE CHAIRMAN:** It may be that either you or I do need to  
23 make sure that things move along swiftly tomorrow with  
24 Mr Hall. So is there anything further that we need to  
25 discuss this afternoon?

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