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IN THE COMPETITION
APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

17 November 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 28)

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, 17 November 2011
 2 (10.30 am)
 3 (Proceedings delayed)
 4 (10.34 am)
 5 **THE CHAIRMAN:** Good morning, ladies and gentlemen. Thank
 6 you very much to everyone for their written submissions,
 7 which we have read. You are going to start this
 8 morning, are you, Mr Lasok?
 9 Submissions by MR LASOK
 10 **MR LASOK:** Yes. We have circulated rather late in the day,
 11 I am afraid, a speaking note. We would have preferred
 12 to have done it earlier, but for logistical reasons it
 13 wasn't possible to do that.
 14 Does the Tribunal have a copy?
 15 **THE CHAIRMAN:** Yes.
 16 **MR LASOK:** I don't propose to read this out, but to go
 17 through it. The topics into which it's divided are
 18 essentially the following, after some introductory
 19 remarks I am going to go through the OFT's case as it
 20 currently stands and the associated theory of harm, and
 21 then I am going to look at how it fits into or what is
 22 the relationship between it and the decision, and then
 23 after that I am going to turn to consider the Tribunal's
 24 jurisdiction, and on how we submit the Tribunal can and
 25 should exercise its jurisdiction in the present case.

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1 To start off with, and this is a point I think at
 2 which I will read something, and it's just the first
 3 preliminary paragraph in the speaking note.
 4 The OFT does consider that the evidence before
 5 the Tribunal indicates that the agreements or concerted
 6 practices used to implement the manufacturers' parity
 7 and differential pricing strategies at issue in these
 8 appeals involved the retailers in playing a more passive
 9 or compliant role than the OFT had previously believed.
 10 We therefore consider that the proceedings should
 11 continue on the basis of that case and that any
 12 procedural concerns which the Tribunal or the appellants
 13 might have can be addressed by an appropriate exercise
 14 of the Tribunal's powers.
 15 That is the gist, the long and short of the
 16 submissions that I am going to make. It's obvious to
 17 everybody why the OFT has taken that view. The OFT has
 18 explained why already to the Tribunal. I think,
 19 however, it is worthwhile bearing in mind that the
 20 suggestion made about some of the appellants that there
 21 was a previous change in the OFT's case is incorrect.
 22 We refer to where this is suggested in paragraph 3 of
 23 the speaking note. The OFT has simply re-stated what
 24 its case as set out in the decision was, and it was only
 25 after the evidence had turned out as it did that there

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1 was a change to the OFT's case, and that followed on
 2 from the cross-examination of witnesses.
 3 Until that time, the OFT's understanding was based
 4 largely upon the contemporary documents and accounts
 5 provided by the parties and their witnesses during the
 6 administrative part of the process, and when one bears
 7 in mind the hierarchy of evidence that the Tribunal
 8 established in JJB and Allsports, that's the 2004
 9 decision, which is the one where the Tribunal analysed
 10 the significance of evidence and drew attention to the
 11 fact that contemporary documentary evidence not intended
 12 to be seen outside the scope of the parties to the
 13 correspondence tends to be rather more probative than
 14 ex post facto rationalisations, particularly those given
 15 by people involved some time after the event.
 16 That approach, based on placing the greater weight
 17 on the contemporary documentary evidence, was, in our
 18 submission, entirely reasonable. But it was also, in
 19 our submission, entirely reasonable for the OFT to pay
 20 attention to the evidence of the witnesses as it came
 21 out in cross-examination for the purpose of evaluating
 22 its credibility, its consistency with other evidence,
 23 and then to reach a conclusion as to whether that led
 24 the case.
 25 That is the reason why we are now where we are. But

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1 it remains the case that there cannot be any doubt at
 2 all that ITL and Gallaher had and operated P&D
 3 strategies involving the linking of the shelf price of
 4 competing brands.
 5 In opening -- and I'll give the Tribunal the
 6 reference, I am now on paragraph 7 of the speaking note,
 7 the reference is to Day 4, page 39, line 15, running to
 8 page 40, line 1 -- the OFT had pointed out that the real
 9 issue in these appeals concerned what had been agreed or
 10 concerted, not the fact that agreements and concerted
 11 practices existed.
 12 Another way of putting it is that the question was
 13 how exactly the P&D strategies were operated in
 14 practice.
 15 Now, under the refined case that the OFT is putting
 16 forward, the starting point is that the agreement or
 17 concerted practice between the manufacturer and the
 18 retailer existed for the purpose of enabling the
 19 manufacturer to achieve its P&D pricing strategy in the
 20 retailer's stores. The retailer understood the
 21 manufacturer's P&D strategy and was a party to
 22 an agreement or concerted practice concerning its
 23 implementation.
 24 That brings us to the restraints that the OFT
 25 submits can clearly be seen on any view emerging from

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1 the evidence which are set out in paragraph 10 of the
 2 speaking note and replicates the two restraints that
 3 were referred to in the OFT's previous written
 4 submission on this subject.
 5 So in paragraph 10, in the two subparagraphs, it's
 6 an agreement or concerted practice restricting the
 7 retailer's ability to determine its retail prices for
 8 competing linked brands, in that (a) it was agreed or
 9 concerted that the retailer would price certain of
 10 manufacturer A's brands at specific retail prices
 11 relative to the retail price of a competing linked
 12 brand, in the context of A's P&D strategy, and (b) it
 13 was agreed or concerted that the retailer was required
 14 or expected to adhere to manufacturer A's P&D strategy
 15 in the absence of a wholesale price change or
 16 alternative instruction made by either manufacturer.
 17 **THE CHAIRMAN:** So you are clear, are you, that the two
 18 restraints set out in paragraph 10 of your speaking note
 19 are intended to be identical to the restraints described
 20 in paragraph 2 of the earlier submissions?
 21 **MR LASOK:** Yes, that's correct.
 22 So in our submission, the manufacturer was able to
 23 achieve its P&D strategy on the basis that the retailer
 24 would set shelf prices for the manufacturer's brands at
 25 the level instructed or requested by the manufacturer in

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1 the context of that strategy, and we refer in the
 2 speaking note to that as manufacturer led
 3 implementation, and the other aspect was that the
 4 retailer would not itself disturb the maintenance of the
 5 P&Ds.
 6 So in the next part of the speaking note, we pass to
 7 consider different factual situations which arose in
 8 the -- in relation to --
 9 **THE CHAIRMAN:** Sorry, are you going to come back in more
 10 detail to the content of these restraints?
 11 **MR LASOK:** I hadn't intended to do so, otherwise than in the
 12 context of an exploration of the theory of harm
 13 associated with them.
 14 **THE CHAIRMAN:** Right.
 15 (Pause)
 16 **MR LASOK:** What I was going to do now is turn to consider
 17 how those two restraints operated in particular factual
 18 situations, but I don't know whether that was the
 19 thought behind the question that the Chairman put to me
 20 just now.
 21 **THE CHAIRMAN:** What wasn't clear to me when I was looking at
 22 2(a) before was whether it was part of the OFT's case
 23 and whether it needed to be part of the OFT's case that
 24 the retailer knew that the specific pricing points being
 25 put to it by the manufacturer were chosen because of the

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1 manufacturer's P&D strategy.
 2 **MR LASOK:** Well, the way we would put it is that as long as
 3 the retailer knew that the manufacturer -- we are
 4 talking about manufacturer A -- was operating a P&D
 5 strategy, the retailer didn't need to know that, didn't
 6 need to be told that a particular price at any given
 7 point in time had been selected by the manufacturer to
 8 that end. Because what the retailer was doing was
 9 signing up to complying with the manufacturer's
 10 instructions or requests concerning the pricing on the
 11 shelves of the manufacturer's brands, knowing in
 12 a general sense that the manufacturer was operating
 13 a parity and differential strategy. Because as long as
 14 the retailer knew that that was what was going on, they
 15 didn't have to know that each and every price that it
 16 was being asked to move to was a reflection of that
 17 strategy.
 18 **THE CHAIRMAN:** And the second point on 2(a), if I can
 19 continue to call it that, even though it's now 10(a), is
 20 whether the restraint is accepted or alleged to be
 21 accepted in respect of particular instances where
 22 a price point is instructed, if I can say that, or
 23 whether the allegation is that there was a preceding
 24 agreement or concertation that they would comply with
 25 pricing instructions as and when given. Because in 2(a)

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1 it looked as if the restraint was an agreement or
 2 concertation of the particular prices at the point that
 3 the instruction was given, whereas 10(a) looks more like
 4 a broader agreement that when pricing instructions are
 5 given, you will comply with them, if that makes sense.
 6 **MR LASOK:** It's that.
 7 **THE CHAIRMAN:** The latter?
 8 **MR LASOK:** Yes. It's not a situation in which you home in
 9 on each communication, and you seek to derive
 10 an agreement or concerted practice from a single
 11 exchange such as a single email. The contention
 12 advanced by the OFT is based on the assertion that you
 13 either had, through a written trading agreement or
 14 through a -- how can one put it? It's a concerted
 15 practice that has emerged, that when an instruction or
 16 request to move to a particular price point would be
 17 issued by the manufacturer, the retailer would make the
 18 move. I can illustrate that by taking Asda, because in
 19 Asda's case, you have basically two periods of time.
 20 There was one period of time running from the agreement
 21 that Mr Jolliff had signed with ITL, shortly before his
 22 departure from acting as tobacco buyer. Before then,
 23 the role played by the previous trading agreement is
 24 a little unclear, but we have written communications at
 25 that earlier point in time indicating that Asda knew of

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1 the parity and differential strategy in the form of the
 2 ITL strategic pricing requirements.
 3 We see not only documentation such as the internal
 4 ITL reports indicating, or rather evidencing that they
 5 had been operating criteria for measuring Asda's
 6 compliance with the strategic pricing requirements, and
 7 there was reporting back on Asda's performance.
 8 But we actually see exchanges between Asda and ITL
 9 that are consistent with the view that, even if you
 10 ignore the written trading agreement that was in effect
 11 at that time, an understanding had emerged as between
 12 ITL and Asda that when ITL issued an instruction or
 13 request, however you call it, to move a shelf price for
 14 the ITL brand, Asda would comply.
 15 Now, obviously there is a -- I don't anticipate that
 16 Asda are going to accept that that interpretation of the
 17 facts and the evidence is correct, because in
 18 Mr Jolliff's witness statement, for example, he says
 19 that compliance with the prices in the price files that
 20 he was sent by ITL was entirely voluntary, that he did
 21 it after a process in which he looked at all kinds of
 22 things, that he wasn't acting, as it were, on the basis
 23 of some kind of understanding with ITL that he would
 24 simply do whatever it was that they told him to do.
 25 But there is a dispute on the evidence about that,

1 because bluntly the OFT's case is that when you look at
 2 the evidence in the round, Asda's explanation simply
 3 lacks credibility, and the truth of the matter is --
 4 **THE CHAIRMAN:** Well, we don't want to get into the evidence
 5 too much. I was just trying to clarify, really, the
 6 scope of the restraints that it's now alleged.
 7 **MR LASOK:** Yes.
 8 **DR SCOTT:** Just so we understand what you are saying in
 9 relation to the evidence, without going into the detail
 10 of it, as I understand it you are relying on paragraphs
 11 like 287 and 288 in the case to which you referred,
 12 which is JJB Sports and Allsports and sentences like:
 13 "As regards the contemporaneous documents, it seems
 14 to us that a document prepared at the time, which the
 15 author never anticipated would see the light of day, is
 16 likely to be more credible than explanations given
 17 later."
 18 And in 288:
 19 "As far as witnesses are concerned, in this case we
 20 have no independent witness in the sense of an impartial
 21 third party who is free of the suggestion that he may
 22 have an axe to grind."
 23 Is that basically what you are saying to us?
 24 **MR LASOK:** Yes. But I wasn't proposing to go into that
 25 today.

1 **DR SCOTT:** No, I understand.
 2 **MR LASOK:** Because that's rather more the submission that
 3 would be made in closing submissions on the facts when
 4 the parties would make their submissions as to how
 5 the Tribunal should approach the evidence.
 6 But the reason why I referred to that case was to
 7 make the observation that the OFT's original stance,
 8 which was based upon the contemporary documentary
 9 evidence, was entirely rational and consistent with the
 10 general approach that one takes to evidence in cases of
 11 this sort.
 12 But in JJB and Allsports, the Tribunal never said
 13 that you simply ignore witness statements and the
 14 evidence given in cross-examination. What it does show
 15 is that you have to evaluate carefully what that
 16 evidence is, and it's that evaluation that we carried
 17 out that led us to the position in which we are
 18 currently in.
 19 **THE CHAIRMAN:** I think you have clarified now, as far as
 20 I am concerned, what the content of 2(a) is.
 21 **MR LASOK:** Yes. Is there anything about 2(b)?
 22 **THE CHAIRMAN:** Not for the moment.
 23 **MR LASOK:** Thank you.
 24 What I would then go to is paragraph 13 of the
 25 speaking note, which deals essentially with the payment

1 and withdrawal of tactical bonuses.
 2 Paragraph 13 is just a summary of the many examples
 3 that one sees in the annexes to the SO, where we have,
 4 looking at the subparagraphs of 13, ITL stating the
 5 price to which it wished the retailer to move, often
 6 expressly stating that the price move was intended to
 7 achieve a particular relativity, and then adjusting the
 8 level of the wholesale price, specifically the level of
 9 the tactical bonus.
 10 You will recall that this type of evidence is, in
 11 our submission, quite illustrative because the letters
 12 almost invariably are couched in the form "please move
 13 the price to", and then it is followed by the
 14 information concerning the adjustment of the wholesale
 15 price through the tinkering with the level of the bonus
 16 being paid.
 17 In paragraph 14, we move on to a different point,
 18 which is the fact, as we see it, that the agreement or
 19 concerted practice concerning shelf prices wasn't
 20 limited to reactive price moves, because we do see
 21 situations where, for example, ITL would implement
 22 a wholesale price increase and instruct the retailer to
 23 increase the shelf price to a particular level. In
 24 those cases, the shelf price would depart from ITL's
 25 stated parity or differential.

1 Now, that, on the face of it, is a price change that
 2 falls outside the scope of the P&D strategy, but it was
 3 a price change that was agreed or concerted with the
 4 retailer and it forms part of the agreement or concerted
 5 practice between the manufacturer and the retailer. The
 6 way we look at it is that ITL understood that it could
 7 bring about such shelf price increases by reducing the
 8 level of the bonus being paid. That's to say, it could
 9 get the retailer to make the alteration in shelf prices
 10 that it wished, and it was anticipating that its parity
 11 or differential would be restored at the higher level
 12 through a change in the retail price level of the
 13 Gallaher brand following a wholesale price increase made
 14 by Gallaher. But then if that didn't happen, ITL could
 15 issue a further instruction causing the parity or
 16 differential to be restored through a reduction in the
 17 shelf price, and this captures the kind of situation
 18 that we see in the period July to September 2002, which
 19 the Tribunal may recall is the point at which there had
 20 been a Gallaher MPI. And in relation to brands like
 21 Dorchester, that had been covered with a price hold so
 22 that the effective wholesale prices didn't change, the
 23 shelf price for the Gallaher product hadn't changed, but
 24 then later on we see the correspondence in which ITL is
 25 writing to the retailers, getting them to move the price

1 up because they wanted to move the market upwards.
 2 When one looks at the pricing over the entire
 3 period, one can see that the pricing of Richmond and
 4 Dorchester had been rising since certainly early 2001,
 5 and it seems to have plateaued in about May/June 2002,
 6 but then we have the 10p rise that took place in the
 7 period from about, I think it was effective from
 8 something like 2 September 2002 to late October, because
 9 it was a rise that was staggered by ITL in two stages.
 10 **THE CHAIRMAN:** Am I right in thinking that where you say in
 11 the penultimate sentence of paragraph 14, "ITL
 12 anticipated that its parity or differential would be
 13 restored through a change in the retail price level of
 14 the Gallaher brand following a wholesale price increase
 15 made by Gallaher", that there are two elements in that
 16 which may or may not be significant. The first is that
 17 it's not now your case that ITL's anticipation arose
 18 from the terms of its agreement or concertation with the
 19 retailer?
 20 **MR LASOK:** Yes.
 21 **THE CHAIRMAN:** That's right?
 22 **MR LASOK:** That's correct.
 23 **THE CHAIRMAN:** And, second, that any change in the retail
 24 price level of the Gallaher brand was dependent on there
 25 being a wholesale price increase made by Gallaher and

1 would not therefore happen in the absence of that
 2 wholesale price change?
 3 **MR LASOK:** I think that's right, yes. The reason why I say
 4 I think that's right is because that appears to be the
 5 pattern of the evidence, and I am getting whispers from
 6 either side of me saying that that is the pattern of the
 7 evidence --
 8 **THE CHAIRMAN:** There is nodding going on, I can tell you.
 9 **MR LASOK:** It's always comforting when this happens. What's
 10 slightly less comforting is when there are frowns and
 11 shaking heads behind one.
 12 **THE CHAIRMAN:** At the moment there is nodding.
 13 **MR LASOK:** So I'm on the right track at the moment. We will
 14 see whether I can surprise those behind me at some later
 15 stage.
 16 So the upshot is that -- this is paragraph 15 of the
 17 speaking note -- where the bonus was paid or withdrawn,
 18 it was agreed or concerted that the retailer would price
 19 at the level instructed or requested by the manufacturer
 20 on the basis of the bonus being paid or withdrawn in
 21 circumstances where the retailer understood that the
 22 manufacturer is seeking to implement its P&D strategy in
 23 the retailer's stores.
 24 That paragraph is not intended to go back on
 25 an answer that I gave a few moments ago to a question

1 from the Tribunal about whether we were asserting that
 2 you have to look at each pricing communication and
 3 decide whether that is or amounts to an agreement or
 4 concerted practice.
 5 Paragraph 15 is simply intended to place the payment
 6 or withdrawal of the bonus and the consequent movement
 7 in the shelf price within the context of an agreement or
 8 concerted practice between the retailer and the
 9 manufacturer, of the sort that I've already described.
 10 Now, the next page deals with manufacturer price
 11 increases, and essentially we have two kinds of
 12 situations that arise in connection with them. The
 13 first is where the MPIs occur in quick succession,
 14 because there, on the evidence, they were commonly
 15 identical in content, so as a general proposition MPIs
 16 didn't result in a departure from the pattern of
 17 pricing, and that is what is said in paragraph 17.
 18 The second situation is where the MPIs didn't happen
 19 in quick succession or weren't identical in content,
 20 giving rise to new or different P&D requirements. The
 21 classic example of that is what happened in May to
 22 September 2002, where the Gallaher MPI was announced to
 23 take place, I think, on 25 June. It did not take place
 24 in terms of real prices for certain brands, and ITL's
 25 MPI was held over until 2 September, which is, I think,

1 the date on which that became effective.
 2 What you then see, in cases like that, is what is
 3 stated in paragraph 18. In between times, the retailer
 4 was expected to adhere to the P&D strategy. So you have
 5 a kind of steady state scenario in between periods of
 6 movement in which the retailer is expected to adhere to
 7 the manufacturer's P&D strategy.
 8 **THE CHAIRMAN:** That's the 2(b) restraint?
 9 **MR LASOK:** Yes. I think it's worthwhile reading the second
 10 sentence of paragraph 17, which refers to the first
 11 situation where the MPI occurs in quick succession, and
 12 there it's said that in the event of any departure from
 13 that pattern of events such as the implementation of
 14 a price hold by the rival manufacturer, the manufacturer
 15 was able to ensure that shelf prices continued to
 16 reflect P&Ds by instructing or requesting a specific
 17 shelf price move as necessary, for example by giving
 18 an instruction to hold the shelf prices of its own brand
 19 by paying a level of tactical bonus accordingly.
 20 Moving on to Budgets, the Budget position, in our
 21 submission, is much simpler, because of the fact that
 22 the Budget price increases were uniform for the
 23 manufacturers, and they were always implemented by the
 24 manufacturers simultaneously, so the position basically
 25 is no different from the MPI scenario.

1 Then moving on to paragraphs 20 to 21, that's the
 2 point about the between MPIs and in the absence of any
 3 manufacturer led promotional activity, the retailer was
 4 expected to adhere to the P&Ds at shelf price level.
 5 **THE CHAIRMAN:** And there you use the word "expected" meaning
 6 expected because of the --
 7 **MR LASOK:** Of the 2(b) --
 8 **THE CHAIRMAN:** -- restraint?
 9 **MR LASOK:** Yes, and in our submission, where you have --
 10 it's best illustrated by the written trading agreements
 11 because where you have a retailer who signs up to
 12 a trading agreement which contains a provision requiring
 13 compliance with ITL's SPRs, then the one thing that you
 14 can be sure about is, in our submission, that the
 15 understanding between the parties to the agreement is
 16 that absent any manufacturer activity that puts the P&Ds
 17 out of line, the understanding was that the retailer
 18 would not itself act so as to put the P&Ds out of line,
 19 and that, I think, from recollection is the evidence of
 20 Fiona Corfield.
 21 **THE CHAIRMAN:** What do you say now in relation to whether
 22 those P&Ds were maxima or fixed?
 23 **MR LASOK:** Well, in our submission, the practical
 24 implementation was in the form of fixed P&Ds. Obviously
 25 there are some agreements in which you have the parity

1 or differential expressed as a fixed parity or
 2 differential in any event. In relation to those where
 3 they are not so expressed, we are focusing on the
 4 practical implementation of the agreements. And in our
 5 submission, the practical operation was as fixed.
 6 Again, one sees that through the correspondence, because
 7 typically the contemporary correspondence doesn't use
 8 the language of "maximum", it uses language indicating
 9 a fixed relationship, words like "parity", "matching",
 10 and so on and so forth.
 11 **THE CHAIRMAN:** You said that this was illustrated by the
 12 trading agreements, but is it the OFT's case that this
 13 applied in all 15 bilateral arrangements throughout the
 14 period of the infringement?
 15 **MR LASOK:** That's correct, yes.
 16 **THE CHAIRMAN:** Yes.
 17 **MR LASOK:** The point made in paragraph 21 of the speaking
 18 note is one that's been made before, which is that the
 19 manufacturers did not try to get the retailer out of
 20 step with the retailer's own pricing policy, whether
 21 that was a pricing policy that put their absolute price
 22 levels at a premium level or at RRP's or at a discount
 23 from RRP's or whether they were benchmarking their prices
 24 by reference to some other retailer. We have always
 25 tried to draw a distinction between the absolute price

1 levels and price relativities. Our case is concerning
 2 the price relativities.
 3 So that brings me to the next section, which
 4 concerns the anticompetitive object of the restrictions.
 5 And this, I think, probably is worthwhile going through
 6 rather slowly, and perhaps reading it out, regrettably.
 7 If we start off at paragraph 22, our contention is that
 8 the agreement or concerted practice in each case
 9 required the retailer to follow the manufacturer's
 10 instructions in order to enable the manufacturer to
 11 implement its P&D strategy, and by its nature, that
 12 enabled manufacturer A quickly and precisely to match
 13 any change in B's retail price.
 14 Moving on to 23, we turn to the restriction on the
 15 ability of the retailers independently to change the
 16 retail price of one brand relative to its rival linked
 17 brand, and the nature of the agreed or concerted
 18 practice was such, we say, that by restricting the
 19 retailer's ability to price independently, A was able
 20 effectively to implement its P&D policy, and that
 21 ensured that A had the ability quickly and precisely to
 22 match any change in the rival manufacturer's retail
 23 price, and there you have the reference to the first
 24 restriction in paragraph 10.
 25 Then moving on to the second restriction in

1 paragraph 10, that facilitated the manufacturer's
 2 ability effectively to implement its P&D pricing
 3 strategy. That was because the retailer was, as it
 4 were, taken out of the equation in terms of interfering
 5 with or possibly interfering with the relative pricing
 6 between the competing linked brands.

7 Paragraph 24 moves on to a slightly different point,
 8 which is that a number of aspects of the agreement or
 9 concerted practices ensured that A's pricing strategy
 10 was clear to the rival manufacturer, and these are there
 11 set out. These result from the various factors that are
 12 set out in paragraph 24, and putting it in a nutshell,
 13 the observation that where you have arrangements of this
 14 sort, you reduce the level of competitive uncertainties
 15 that would otherwise exist in the market.

16 Then we are passing on to paragraph 25.

17 **DR SCOTT:** Sorry, just pausing on 24 for a moment. Are you
 18 saying in 24 that there was something here over and
 19 above the inferences that a manufacturer would draw from
 20 the relativities in the published RRP's?

21 **MR LASOK:** Yes.

22 **DR SCOTT:** Yes.

23 **MR LASOK:** Because if you had relativities in the published
 24 RRP's, you couldn't guarantee that the shelf pricing
 25 would necessarily conform. However, there would

1 obviously be, when you were observing what was going on,
 2 situations in which you could see from the shelf prices
 3 that the pricing was resembling or following the RRP
 4 differentials. But in the absence of arrangements of
 5 this sort, you wouldn't have expected to be observing
 6 that all the time or a preponderance of the time or
 7 whatever. There would be a greater uncertainty as to
 8 shelf price levels.

9 But our case is that once the manufacturer has
 10 inveigled the retailer into pricing on the shelves
 11 consistently with the P&D strategy, then the
 12 uncertainties that would otherwise exist reduce, because
 13 then you are seeing more regularity, if you like, in the
 14 pattern. In fact, some of the witnesses have confirmed
 15 that they knew the other manufacturer had a P&D
 16 strategy.

17 So once you know that --

18 **THE CHAIRMAN:** It's not whether the retailer knew that, it's
 19 whether --

20 **MR LASOK:** No, the manufacturer.

21 **THE CHAIRMAN:** The other manufacturer ...

22 **MR LASOK:** I can't remember, I may have misspoken.

23 The manufacturers knew that the others had P&D
 24 strategies, and once you have got that, then there is
 25 a greater ability, it's not so much in terms of

1 prediction, really the best way of putting it is as in
 2 fact stated in the decision, it's the reduced
 3 uncertainties, because you don't have the kind of
 4 freedom in terms of selection of shelf price levels that
 5 would otherwise exist.

6 **THE CHAIRMAN:** And you say that the speed and precision, as
 7 you have put it, with which manufacturer A can match
 8 a change in the rival price, that speed and precision
 9 derives from the restraint that you have described in
 10 2(a)?

11 **MR LASOK:** And 2(b), because what's happening is that --

12 **THE CHAIRMAN:** Well, no, because here we are talking about
 13 matching changes.

14 **MR LASOK:** I am sorry, yes, that's correct, you are correct,
 15 it is 2(a).

16 **THE CHAIRMAN:** Yes.

17 **MR LASOK:** Yes, I apologise for that.

18 24 is dealing with the 2(a) situation where you have
 19 manufacturer led implementation. The 2(b) or 10(b)
 20 point is relevant to the reduced uncertainties because
 21 of the fact that, to put it in a kind of colloquial or
 22 figurative way, if you have a retailer whose freedom to
 23 select his shelf prices is unconstrained, then you have,
 24 as it were, somebody interposed between the two
 25 manufacturers, because each manufacturer may have its

1 own desired pricing position for its brands, and I am
 2 talking now about the shelf price position, but if the
 3 retailer is sitting in between them and has complete
 4 freedom to do what it wants in terms of shelf prices,
 5 you have a kind of barrier between the two manufacturers
 6 which is normal competition. It was a barrier that
 7 reduces the level of transparency that might otherwise
 8 exist.

9 Now, once you take the retailer and confine the
 10 retailer's ability to determine its shelf prices for
 11 itself, and so you are linking the retailer to the
 12 manufacturer's pricing strategy, that particular element
 13 of uncertainty disappears, and it's inevitable, we say,
 14 that when the manufacturers hypothetically look at each
 15 other across the market in which there are these various
 16 retailers who are players in the market, the
 17 manufacturers now have reduced uncertainty in terms of
 18 what is going to happen next.

19 **THE CHAIRMAN:** And you would say that the agreement, or that
 20 restraint adds something over and above what might be
 21 expected to happen anyway in this market where margins
 22 are very thin so that one might expect from the
 23 structure of the market that prices would map quite
 24 closely changes in wholesale price?

25 **MR LASOK:** Yes. It's slightly more complex than that,

1 because where you have a situation in which the
2 manufacturer is operating these strategies, on the
3 evidence, it appears that the retailer is less likely to
4 be inclined to bargain down the wholesale price. What
5 is interesting, when one looks at the evidence, is the
6 fact that the retailers did tend to move in accordance
7 with these wholesale price changes.

8 Now, I put it in that way quite deliberately,
9 because it was a question that I actually put, I think,
10 to Mr Jolliff, that when one looked at a particular
11 exchange in which an amended price for an ITL brand was
12 put to him, which was consequential upon a change in the
13 linked Gallaher brand, he reacted immediately and said
14 "Okay", and the price change was actioned.

15 I put it to him that there was no attempt made by
16 him as the tobacco buyer to seek to negotiate the
17 wholesale price. So there is that element that comes
18 into it. There is possibly another point, but I have
19 now forgotten it, as is always the case.

20 **DR SCOTT:** There seemed, from the evidence, to be
21 an appreciation on the part of the buyers that their
22 margins would effectively be maintained by the
23 manufacturers adjusting the wholesale price so that when
24 the retail prices moved, the margin was maintained.

25 **MR LASOK:** Yes. And you have that oddity where -- again

25

1 this is Mr Jolliff and Asda -- it looks as though Asda
2 had sufficient room for manoeuvre to have a Richmond and
3 Dorchester shelf price differential but they didn't do
4 it. And of course the other aspect concerns what the
5 motive of the retailer was for selling tobacco products,
6 because if the retailer was selling tobacco products for
7 reasons other than making the margin, and that is really
8 self-evident, they were doing it for other reasons, then
9 they might otherwise have been inclined to vary their
10 pricing, because they weren't selling the tobacco
11 products in order to make a margin, the margins were too
12 small. They were doing it for other reasons, and that,
13 in a sort of counterfactual scenario, you would
14 therefore have expected that there would have been
15 greater movement or greater variation in the selection
16 of shelf prices by the retailer, but we don't get that
17 in the scenario that we are presented with here on the
18 evidence.

19 I think I had got to paragraph 25, which I think
20 I've actually probably already dealt with.

21 Then paragraph 26. It is well worth looking at that
22 this reduction in uncertainty does figure in the
23 decision, but I am going to come on later on to consider
24 how the OFT's current case relates to the decision. To
25 some extent the difference is heralded in 26, because if

26

1 you look at the second sentence, it says that the
2 difference between the case made out in the decision and
3 the OFT's refined case is that the latter makes it clear
4 that implementation was manufacturer led.

5 Then the OFT's analysis of the anticompetitive harm
6 resulting from --

7 **THE CHAIRMAN:** Sorry, can I just interrupt you? When you
8 say "implementation was manufacturer led", is it part of
9 your case or is it accepted by you that when the
10 manufacturer gave the instruction, as you would put it,
11 to the retailer to alter the retail price, it was part
12 of the understanding that -- as Dr Scott said -- the
13 wholesale price would be adjusted to ensure that the
14 margin was not altered either to the detriment of the
15 retailer or to the detriment of the manufacturer by
16 increasing the retailer's share of the money to be made?
17 In other words, do you accept that the restraint in 2(a)
18 was dependent on movements in the wholesale price by
19 manufacturer A?

20 **MR LASOK:** Well, it wasn't dependent, but you very often see
21 the wholesale price being moved in this way, and the way
22 we see it is that it's the machinery by which the
23 manufacturer ensured that the price change would take
24 place. In the decision it's referred to, I think, as
25 micromanaging of the prices.

27

1 **THE CHAIRMAN:** Well, the micromanaging point is a different
2 point. Here, the point I am asking about is you say
3 that the understanding between the manufacturer and the
4 retailer was that the retailer would comply with pricing
5 instructions from the manufacturer and the retailer knew
6 that those instructions were motivated by the
7 manufacturer's wish to maintain certain relativities
8 between its brand and the competing brand. Given that
9 you say that was a restraint that the retailer accepted,
10 I think it is important to ascertain whether it's your
11 case that, as the quid pro quo for that restraint, the
12 retailer expected that the manufacturer would adjust the
13 wholesale price to maintain the previous margin that
14 they had earned before that price instruction was
15 issued.

16 **MR LASOK:** The quid pro quo was that the retailer would not
17 be left worse off.

18 **THE CHAIRMAN:** Yes, thank you.

19 **DR SCOTT:** Sticking in paragraph 26, you appear to be
20 drawing a distinction between the words "increase at the
21 same time" and "cause the retail price of its product to
22 follow", in the next sentence. I just wondered what you
23 meant by "at the same time" in that sentence? I know
24 there were moments when things happened at the same time
25 in a very literal sense, but --

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1 **MR LASOK:** It's not intended to be literal, because it's
 2 really, you know, at about the same time, it's ...
 3 **DR SCOTT:** So it's a turn of phrase rather than a difference
 4 that you are expressing in those two sentences?
 5 **MR LASOK:** Yes, because if you took it literally, it would
 6 be impossible, because "at the same time" means, as it
 7 were, instantaneously.
 8 **DR SCOTT:** That takes us back to automaticity, which you are
 9 not pleading?
 10 **MR LASOK:** Yes. It's not automaticity, it's the sense that
 11 if you look at it again in terms of the competitive
 12 uncertainties that would otherwise have existed, those
 13 have decreased because it is possible to observe the
 14 movements and the manufacturer would draw the ordinary
 15 and natural conclusion from what was going on.
 16 As I say, we accept that there would be a time lag,
 17 but we are not talking about a time lag that would
 18 render the inference meaningless, it's the time lag is
 19 sufficiently close that the ordinary and natural
 20 inference that you would draw from events is that your
 21 uncertainties as to what's going to happen next are
 22 reduced. It's a sort of common sense thing.
 23 Then again, paragraph 27 deals with the existence of
 24 the parallel agreements each manufacturer had, which of
 25 course affects also the manufacturer's anticipation or

1 the conclusion that it draws, as an ordinary and natural
 2 conclusion of what is going to happen as a result of its
 3 own act.
 4 It's well worth pointing out that paragraph 27 in
 5 the second half does cater for the possibility that the
 6 manufacturer, manufacturer A, would have to effectively
 7 re-establish the relevant parity or differential,
 8 because we are not asserting that these arrangements
 9 produced complete transparency so that everything was
 10 wholly predictable. What we are arguing is that these
 11 arrangements produced a reduction in uncertainties that,
 12 in their absence, would not have existed.
 13 Then paragraph 28 deals with the position over time.
 14 Paragraph 29 makes the point that the theory of
 15 harm, in its essentials -- I am talking now about the
 16 theory of harm explored in the paragraphs of the
 17 speaking note that we have just been going through.
 18 That theory of harm in its essentials is the same as the
 19 theory of harm in the decision. That means that the
 20 criticisms of the OFT's current case that have been
 21 advanced, in particular we refer to ITL's skeleton
 22 argument, are misplaced.
 23 Paragraph 30 is really there for the sake of
 24 completeness, and to deal with the margin parities
 25 argument that appears to have resurfaced. Our case

1 isn't anything to do with margin parities, we are not
 2 asserting that there was a margin parity restraint, and
 3 in fact, as we see it, there is no evidence that there
 4 was a margin parity restraint.
 5 That leads to the conclusion in paragraph 31, and
 6 paragraph 31 is just taking it at a relatively high
 7 level -- that we have here a situation where
 8 manufacturers are implementing policies that dampen the
 9 degree of price rivalry between themselves, and our case
 10 is that that kind of behaviour is anticompetitive, it's
 11 in nature rather like straight horizontal pricing
 12 agreements, and has the same interbrand harm,
 13 competition is reduced and consumers pay higher prices.
 14 **DR SCOTT:** So to be clear, one of the points that you made
 15 earlier on was that if we had moved by this time to
 16 expert evidence, we needed to be clear what points were
 17 being put to the experts. What you appear to be saying
 18 is that you believe that 10(a) and 10(b) fall within the
 19 theory of harm as broadly expressed in the decision,
 20 even if 10(a) and 10(b) were not put in detail to any of
 21 the experts?
 22 **MR LASOK:** That's correct, yes. Would this be a convenient
 23 moment for the mid-morning break?
 24 **THE CHAIRMAN:** Yes, subject to one point: when you refer to
 25 "margin parities" in paragraph 30 as being focused on

1 particularly by Dr Jenkins, could you say what you
 2 understand the difference to be between a margin parity
 3 arrangement and an arrangement that you have outlined?
 4 **MR LASOK:** The arrangements that we are focused on, or at
 5 least the arrangements that we say existed in the
 6 present cases are concerned with relativities between
 7 shelf prices of competing linked brands. Now, as
 8 I understand the margin parities case, it seems to be
 9 about maintaining the retailer's margins at parity as
 10 between the ITL brands on the one hand and the Gallaher
 11 brands on the other.
 12 Now, in fact there is evidence to demonstrate that
 13 the margins were not at parity, so this can't be what
 14 these arrangements are about.
 15 **THE CHAIRMAN:** So that's margin parity as between competing
 16 brands, rather than maintaining the margin on the same
 17 brand before and after a price change?
 18 **MR LASOK:** Yes, that's right.
 19 **THE CHAIRMAN:** Thank you. That is a convenient moment,
 20 then. We will come back at five to 12.
 21 (11.42 am)
 22 (A short break)
 23 (12 noon)
 24 **MR LASOK:** I've come now to the heading before paragraph 32
 25 of the speaking note, which raises the question: do the

1 restrictions set out at paragraph 10 of the speaking
2 note form part of the infringing agreements identified
3 in the decision?
4 Before embarking on that topic, the OFT submits that
5 it is important from the perspective of the Tribunal's
6 jurisdiction and how it would exercise the powers that
7 the OFT submits that the Tribunal has, to be clear about
8 where exactly lie the common features between the
9 decision and the case that the OFT is currently
10 advancing, and where lie the divergences between those
11 two positions.

12 We have attempted to do that in this section of the
13 speaking note, and it starts off by making the point
14 that I've made previously, that was that -- this is
15 paragraph 32 -- the decision was based upon the finding
16 that the retailer was under a positive obligation to
17 maintain P&Ds in the shelf prices.

18 Now, we make the point here it wasn't lock-step, it
19 wasn't automatic implementation, and we refer to
20 paragraph 6.223 to 6.225 of the decision which makes
21 that clear. It was that understanding of the retailer's
22 role in the P&D strategy that was the basis of the
23 finding in the decision.

24 When we turn to the OFT's current case, which is
25 summarised at paragraph 33, it's based on

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1 a re-evaluation of the evidence that suggests that the
2 P&D pricing strategies were implemented by the retailer
3 playing a more passive or compliant role.

4 Now, if we look for a moment at the common
5 features --

6 **THE CHAIRMAN:** Just going back to the end of 32, where you
7 say "It did not involve automatic implementation". In
8 some instances in the decision the OFT refers to
9 particular conduct and says "Well, we acknowledge that
10 sometimes that happened, but that doesn't detract from
11 the fact that what was expected to happen and what they
12 agreed was X, they didn't always do it but that's
13 a different issue". There is that analysis. But when
14 you say "did not involve automatic implementation", are
15 you meaning that, namely there wasn't always automatic
16 implementation but that doesn't detract from our case
17 that that was what was agreed; or are you saying the
18 agreement was not for automatic implementation?

19 **MR LASOK:** It's the latter, because if you look at
20 paragraphs 6.223 to 6.225, that discussion starts off
21 with the opportunity to respond clause. Because if you
22 recall, and this is the submission in effect that
23 I made -- I think it was on Day 17 -- that when you look
24 at the reasoning in the decision, you see that it starts
25 off from a description of how the P&D arrangements, as

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1 understood by the OFT would operate in the event of full
2 or complete implementation.

3 Then the OFT addressed the issue raised by the
4 existence of the opportunity to respond clause, because
5 that was, in some of these arrangements, an express
6 provision in the agreements which contemplated that
7 if -- we will call them manufacturer A and B --
8 manufacturer A has the P&D agreement, the trading
9 agreement with the retailer, if B reduced its prices,
10 then under the express terms of the agreement, the
11 retailer was not expected to reduce the price of A's
12 brand.

13 So that was part of the agreement. It wasn't said
14 that this is not implementation in the kind of classic
15 sense of the cartelists who meet together -- in
16 old-fashioned days it used to be a smoke filled room --
17 and they agree on prices and so forth but one of them
18 has a mental reservation and intends to cheat on the
19 cartel.

20 Or the other situation that we have in the present
21 case where there are poor shelf price controls so that
22 although there is an understanding between the
23 undertakings, it's the implementation of that
24 understanding in the individual stores that falls short.
25 What the discussion of the opportunity to respond clause

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1 was focusing on was a part of the agreements that
2 clearly did not contemplate an automatic change to A's
3 brand price when B's price went down.

4 That was then followed through in paragraphs 6.224
5 and 6.225 as a way of conveying that the OFT, as it
6 perceived it, recognised that these arrangements might
7 not have all the elements that a P&D arrangement in
8 principle would have, and therefore you had to address
9 that aspect of the situation as it presented itself to
10 the OFT at the time of the making of the decision.

11 So that's what we are talking about when we say that
12 it didn't necessarily involve automatic implementation.

13 **THE CHAIRMAN:** Are those points the same points which caused
14 the OFT throughout this trial to demur from ITL's
15 position that the paragraph 40(a) to (d) restraints
16 constituted the OFT's case?

17 **MR LASOK:** Quite so, and that was the point of the
18 submission that I made on Day 17. I went back to the
19 decision in order to show that in the decision you have
20 this move from the analysis of a P&D arrangement, fully
21 implemented, which has all four elements, but there was
22 a progression in the reasoning in the decision which
23 recognised that, in the present case, you would not have
24 all these four elements. I do not want to go over old
25 ground on this one, but the point that was made was

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1 that, from the OFT's perspective, the number of elements
 2 that you have got goes to the degree of the
 3 anticompetitive harm.
 4 **THE CHAIRMAN:** What we haven't got to at this stage of this
 5 hearing is an analysis from the OFT as to which of the
 6 15 bilateral arrangements contained an opportunity to
 7 respond clause, either expressly or in fact from
 8 practice, and which of the 15 do not contain all of the
 9 four restraints in paragraph 40.
 10 **MR LASOK:** That's quite right, but the position as stated by
 11 the OFT a few days ago was that we considered that,
 12 applying the correct legal standard, we might be able to
 13 establish the one constraint plus the opportunity to
 14 respond position, but that was then.
 15 **THE CHAIRMAN:** Yes.
 16 **MR LASOK:** So what you have in the decision is a particular
 17 understanding of the role played by the retailer in
 18 these P&D arrangements, and it's that understanding
 19 which has altered as the OFT sees it. But the common
 20 features are things like, there were P&D arrangements,
 21 there were the trading agreements, the P&D strategies
 22 were concerned with the linking of the shelf prices of
 23 competing brands.
 24 Now I want to move on from that rather general
 25 description of the common features to look at the

1 question of the particular restrictions that were
 2 identified in paragraph 2 of the earlier document, the
 3 earlier submission that the OFT produced and that are
 4 now in paragraph 10 of the speaking note.
 5 Paragraph 35 of the speaking note summarises them
 6 and now what I want to do is go to the decision to look
 7 at the bits where the restrictions that we are now
 8 focusing on appear.
 9 The first one, which is dealt with in paragraph 36
 10 of the speaking note, is the retailer pricing
 11 manufacturer A's own brands at prices implementing
 12 manufacturer A's pricing relativities between its brands
 13 and those of a competing manufacturer.
 14 That paragraph gives some examples of where this
 15 appear. The first one is paragraph 1.6 of the decision.
 16 (Pause). That restriction is actually articulated in
 17 1.6 as being a restriction contained within the
 18 infringing agreements.
 19 In paragraph 1.8(ii), the same restriction is said
 20 to have been in the written trading agreements.
 21 6.15(ii), which is on page 80, is effectively
 22 a repetition of paragraph 1.8.
 23 6.29, which is on page 84 is to the same effect.
 24 The associated --
 25 **THE CHAIRMAN:** Well ... (Pause). Just say again for what you

1 rely on these paragraphs in the decision.
 2 **MR LASOK:** If you look at paragraph 6.29, for example, on
 3 page 84, it says:
 4 "Pursuant to these written trading agreements, the
 5 retailer concerned agreed to price the manufacturer's
 6 leading brands at parity with or at a specified
 7 differential to competing linked brands."
 8 That is the first restriction in paragraph 10.
 9 Because this is -- paragraph 6.29 is concerned with
 10 an agreement, a trading agreement between manufacturer A
 11 and the retailer under which the retailer agrees to
 12 price A's brands at parity with or at a specified
 13 differential to competing linked brands.
 14 **THE CHAIRMAN:** Yes.
 15 **MR LASOK:** This point was also associated with the
 16 instructions that were issued from time to time, but
 17 there the fact that movements by a retailer of A's brand
 18 prices pursuant to a communication from A, and the
 19 associated inducement of a move by the grant of bonuses,
 20 again it features in the decision as being a part of the
 21 infringing agreements.
 22 If you go back to 1.8, 1.8 talks about what the
 23 infringing agreements involved, and in (ii) I've already
 24 drawn attention to the provision in the written trading
 25 agreements; (iii) is divided into three bits but the

1 first of (iii) deals with the contacts between the
 2 manufacturer and the retailer regarding the retail
 3 prices for the manufacturer's brands; (iv) is the
 4 payment or withdrawal of bonuses and so forth to
 5 incentivise the retailer to set retail prices in
 6 accordance with the manufacturer's retail pricing
 7 strategy.
 8 If you go to 1.11 on the next page, in the middle,
 9 it's the second sentence:
 10 "However, taking the evidence as a whole, the OFT
 11 considers that the infringing agreements in fact
 12 provided for parity and fixed differential requirements
 13 which were implemented by communications from the
 14 manufacturer to the retailer pursuant to which the
 15 retailer was to move to a specific retail price point.
 16 The retailer's compliance with such communications was
 17 induced by the grant of ongoing and tactical bonuses."
 18 Then there is a reference to the monitoring.
 19 **DR SCOTT:** Just to be clear, here we are dealing with the
 20 generality; would it be your submission in overall
 21 terms -- not going into the detail at the moment -- that
 22 in relation to each of the 15, these points are
 23 substantiated later in the decision?
 24 **MR LASOK:** I think they are. The example that I had
 25 considered was Asda, simply because it was the first

1 one, and that's the one referred to in the speaking
 2 note. But the cross-references to paragraph 6.413 to
 3 6.421 are specifically concerned with the contacts, and
 4 the instructions or requests running between ITL and
 5 Asda concerned with the pricing of the ITL brands in
 6 pursuance of ITL's P&D strategy.

7 **THE CHAIRMAN:** It seems to me that paragraph 1.8 and
 8 paragraph 1.11 are dealing with very different things.
 9 Paragraph 1.8 is dealing with the kinds of material that
 10 the OFT has looked at in order to ascertain what the
 11 terms of the agreement or the consultation are, whereas
 12 what we are looking at here is, having found out what
 13 those terms of the agreement or concertation are, as set
 14 out in the decision, are those the same as or do they
 15 incorporate the restraints that you are currently
 16 maintaining?

17 So the reference to the contacts regarding the
 18 retail prices is only relevant insofar as one can derive
 19 from those contacts a restraint which is made out on the
 20 evidence and is part of the infringing agreement.

21 **MR LASOK:** But in paragraph 1.11, for example, which talks
 22 about the implementation of the infringing agreements by
 23 communications to move to a specific retail price point
 24 and the inducement of compliance by the grant of ongoing
 25 and tactical bonuses, that wouldn't have worked as

1 a method of implementation unless there had been an
 2 agreement or concerted practice that the retailer would
 3 actually move to the price point.

4 So there is that. One can also refer in relation to
 5 the tactical bonuses to things like the discussion at
 6 paragraph 6.118 and following of the decision. That was
 7 the role of the bonuses in bringing about the price
 8 changes.

9 Moving to the point that I was making about using
 10 Asda as an illustration, if you go to 6.414, which is on
 11 page 189, the OFT's analysis of the communications which
 12 are referred to in general terms in 6.413 was that Asda
 13 had accepted and/or indicated its willingness to
 14 implement the directions contained in the
 15 communications. So that's an agreement or concerted
 16 practice to price in accordance with those
 17 communications.

18 It's true to say, and I am coming now to
 19 paragraph 38 of the speaking note, that there are also
 20 in the decision paragraphs that refer compendiously to
 21 the restriction of the retailer's ability to determine
 22 its retail prices for competing brands that encompass
 23 the restrictions identified in paragraph 10, affecting
 24 the relative pricing by the retailer of A's and B's
 25 brands.

1 So you have a different order of findings in the
 2 decision that focus on the relative pricing of A's and
 3 B's brands, and examples are given, 1.4 in the general
 4 part of the decision, you have a whole load of them
 5 which include, right at the end, 8.2, which is the one
 6 that Mr Howard referred to the other day.

7 There was some suggestion in ITL's skeleton argument
 8 that the OFT hadn't addressed the point about retailer
 9 initiated price movements as opposed to manufacturer led
 10 movements, but that in fact had been raised in the OFT's
 11 opening, and I've given the reference to the part in the
 12 transcript that is where the OFT dealt with that aspect
 13 of the case.

14 Moving now to paragraph 40 of the speaking note,
 15 that turns to look at the passages in the decision
 16 running from 6.205 that consider the restrictive nature
 17 of the infringing agreements as found.

18 **DR SCOTT:** Sorry, can we just for a moment touch on 8.2,
 19 because --

20 **MR LASOK:** I apologise.

21 **THE CHAIRMAN:** 8.2.

22 **DR SCOTT:** 8.2. I suppose the question in our mind is that
 23 the structure of a United Kingdom decision by the OFT is
 24 rather different to the structure of a decision made by
 25 the European Commission, and lacks the difference

1 between the operative part at the end and the reasoning
 2 that runs up to it.

3 How would you characterise 8.2 in this context?

4 **MR LASOK:** Well, 8.2 is a summary of the decision. The way
 5 you would look at it, actually, is that you would read
 6 the decision as a whole. I fully accept the point made
 7 by Mr Howard the other day, he says if you look at 8.2
 8 it talks about the infringing agreements concerning the
 9 pricing of competing brands, and we don't shrink from
 10 that because that's what it says.

11 But when you look at the decision as a whole, you
 12 actually have within it a number of findings and the
 13 reality is that you end up with, in English terms,
 14 something that may be regarded as a combination of
 15 findings and decisions that produce an end result, and
 16 this, the end result, would be defined in a conclusory
 17 paragraph.

18 I don't think, although I can't recall offhand, of
 19 discussion about what one does when one has got
 20 a combination of that nature, but I suspect it doesn't
 21 really matter, because at the end of the day, the
 22 decision is the thing that is the subject of the appeal
 23 to the Tribunal, and an appellant has to be able to
 24 undermine critical parts of the decision in order to
 25 overturn the finding of infringement that leads to the

1 imposition of the penalty; or, alternatively, to reduce
 2 in some way, knock bits off the infringement finding so
 3 as to justify a reduction in the fine that is imposed.
 4 The discussion that we are considering at the moment is
 5 of a slightly different order, because of the
 6 submissions that I am coming to shortly concerning the
 7 nature of the Tribunal's jurisdiction, and in relation
 8 to that, there is clear blue water between the parties
 9 because the appellants take a different view of the
 10 Tribunal's jurisdiction from that taken by the OFT.

11 Where I think we are ending up to is this: we don't
 12 dispute the fact that the decision proceeded on
 13 a particular basis, and having regard to a particular
 14 line of reasoning taken in the decision, it generated
 15 a particular conclusion that is summarised in the
 16 conclusory paragraphs at the end of the decision in
 17 paragraphs 8.2 and 8.3. We don't shrink from that.
 18 The point that I am making is that although in the
 19 OFT's current case there is a departure from part of
 20 a line of reasoning that led to the conclusory
 21 paragraphs in 8.2 and 8.3, the starting point and parts
 22 of the reasoning remain applicable to the current case.
 23 To anticipate what I was going to say later, we are in
 24 one of those situations in which, in our submission at
 25 any rate, we are not dealing with a case advanced by the

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1 OFT now that falls entirely outside the scope of the
 2 decision. It originates in the factual matrix of the
 3 decision, it originates in findings of fact made in the
 4 decision, it replicates elements of the decision, which
 5 we have just seen. But the difference which is
 6 encapsulated in this idea of the role played by the
 7 retailer in the P&D arrangements, the difference is
 8 there, and it is that difference that marks the
 9 departure from the decision as written, because the
 10 reasoning in the decision is not directed at the
 11 scenario that is captured by the case that the OFT
 12 currently wishes to run because it is focused on
 13 a different understanding of the role played by the
 14 retailer, and that had an effect on the description of
 15 the infringing agreements, because in the decision the
 16 description of the infringing agreements go beyond what
 17 is necessary for the purpose of the OFT's current case,
 18 and it also meant that the theory of harm was set out in
 19 a particular way that, although it is essentially the
 20 same kind of thing as is relevant to the OFT's current
 21 case, is a variation of it.

22 So the problem that we have here is that the OFT's
 23 current case is not the case that was made out in the
 24 decision. Neither is it a case that was not made out in
 25 the decision and that's --

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1 **THE CHAIRMAN:** Well, perhaps the difference between your
 2 position and that of the appellants is whether it's
 3 enough that the restraints are part of the findings set
 4 out in the decision, the refined case restraints, or
 5 whether you have to show that the decision found that
 6 those restraints were an infringement, an object
 7 infringement of the Competition Rules.

8 If we take a different example: suppose in a cartel
 9 case there is a decision that the cartel lasted from
 10 1992 to 1998, and then it emerges from the evidence that
 11 actually it seems it only lasted from 1992 to 1996,
 12 clearly within the finding of infringement in the
 13 decision there is a finding that there was
 14 an infringement between 1992 and 1996 as part of the
 15 infringement found to have lasted from 1992 to 1998.

16 What I am struggling with here is whether you say
 17 that it's enough that you can point to parts of the
 18 decision where you say "We have found that these
 19 restraints existed", whether you have to go further and
 20 say "The decision found that these restraints were
 21 an infringement of the Chapter 1 prohibition", and if
 22 you do have to go that far, do you say that the decision
 23 found that these restraints were an infringement of the
 24 Chapter 1 prohibition?

25 **MR LASOK:** Yes, well, we have to put our case in essentially

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1 two ways: one way is that what you have in the case
 2 currently advanced by the OFT is something that, in its
 3 material parts, is contained within the decision. The
 4 decision went further, but if you chopped off the
 5 additional bits, you would still have an object
 6 infringement. That's one way of looking at it.

7 Another way of looking at it is that although the
 8 current case arises out of the factual matrix and in its
 9 nature is the same type of infringement as the
 10 infringement that is found in the decision, because it
 11 is not precisely the infringement found in the decision,
 12 you are outside the decision. But in those
 13 circumstances we would say that it's simply a choice
 14 between which power the Tribunal exercises under
 15 schedule 8, paragraph 3.

16 Because we are faced with this situation in which,
 17 when you look at the case that is currently run by the
 18 OFT and compare it with the decision, you can see -- we
 19 submit, at any rate -- that that case is there but it's
 20 not articulated. For example, it's not articulated as
 21 an alternative. In the speaking note I've got some
 22 paragraphs that look at part of the decision where there
 23 is a discussion about effectively the restraints that we
 24 are now talking about, and where the OFT does address
 25 certain arguments that was put to it and rejects them.

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1 But the point is that in the decision, those paragraphs
 2 weren't elevated into an alternative case.
 3 So what you had was a situation in which the
 4 decision goes down one particular route, it contains we
 5 would say, all or virtually all of the elements for an
 6 alternative way of arriving at the same end result, but
 7 that alternative was never articulated as an alternative
 8 case.
 9 **DR SCOTT:** Would you say that -- and we may come to this
 10 from the other side -- there was a sufficiency of
 11 reasoning from fact through theory of harm to
 12 conclusion -- in other words, getting to 8.2 -- that in
 13 the absence of those elements that you may now choose to
 14 decide you can't make stick on the evidence, would lead
 15 to a safe finding in 8.2?
 16 **MR LASOK:** Well, we would say that it would lead to a safe
 17 finding in 8.2, but it's not the kind of exercise in
 18 which you could simply run a blue pencil through parts
 19 of the decision and say "Well, there you are, you have
 20 the fully fledged reasoning". You see, if that was the
 21 case that we were confronted with, we wouldn't have this
 22 difficulty, because it would be simple for the Tribunal
 23 to say, in the normal exercise of its jurisdiction, if
 24 it found that the alternative case articulated in the
 25 decision corresponded to the facts whereas the primary

1 case didn't, that what you would then do is to confirm
 2 the alternative line of reasoning in the decision but
 3 you would set aside the rest of it.
 4 What we have in the present case, and what causes
 5 the difficulty, as we perceive it -- the appellants
 6 don't perceive the difficulty, but what we perceive to
 7 be the difficulty is that when you look at the decision,
 8 it's got all these elements in it, but they are not
 9 articulated as an alternative case.
 10 **DR SCOTT:** And what that means is that the appellants have
 11 attacked the reasoning of the case that currently leads
 12 up to 8.2, thinking that that is what they are expected
 13 to do in an appeal. But as a matter of procedural
 14 fairness, they will say it's difficult for them to
 15 attack a different line of reasoning because that line
 16 of reasoning was not adequately articulated in the
 17 decision as published.
 18 **MR LASOK:** Yes, and that's in summary I think what the issue
 19 really boils down to. But the discussion about whether
 20 the current case falls within the decision or falls
 21 outside the decision or bits of it are in and bits of it
 22 are out, is something that, in our submission at any
 23 rate, goes to a question of the Tribunal's jurisdiction
 24 and its powers, because does its jurisdiction cover that
 25 type of situation? We know it covers a situation where

1 an alternative case is articulated in the decision.
 2 Does the Tribunal's jurisdiction cover the situation we
 3 are presented with at the moment? And if so, which are
 4 the powers that would be applied in order to deal with
 5 the situation?
 6 Of course, our case is based on the submission that,
 7 as the case currently advanced by the OFT does arise out
 8 of the factual matrix found in the decision, and does
 9 contain the restrictions that are described in the
 10 decision, that on any view is a material factor because,
 11 having regard to the purposive construction of the
 12 statutory provisions dealing with the Tribunal's
 13 jurisdiction, it is something that the Tribunal has
 14 jurisdiction to deal with, however you express it. You
 15 may have a debate about which power is exercised --
 16 **THE CHAIRMAN:** What do you mean in that context about "we
 17 have jurisdiction to deal with it"?
 18 **MR LASOK:** In our submission, I think the way I put it
 19 orally the other day was that the decision and the
 20 appeal against the decision brings a matter before
 21 the Tribunal. The Tribunal's jurisdiction is to resolve
 22 that matter by reference to the merits, and it is at
 23 that point that you get into this debate about the
 24 relationship between provisions such as the provision
 25 that says that the Tribunal decides the appeal on the

1 merits by reference to the grounds of appeal, but then
 2 you have provisions -- the provision in schedule 8,
 3 paragraph 3(2)(e) that is actually difficult to
 4 reconcile with a restricted view of the Tribunal's
 5 jurisdiction.
 6 **THE CHAIRMAN:** Well, that's a point that crops up later in
 7 your speaking note. At the moment we are trying to
 8 focus, or I am trying to focus, on what it means or what
 9 you say it means to say that the restraints in 2(a) and
 10 (b) are within the decision. Is it enough that there
 11 are findings of fact in the decision that those
 12 restraints exist? Or do you have to show, and can you
 13 show, that the actual infringement found in the decision
 14 incorporated those restraints?
 15 **MR LASOK:** Yes. This was what I was about to come to,
 16 because when one looks at the summary in 8.2, perhaps if
 17 we look at it, it's the last sentence of 8.2 which says:
 18 "The infringing agreements restricted the retailer's
 19 ability to determine its retail prices for competing
 20 tobacco products and had the object of preventing,
 21 restricting or distorting competition in the supply of
 22 tobacco products in the UK in breach of the Chapter 1
 23 prohibition."
 24 Now, that summary of the position encompasses the
 25 restrictions that are set out in paragraph 10 of the

1 skeleton argument. The problem is that the decision,
2 the reasoning of the decision leading up to that
3 conclusion, looked at additional matters, and the theory
4 of harm that was elaborated in the decision, looked at
5 an entire package, and, as I've submitted, what the
6 decision did not do was to extract from that package
7 a limited group of restrictions such as the paragraph 10
8 restrictions and then articulate an alternative case.

9 So that, as we perceive it to be, is the problem.
10 At the risk of repeating this, the difficulty that
11 I have, which we fully recognise, is that the decision
12 did not articulate an alternative case. One has to
13 start off, in our submission, from that premise. It is
14 then necessary to analyse the decision as a legal
15 document to see what role the elements of the case
16 currently being put by the OFT played in the decision,
17 because the conclusion that one reaches as a result of
18 that evaluation feeds into the Tribunal's interpretation
19 and application of the jurisdictional provisions and, if
20 they apply, to how it would exercise its discretion.

21 The case that I am advancing is that you have all
22 these things in the decision itself and hence what you
23 basically have is a situation in which the Tribunal can
24 continue these proceedings with that limited case, and
25 ultimately in its final decision, if it considered that

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1 that alternative case was made out, then what
2 the Tribunal would do would be to uphold the decision as
3 to a part and set aside the rest of it.

4 But I have to accept that the Tribunal could easily
5 come to the view that that is not the correct way of
6 analysing the decision, and that, although the case
7 currently advanced by the OFT does indeed arise from the
8 same factual matrix and it has all these common
9 features, nonetheless it is not something that -- it is
10 not so closely connected to the decision that enables
11 the Tribunal to take the simple route of, if it finds
12 that case is made out, confirming the decision in part
13 and then setting aside as to the rest.

14 If you are in that territory, then in our submission
15 you are into schedule 8, paragraph 3(2)(e).

16 **DR SCOTT:** At that point we are not just into "can" but
17 "should" the Tribunal?

18 **MR LASOK:** Yes, because it's a discretionary power. Our
19 submission is that you have the jurisdiction. The
20 question is: should you exercise it? That is, broadly
21 speaking, in our submission, where the battle lines are
22 drawn.

23 **THE CHAIRMAN:** Mr Saini's submissions seem to be that even
24 if we were to find that the restraints in 2(a) and (b)
25 are part of the decision, there is still an issue as to

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1 whether we can or should continue with the appeals;
2 whereas Mr Howard's submissions didn't quite deal with
3 what the situation would be if we came to that
4 conclusion, that that was the position.

5 **MR LASOK:** Yes.

6 **THE CHAIRMAN:** You say that if we are with you on the point
7 about whether the restraints are within the decision,
8 whatever we decide that means, then we are bound to
9 carry on with the appeals or we can carry on with the
10 appeals?

11 **MR LASOK:** No, in our submission you carry on with the
12 appeals, because, again, this is obviously the subject
13 of dispute between the parties, but in our submission
14 the jurisdiction of the Tribunal is to decide the case
15 on the merits, and if the Tribunal is faced with
16 a situation in which, on the merits, there is an object
17 infringement falling within the scope of the decision
18 but it's not precisely the object infringement that was
19 found in the decision, then a merits based approach
20 requires the Tribunal to rule accordingly. The
21 justification for that is that this is not civil
22 litigation at all in the sense that it's one of these
23 artistic games that commercial people and other people
24 play in court according to certain rules. This is part
25 of public law. The particular function of the Tribunal

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1 is to ensure that the law is observed. Here it's the
2 Competition Act 1998.

3 The whole purpose, we submit, of providing
4 the Tribunal with a merits based jurisdiction and with
5 the extensive powers that it has, and that it has
6 exercised in previous cases, is to ensure that, at the
7 end of the day, the correct result on the merits is
8 established. It is obvious and uncontroversial that
9 procedural fairness enters into it, but procedural
10 fairness is part of the process; it's not the end
11 result. The end result intended by the Act was to
12 achieve the correct application of the Chapter 1 and
13 Chapter 2 prohibitions.

14 Now, I suspect that I've probably covered most of
15 the remaining parts of that section of the note. The
16 heading above paragraph 48 deals with paragraph 40 of
17 the OFT's previous skeleton argument. I think I've
18 dealt with that orally. At all events, you can see the
19 point made there. I think that it's probably sufficient
20 just to note paragraph 52 of the speaking note, which
21 points out what is, in our submission,
22 a misunderstanding made by ITL of the OFT's submissions
23 of 9 November.

24 On that basis I come now to the submissions on the
25 Tribunal's jurisdiction. What I would like to do,

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1 I think, is just have a quick run through to see what
 2 I've covered. What I suppose I ought to do is to --
 3 **THE CHAIRMAN:** Perhaps, Mr Lasok, if I can interrupt you,
 4 there are a couple of points that I think we want to
 5 make now which may then result in you turning to that
 6 section after the short adjournment.
 7 The first question from me, just to clarify: in
 8 respect of the restriction in 2(a), 10(a), would you
 9 accept or not that it is a key element of that
 10 restriction that the prices included in the instruction
 11 or request were not understood as being maximum prices?
 12 Or would you maintain that that was still a restraint,
 13 even if the price instructed was intended to be
 14 understood and was understood as a maximum price? There
 15 I have regard particularly to what's said in
 16 paragraph 6.274 of the decision.
 17 The other point, whilst you are just looking at
 18 that, is a point for the appellants: you have now all
 19 seen each others' submissions, some of the appellants
 20 have said expressly in their submissions that they adopt
 21 the submissions of others, but as we have intimated,
 22 there are instances where people are making different
 23 points, it would be helpful for us to have
 24 an indication -- and no doubt also helpful for
 25 Mr Lasok -- as to whether we should assume that the

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1 appellants are speaking as one, largely, in the points
 2 that they want us to consider, or whether there are
 3 material differences between their respective cases on
 4 this point and if so, could they clarify what those
 5 differences are.
 6 I don't know whether you have been making any
 7 particular assumption on that point, Mr Lasok?
 8 **MR LASOK:** No.
 9 **THE CHAIRMAN:** Is there something you can usefully say about
 10 the maximum price point at this stage?
 11 **MR LASOK:** I would prefer, if the Tribunal permits, to take
 12 instruction upon that point.
 13 **THE CHAIRMAN:** Well, let's rise slightly early, then, and
 14 come back at 2 o'clock.
 15 (12.57 pm)
 16 (The short adjournment)
 17 (2.00 pm)
 18 **MR LASOK:** Madam, in answer to the question that you put to
 19 the OFT just before lunch, the OFT submits that what
 20 I'll describe as the paragraph 10(a) restriction, which
 21 is the first one in 10(a), and the same as 2(a), was in
 22 fact a restriction about pricing at a fixed price, not
 23 a maximum, so as a matter of fact, that was what it was
 24 in these cases, and the OFT is not asserting in these
 25 cases that it was an agreement or concerted practice for

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1 a maximum price. The assertion is that it was for
 2 a fixed price.
 3 The OFT doesn't rule out the possibility that in
 4 a parity and differential context, an agreement or
 5 concerted practice on a maximum could be
 6 anticompetitive, but that's not the case that is being
 7 advanced by the OFT in these appeals. It's for another
 8 case.
 9 So that brings me now to submissions on the
 10 Tribunal's jurisdiction, and to some extent I've already
 11 embarked upon this, because if one goes to paragraphs 53
 12 to 54 of the speaking note, I've already made the point
 13 before lunch that if we look at paragraph 3(1) of
 14 schedule 8, we see that the Tribunal must decide appeals
 15 on the merits by reference to the grounds of appeal set
 16 out in the notice of appeal. But in our submission, the
 17 point is that if that were the full and indeed only
 18 extent of the Tribunal's function in an appeal, then
 19 paragraph 3(2) of schedule 8 wouldn't have contained (d)
 20 or (e). As the case law on this has developed, there
 21 has emerged, in our submission, a broader understanding
 22 of the scope of the Tribunal's jurisdiction.
 23 In that connection, we do, I think, forcefully make
 24 the point in paragraph 55 that the understanding of the
 25 scope of the Tribunal's jurisdiction has developed over

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1 time and relatively early Tribunal decisions reflect
 2 relatively early views of its jurisdiction.
 3 In fact, when one just looks at the cases, you can
 4 see an evolution in the thinking of the Tribunal about
 5 the relationship between paragraph 3(1) and the other
 6 powers in paragraph 3(2) of schedule 8.
 7 Our case really is based upon the Court of Appeal's
 8 decision in Albion Water in 2008, and the Tribunal's
 9 decision in that case, which had been upheld by the
 10 Court of Appeal.
 11 There should be a file 13 in the bundle of
 12 authorities which has Albion Water in it.
 13 (Pause)
 14 **DR SCOTT:** Which tab? We have it separately, but which tab
 15 should it be?
 16 **MR LASOK:** It should be in tab 183. The Court of Appeal
 17 judgment should be at tab 183 in file 13.
 18 Because I am sure that the Tribunal is very familiar
 19 with the problem in Albion Water, I'll just go to the
 20 material parts of the Court of Appeal's judgment. The
 21 discussion of the jurisdictional issue starts in the
 22 copy that I have at the bottom of page 27. It's
 23 paragraph 112 of the judgment. There is a heading there
 24 which says "The Jurisdictional Issue".
 25 At paragraph 123, the Court of Appeal refers to the

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1 argument that had been submitted to it on behalf of the
2 Water Services Regulation Authority, and it was that
3 argument that was endorsed by the Court of Appeal in
4 paragraph 127 of its judgment. So it's easier to
5 understand 127 if you look first at 123.

6 123, the submission in the second sentence was that:
7 "The power under paragraph 3(2)(e) wasn't limited to
8 a power to make a decision that the regulator could have
9 made at the time it took the decision under appeal. The
10 language embraced any decision of a kind that the
11 regulator could have made, that is a decision within the
12 meaning of section 46(3) of the Act, in particular as to
13 whether there has been a relevant infringement."

14 Then there is an explanation of the terminology used
15 in the statute, and the argument is then summarised as
16 follows:

17 "The Tribunal has jurisdiction to make a decision
18 where it has before it material on the basis of which
19 the regulator could have made that decision if seized of
20 the matter. The provision does not import the
21 procedural requirements to which the regulator is
22 subject, such as the issue of a statement of objections.
23 Whether it is appropriate in all the circumstances for
24 the Tribunal to exercise its discretion to make such
25 a decision is a different issue."

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1 If one goes to paragraph 127, we see the Court of
2 Appeal adopting the analysis that had been put forward
3 by counsel for the Authority, and which is summarised in
4 paragraph 123. The Court of Appeal goes on to say in
5 the second sentence of paragraph 127:

6 "In particular, the reference in paragraph 3(2)(e)
7 to 'any other decision which the OFT could itself have
8 made' is a reference to the kind of decision which the
9 regulator could have made, namely a decision within
10 section 46(3), for example 'a decision as to whether the
11 Chapter 2 prohibition has been infringed'. The
12 provision does not look at the historical position but
13 confers jurisdiction on the Tribunal to make a decision
14 of the kind that the regulator, if still seized of the
15 matter, could have made on the basis of the material now
16 available."

17 Then the Court of Appeal goes on to repeat that
18 3(2)(e) does not import the procedural requirements of
19 decision-making by the regulator.

20 So if one looks at it from the perspective of
21 jurisdiction, in our submission the position following
22 from the Court of Appeal in Albion Water is as I've
23 previously described it, that to put it in a slightly
24 different way, the decision that is made by the
25 regulator is the occasion for bringing the matter before

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1 the Tribunal, which starts off by having to decide the
2 appeal before it by reference to the grounds of appeal
3 set out in the notice of appeal. But the jurisdiction
4 of the Tribunal, when seized by way of the appeal, is to
5 decide the matter by reference to the merits. The
6 merits aspect of the Tribunal's jurisdiction, the public
7 function that the Tribunal performs pushes the original
8 decision into the historical background, and this is
9 what causes the Court of Appeal to conclude that the
10 jurisdiction covers the making of any decision that the
11 regulator could have made if it had remained seized of
12 the matter, but this time by reference not to the facts
13 and the evidence that were before the regulator in the
14 past, instead by reference to the facts and the evidence
15 that are before the Tribunal in the proceedings before
16 it.

17 Now, I think we would all accept that that is
18 a broad understanding of the jurisdiction of a judicial
19 body like the Tribunal. But, in our submission, it is
20 a description of the Tribunal's jurisdiction that the
21 Tribunal had itself been working towards in earlier
22 cases, and the Albion Water case was simply the most
23 pronounced illustration, if you like, of the activist
24 role that the Tribunal saw itself as playing. So that
25 whereas in the early days the Tribunal was particularly

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1 focused on the finality of the regulator's decision on
2 preventing the regulator from, as it was said in some of
3 the earlier cases, embroidering its decision,
4 the Tribunal over time moved away from that until it
5 reached the point in Albion Water where it was
6 effectively taking the matter over from the regulator.
7 That is what generated the objection made by the
8 appellants in the Albion Water case, which was settled
9 against them by the Court of Appeal, using the
10 phraseology that one sees in paragraph 127 of the Court
11 of Appeal's judgment.

12 That understanding of the scope of the Tribunal's
13 jurisdiction, in our submission, is perfectly consistent
14 with what the Tribunal itself at an earlier stage had
15 been indicating when, in cases like Napp, it had been
16 going back to the legislative history lying behind the
17 creation of the jurisdiction of the Tribunal.

18 I am not going to go into Napp today. In the
19 earlier submission that the OFT put in, there is
20 a cross-reference to the relevant passage.

21 In our submission, the important point is that the
22 matter has been determined by the Court of Appeal using
23 this broad approach to the Tribunal's jurisdiction,
24 which, at the end of the day, makes sense; it makes
25 sense from the perspective of the legislative purpose,

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1 it makes sense from the perspective of efficiency.
 2 Now, there is also a kind of safety valve to this,
 3 and the safety valve lies in the extent of the
 4 Tribunal's discretion in relation to procedural matters
 5 to ensure that there is procedural fairness.
 6 It is through the Tribunal's procedural powers that
 7 one can achieve a reconciliation between the public
 8 purpose served by the Tribunal, which ultimately is to
 9 determine whether or not there are infringements of the
 10 Competition Act by reference to the merits, that is to
 11 say what actually happened, and the procedural fairness
 12 problems that may be caused where you have developments
 13 in a case, as has happened in the present case.
 14 I fully accept that the appellants take the view
 15 that the developments in the present case are not of the
 16 same sort as those, for example, in Albion Water and the
 17 earlier cases. But in our respectful submission, that
 18 isn't actually the point, because when one looks at
 19 a ruling such as that made by the Court of Appeal in
 20 Albion Water, one is not looking at it from
 21 a perspective of what were exactly the facts of that
 22 particular case; one is looking at what is the
 23 explanation given of the meaning of the statute, because
 24 that explanation determines the scope of the Tribunal's
 25 jurisdiction. The application to in a particular case

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1 is another matter.
 2 So --
 3 **THE CHAIRMAN:** Do we know from this judgment or the previous
 4 judgments what the relief sought by Albion -- I should
 5 know this, I suppose -- in its original notice of
 6 appeal, was? Is it stated there at all?
 7 **MR LASOK:** Yes, I think it may be in the Tribunal's
 8 judgment. I was just looking at paragraph 5 of the --
 9 51, is it? I think paragraph 51 looks like something
 10 different. The full appeal is in tab 186.
 11 **THE CHAIRMAN:** Perhaps somebody could just check out whether
 12 that appears anywhere. I do not want to take up more
 13 time with that.
 14 (Pause)
 15 **MR LASOK:** Well, I think somebody else will have a look to
 16 see where there is a convenient point at which the --
 17 I suppose it could be paragraph 51 of the full judgment
 18 of the Tribunal. It's 50 and 51.
 19 (Pause)
 20 **THE CHAIRMAN:** Yes. I have just been pointed to
 21 paragraph 208 of the Tribunal's judgment at tab 186,
 22 where it does seem to say that the final relief sought
 23 by Albion was a finding by the Tribunal that the
 24 decision should be set aside and a declaration that
 25 Dwr Cymru had abused its dominant position by charging

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1 excessive price, et cetera.
 2 The logic of your submissions must be that what the
 3 Court of Appeal said in Albion places greater emphasis
 4 on the powers in paragraph 3(2) that on the Tribunal's
 5 duty in paragraph 3(1) --
 6 **MR LASOK:** Quite so.
 7 **THE CHAIRMAN:** -- in terms of the grounds of the appeal the
 8 relevance of the grounds of the appeal.
 9 **MR LASOK:** Yes, and in the Tribunal's decision, one can see
 10 a similar shift in emphasis, for example, if you would
 11 go to paragraph 188, but it's also at paragraphs 193 to
 12 195.
 13 **THE CHAIRMAN:** Is this still at tab 186?
 14 **MR LASOK:** Yes, it's 186.
 15 It's particularly evident in 194. The discussion
 16 effectively starts with the citation of the passage in
 17 Burgess which is at paragraph 188, and if one just goes
 18 through it very, very quickly, paragraph 190 shows that
 19 the Tribunal didn't consider that, so far as the issue
 20 of dominance was concerned, it was acting under 3(2)(e)
 21 because it thought that it was acting under 3(2).
 22 What it did then was to consider the Burgess
 23 criteria which it regarded as criteria relating to
 24 3(2)(e). You see that at 194, after considering
 25 an argument advanced by Dwr Cymru concerning the two

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1 tier system of the Act, which is very much an appeal
 2 based view of the Tribunal's jurisdiction, the Tribunal
 3 says in 194, in giving its first answer to that
 4 submission, that under the Competition Act, the Tribunal
 5 in its merits jurisdiction acts in many cases as the
 6 primary decision-maker on matters of fact.
 7 What had happened was that in earlier cases
 8 the Tribunal had been ambivalent on its position as
 9 a primary fact finder as opposed to a body that was
 10 simply ruling upon the merits of the points raised in
 11 the appeals. But by this stage, the Tribunal had been
 12 shifting to a more broadly based understanding of its
 13 role to dispose of the litigation brought before it in
 14 the notice of appeal, on the merits but actually by
 15 engaging in primary fact finding.
 16 Later on in the judgment, for the sake of
 17 completion, one can see that the Tribunal distinguished
 18 between the dominance issue which it had been dealing
 19 with at this point and which it had considered fell
 20 within the first sentence of paragraph 3(2), and the
 21 excessive pricing issue, because the excessive pricing
 22 issue was an issue that it considered to fall within
 23 3(2)(e), and that's at paragraph 240 of the Tribunal's
 24 decision.
 25 **DR SCOTT:** Mr Lasok, it seems to me that both in Albion and

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1 in Burgess there were aspects of the case which were
 2 forward looking as distinct from simply backward
 3 looking. In Burgess, as is rehearsed at paragraph 189
 4 of Albion, you point out that the Tribunal had before it
 5 all the material necessary for it to decide the issue of
 6 dominance.
 7 Then in the quotation from paragraph 138:
 8 "In addition, as already pointed out, there is no
 9 question of a penalty being imposed on Austins."
 10 Here we have an interesting situation where it would
 11 no doubt be useful for posterity to know whether 10(a)
 12 and (b) are indeed infringing or not, if we found it
 13 necessary to make that decision, but as Mr Howard will
 14 no doubt reiterate, in this case we do have the matter
 15 of substantial fines which will have to be taken into
 16 account in the exercise of any discretion by ourselves
 17 as to procedural fairness. And that would, it seems to
 18 me, differentiate it from a pure Burgess situation.
 19 **MR LASOK:** Yes. There are, I suppose, two responses that
 20 one can make to that. The first is that the Tribunal,
 21 both in Burgess and in Albion Water, was very careful
 22 not to, as it were, pigeonhole itself or paint itself
 23 into a corner which, in our submission, was the right
 24 thing to do because a jurisdiction is a jurisdiction,
 25 and it's not something that magically appears in one

1 case and --
 2 **DR SCOTT:** It's the "can"/"should" differentiation.
 3 **MR LASOK:** The "can" and "should" is different, yes. But we
 4 would therefore start off on the basis that the Tribunal
 5 was right in Albion Water, and obviously the Court of
 6 Appeal decision is binding in any event in its
 7 explanation of what the scope of the jurisdiction is,
 8 and as I've submitted, it's entirely consistent with the
 9 obvious statutory purpose. Why else does the Tribunal
 10 have the powers that it has, if it doesn't have --
 11 **THE CHAIRMAN:** Well, it has that power, one can see in
 12 Albion, the finding by the OFT was that there had been
 13 no margin squeeze, say. That was challenged on appeal,
 14 Albion said there had been a margin squeeze. So
 15 the Tribunal then decides that appeal, the issue being:
 16 was there a margin squeeze or wasn't there? If it
 17 decides that there was a margin squeeze, it can do two
 18 things. It can simply set aside the OFT's decision and
 19 say "OFT, you were wrong to decide there wasn't a margin
 20 squeeze" and leave it at that, and I suppose in ordinary
 21 civil litigation, if one can read across some analogy,
 22 that would be what the court would do. But here we have
 23 power to say not only do we find that the OFT had been
 24 wrong in deciding that there was no margin squeeze, but
 25 we will make a finding of infringement, and that has all

1 sorts of consequences which are now being played out.
 2 But it still seems that in that situation the
 3 decision to find an infringement rather than simply
 4 decide that the OFT erred in finding that there wasn't
 5 an infringement, can still be seen as an extension of
 6 the relief that's given following on the determination
 7 of the appeal. Isn't what you are asking us to do
 8 something rather different from that?
 9 **MR LASOK:** Well, we would say no. Going back to
 10 Albion Water, it's relevant to bear in mind that in
 11 relation to excessive pricing an investigation had to be
 12 carried out, and certain matters were remitted to the
 13 authority to investigate. Now, it's true that on one
 14 reading of the decision the Tribunal's judgment in
 15 Albion Water, the Tribunal might have come to the same
 16 conclusion even if that investigation had not been
 17 carried out, but in fact the Tribunal did ask for that
 18 investigation to be carried out so that it could make
 19 its decision. That therefore was an indication that
 20 the Tribunal was stepping outside a strictly appellate
 21 role, even an appeal on the merits, because it wasn't
 22 simply taking the facts as found by the decision-maker
 23 and saying "Well, on the basis of those facts, you have
 24 got it wrong, we are going to re-make your decision",
 25 but it was actually going outside the confines of the

1 original decision, which is not something that one
 2 normally does in the exercise of a purely appellate
 3 jurisdiction.
 4 Turning to the present case, and advancing the
 5 second answer to Dr Scott's enquiry, if in the present
 6 case you have a situation in which the appellants were
 7 infringing the Chapter 1 prohibition, because the
 8 evidence shows that they were, and that they should have
 9 been fined, then why is it that they should not be
 10 fined?
 11 Now, the problem is this: it's easy to say: well, in
 12 circumstances like that, a purely appellate jurisdiction
 13 would, if it considered that the facts as found didn't
 14 stack up to an infringement or that certain facts had
 15 not been found which should have been found and could
 16 have been found on the evidence, and therefore you remit
 17 the matter to the original decision-maker. That's
 18 an appellate function. But the function as described by
 19 the Court of Appeal in Albion Water is not an appellate
 20 function of that nature, and in our submission, there is
 21 a reason why, and that is that it is actually efficient
 22 to proceed on the basis that the evidence gathered
 23 before the Tribunal logically leads to a decision that
 24 there has been an infringement.
 25 If you have gone to all the trouble of gathering

1 together all this evidence, what on earth is the point
 2 of remitting the matter to the original decision-maker,
 3 which then has to start the process all over again?
 4 Now, obviously within the context of the Tribunal
 5 proceedings, procedural fairness has to be observed.
 6 But if there is a way of protecting procedural fairness,
 7 the proper way, we submit, of ensuring that the
 8 statutory purpose is going to be fulfilled in
 9 an efficient way is for the Tribunal to carry on with
 10 the case and reach a decision.
 11 There is nothing in Albion Water to suggest
 12 otherwise. That's putting it in a slightly negative
 13 way, but in Albion Water, the Court of Appeal does make
 14 the point that the procedural safeguards that you find
 15 in the administrative procedure don't apply, but you ask
 16 yourself: well, why is it doing that? In other words,
 17 why is the Court of Appeal making this point? It's only
 18 relevant if the jurisdiction before the Tribunal is such
 19 that it would be engaging in this broader investigation
 20 than an ordinary appellate jurisdiction would engage.
 21 So that's why we submit that the Court of Appeal's
 22 ruling on this point is actually quite clear and
 23 resolves matters. One of the reasons for mentioning
 24 that in Albion Water and the Tribunal, the Tribunal
 25 looked at different parts, dominance and the excessive

1 pricing, in different ways, was to show that
 2 the Tribunal, even at that stage and following Burgess,
 3 regarded its role as going beyond the appellate role.
 4 It saw it moving in two different ways. One way was
 5 under the first sentence of paragraph 3(2), the other
 6 way was under 3(2)(e).
 7 That leads back to the submissions that I made
 8 earlier about how the OFT's current case falls within
 9 the scope or relates to the decision. But I've made my
 10 submissions on that point, which I don't think I need to
 11 elaborate any further.
 12 **DR SCOTT:** If we think about the point that we had reached
 13 in almost getting to the end of the factual evidence,
 14 but not getting to the expert evidence, we are,
 15 I suppose, going to have to consider how far the factual
 16 findings in the decision relate to the suggestions in
 17 10(a) and 10(b), and also from the point of view of
 18 procedural fairness, how far those were put to the
 19 witnesses during that factual evidence.
 20 Now, there may be a differentiation there because of
 21 the way things progressed as we went along. Then we
 22 would have to consider how procedurally one proceeded
 23 from there if it was accepted that there was not
 24 a proper line through the theory of harm to 8.2. And
 25 how would you suggest that we approached that area?

1 **MR LASOK:** Well, that was what I was going to come to next,
 2 because I think that is the -- I am just trying to see
 3 whether -- what I could do is to go straight to
 4 paragraph --
 5 **THE CHAIRMAN:** Don't let us take you out of your train of
 6 thought.
 7 **MR LASOK:** I was just wondering whether there was anything
 8 that I needed to draw the Tribunal's attention to
 9 specifically in paragraphs 59 to 68. Because in those
 10 paragraphs, we address certain of the points made by the
 11 appellants in various parts of the skeleton argument.
 12 I think it's worth mentioning, perhaps, it's really
 13 paragraphs 62 and 63, because 62 addresses a suggestion
 14 made by Morrisons and Safeways and by ITL about the
 15 decisions of the Tribunal, which is the heading to
 16 paragraph 3 of schedule 8. Of course it's well worth
 17 bearing in mind that paragraph 3 of schedule 8 simply
 18 identifies action that the Tribunal can take that takes
 19 the form of a decision, and it doesn't restrict
 20 the Tribunal as to the time in the course of the
 21 proceedings at which any of those decisions is taken.
 22 But it's trite to point out that if the Tribunal
 23 terminates the proceedings before it, then it is, to put
 24 it mildly, controversial as to whether the Tribunal has
 25 any residual powers. That was the issue in the

1 Floe Telecom, and it was the concerns about what happens
 2 when the proceedings are brought to an end but there are
 3 residual matters, that led to the Tribunal in
 4 Albion Water doing what it did, that's paragraph 63.
 5 So the long and short of it is, in relation to that
 6 particular part of the exercise, the Tribunal, if it's
 7 acting under, for example, paragraph 3(2)(e), still has
 8 to keep the proceedings before it in existence, it can't
 9 simply bring the proceedings to an end. So technically
 10 what happens is that it makes the decisions that it
 11 needs to make, preparing the way for a final judgment,
 12 and it's in the final judgment that it grants the final
 13 relief that it needs to grant which, as in the case of
 14 Albion Water, could be a combination of the setting
 15 aside of the decision appealed against, the making of
 16 a different decision under 3(2)(e), and so on and so
 17 forth.
 18 **THE CHAIRMAN:** Is that effectively your answer to the point
 19 that ITL make in their skeleton, which seemed to be that
 20 if they are right that paragraph 2(a) and 2(b)
 21 restraints are not within the decision so that what we
 22 are talking about is the Tribunal setting aside the
 23 decision, that once we have arrived at that position --
 24 I think this is what they say -- the Tribunal must set
 25 aside the decision and does not have power to continue

1 with the appeals, delaying the setting aside of the
 2 decision in order to decide whether it wants to exercise
 3 any of the other powers in paragraph 3(2)?
 4 **MR LASOK:** Quite so, because the problem is that if you
 5 adopt that interpretation, then effectively you deprive
 6 part of the jurisdictional provisions of their legal
 7 effect. And that was something that the Tribunal in
 8 Albion Water was clearly aware of, and decided not to go
 9 down that road, because the point in Albion Water had
 10 been reached at a relatively early stage, at which
 11 the Tribunal had come to -- I should call it loosely
 12 a provisional conclusion that the decision appealed
 13 against was wrong. But nonetheless, the proceedings
 14 carried on so the Tribunal could exercise its
 15 jurisdiction and provide the resolution of the
 16 litigation that it perceived was mandated by the
 17 statutory provisions.

18 But it would have been perverse for the Tribunal to
 19 have said "Well, what we think we need to do is to
 20 exercise our power under 3(2)(e) and therefore in order
 21 to do that we will set aside the decision, thus
 22 depriving us of the power to exercise the power under
 23 3(2)(e) that we started off wanting to do".

24 This had all been foreshadowed in fact by the Court
 25 of Appeal decision in Floe Telecom.

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1 So I think that I've dealt with, I would have
 2 supposed, most of the points that run up to 68, and that
 3 brings me now to the exercise of discretion point, which
 4 is: would it be appropriate for the Tribunal to continue
 5 the present proceedings in relation to the restrictions
 6 set out at paragraph 10?

7 Obviously in paragraphs 69 to 72, we make the point
 8 that if one looks back at cases like Albion Water and
 9 Burgess, the indications are that it would be
 10 appropriate for the Tribunal to continue. We fully
 11 accept that there is an issue of procedural fairness.
 12 But that question is simply whether or not, were the
 13 proceedings to continue, the appellants would be
 14 prevented from defending themselves, and that's
 15 something that can be resolved through appropriate
 16 directions made by the Tribunal. We give some
 17 indication of what the appropriate directions can be.

18 The suggestion that there should be an SO or full
 19 pleadings, which was raised in Albion Water, was
 20 rejected by the Tribunal in that case. That's in the
 21 reference at paragraph 75 of the speaking note. That
 22 idea was completely killed off by the Court of Appeal in
 23 Albion Water which made the point that, when the matters
 24 are before the Tribunal, it's for the Tribunal to
 25 exercise its procedural powers but not replicate or

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1 require the replication of the different procedural
 2 rules that apply at the administrative process that is
 3 conducted by the OFT.

4 So the question would be: well, what is the correct
 5 way forward? And we fully accept that the appellants
 6 may require or need the OFT to re-state its case,
 7 because that, they would say, gives them something
 8 coherent that they can focus on. We would submit that,
 9 if the Tribunal made such a direction, it can be done
 10 because it can be done in the form of a kind of
 11 preliminary closing on the facts.

12 **THE CHAIRMAN:** Well, the facts -- if you limit yourself to
 13 the restraints in 2(a) and (b), you might not actually
 14 be all that far apart on the facts from the appellants,
 15 with some appellants more than others. But there are
 16 certain issues were those prices maximum or fixed
 17 prices, there is probably more of an issue as regards
 18 2(b), but it may be that the scope of the factual
 19 dispute as to how these agreements were intended to
 20 operate is greatly reduced in the light of the
 21 refinement of your case.

22 **MR LASOK:** That's in fact what we put in the speaking note,
 23 because there has been some suggestion about lack of
 24 particularity in the case that the OFT currently wishes
 25 to run, but with all due respect, we don't see it in

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1 that way, because the description of the restrictions is
 2 short, it's readily comprehensible, but we also make the
 3 point that it has an obvious relationship with the
 4 evidence as it has emerged. We have raised the
 5 suggestion of putting in a document because we recognise
 6 that the appellants, from the procedural fairness
 7 perspective, may well say "This is what we would
 8 prefer", and if that's what they would prefer and
 9 the Tribunal is minded to go down that route, that has
 10 our support.

11 It is a bit difficult at this stage to see how the
 12 later steps would follow, because it is not clear, and
 13 the appellants have suggested that they might wish to
 14 recall witnesses, it's not clear whether and if so to
 15 what extent that would be necessary, but witnesses can
 16 be recalled. One thing is absolutely certain, and that
 17 is that the case currently run by the OFT has not been
 18 put to the expert witnesses. That's the reason why we
 19 raised it at this stage rather than later on.

20 On that there is perhaps a footnote that I could put
 21 in which is that there has been some suggestion that the
 22 case adopted now by the OFT doesn't have the backing of
 23 a report from Professor Shaffer, but that, with respect,
 24 is a matter of evidence. When a body like the OFT
 25 adopts a decision like the decision challenged in these

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1 proceedings, or a decision that takes the form of
 2 a description of the infringing agreements such as that
 3 which the OFT is currently advancing, it doesn't follow
 4 that the decision has to be replete with references to
 5 some expert's report. What you actually see is
 6 an articulation of the theory of harm and then, when
 7 it's challenged, the OFT gets an expert in order to
 8 support its view of the theory of harm or of the
 9 anticompetitive consequences of the arrangements.
 10 So things like experts' reports would in any event
 11 come after the complaint, if you like, had been
 12 articulated. We also canvass in the speaking note, but
 13 very, very briefly, the exemption arguments, and things
 14 like reliance on the vertical restraints order. But in
 15 our submission, all these are manageable, not least
 16 because in relation to exemption point, that argument is
 17 largely based upon, if not entirely based upon, the
 18 appellants, particularly ITL's own submissions as to
 19 what the nature of the P&D arrangements with the
 20 retailers were. ITL has never really addressed the case
 21 that was made out by the OFT even in the original
 22 decision. In any event, we already have got evidence on
 23 the purpose and objectives of the ITL parity and
 24 differential strategy, and how it was implemented. So
 25 there is already material on which an informed view can

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1 be reached as to the viability of these arguments based
 2 on exemption of the arrangements. So that we don't
 3 perceive to be a problem.
 4 At the end of the day, in our submission, we have
 5 a situation in which it is, we would submit, efficient
 6 and perfectly possible to take advantage of the
 7 investment that all the parties have made thus far in
 8 the litigation, but instead of wasting that, proceed
 9 further to a final determination of these matters, so
 10 that we know whether or not there was an infringement of
 11 the Chapter 1 prohibition.
 12 Now, I've noticed that in the speaking note there is
 13 a reference to some of the evidence in relation to
 14 Co-op. I have given the Tribunal the references so you
 15 can see where we got that from. There is also a point
 16 made by ITL in its skeleton argument -- this is dealt
 17 with at paragraph 88 of the speaking note -- that the
 18 OFT could always have run the new case, and the answer
 19 to that is that the OFT was entitled to evaluate the
 20 evidence before it and adopt a decision that it
 21 considered fitted that evaluation.
 22 The two points made by ITL in support of the
 23 suggestion that the OFT's case was misconceived from the
 24 start concern Ms Corfield's statement which we provided
 25 to the OFT by Sainsbury, and the Somerfield transcript.

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1 Now, so far as Ms Corfield is concerned, the point
 2 is a very short one, and that is that if one actually
 3 reads Ms Corfield's original statement, a lot of what
 4 she said did support the OFT's interpretation of events.
 5 She said, for example, that the P&Ds were respected
 6 virtually all the time, over 90 per cent or something
 7 like that, and she had identified only one scenario in
 8 which P&Ds might temporarily be unoperational, but the
 9 OFT had taken that into account when it made its
 10 decision. What, of course, the OFT hadn't seen was the
 11 full extent of Ms Corfield's evidence which came out
 12 when she was cross-examined and re-examined.

13 So far as the Somerfield transcript is concerned, if
 14 my learned friend wants to take the Tribunal to that he
 15 is perfectly welcome to, but he refers to only one line
 16 of it, and he hasn't taken into account other passages
 17 in the transcript which don't help him.

18 **THE CHAIRMAN:** Just going back to Mrs Corfield for a moment,
 19 she was obviously your witness, do you accept that the
 20 OFT has to continue on the basis that what she said was
 21 the case is the case? You don't, or do you, challenge
 22 her evidence in any way, the evidence that she gave in
 23 the witness box? Or do you accept that the case has to
 24 proceed on the basis that what she said was true?

25 **MR LASOK:** Well, we have not made an application that she be

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1 treated as a hostile witness. Her evidence has to be
 2 assessed like the evidence of any other witness and the
 3 evidence has to be taken in the round.

4 **THE CHAIRMAN:** Well, she is not like any other witness,
 5 because all the other witnesses are called by the
 6 appellants. She is different in the sense that she is
 7 your witness, so certainly in relation to the evidence
 8 of the other witnesses it would have been possible, at
 9 the end of the day, for you to say "Well, tribunal, you
 10 must look at the documents and you are entitled to draw
 11 an inference as to the meaning of that document which is
 12 not the same as what Mr Whoever said it meant".

13 Now, the question is: can you do the same in
 14 relation to Mrs Corfield, or do you accept that, no, you
 15 can't, she is your witness, you didn't apply to treat
 16 her as a hostile witness, so you are stuck with the
 17 answers that she gave?

18 **MR LASOK:** Well, you have to take her evidence in the round,
 19 and if we are stuck with the answers --

20 **THE CHAIRMAN:** Well, what do you mean by that, though?

21 **MR LASOK:** Well, for example, when she says that Sainsbury's
 22 was obliged under the trading agreement to comply with
 23 the differentials. That's a problem that ITL has.

24 **THE CHAIRMAN:** Well, it's not so much a problem for them as
 25 it is for you, because of course she is not their

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1 witness, she is your witness, so they don't have to
 2 accept what she said any more than you have to accept
 3 what their witnesses said. The point is that Mr Howard
 4 presumably wouldn't be asking us not to accept as
 5 evidence answers which the ITL witnesses gave. He
 6 would, I think, regard himself as stuck with those,
 7 whether they were for him or against him.

8 **MR HOWARD:** I would refer you to the Filiatra Legacy, the
 9 decision of the Court of Appeal on this point, which
 10 makes it clear what the position is.

11 **THE CHAIRMAN:** I would like to see where I get to with
 12 Mr Lasok on this point.

13 **MR LASOK:** The difficulty is that it was largely
 14 Ms Corfield's evidence that generated the case that the
 15 OFT is currently putting forward. So to some extent
 16 this is a bit of a non-point. I will repeat, I think
 17 the problem with Ms Corfield is that she gave some
 18 answers that were helpful to Mr Howard, but she gave
 19 other answers that were helpful to us, and when one
 20 looks through her evidence, the Tribunal is going to
 21 have to come to a view overall as to what her evidence
 22 actually was.

23 **THE CHAIRMAN:** Insofar as there is an inconsistency between
 24 her witness statement and the answers that she gave in
 25 the witness box.

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1 **MR LASOK:** Yes.

2 **THE CHAIRMAN:** But insofar as she gave answers in the
 3 witness box in relation to matters that hadn't been
 4 covered in her witness statement?

5 **MR LASOK:** Well, that's her evidence, yes. But in relation
 6 to that, one must be slightly careful because -- I put
 7 it like that because when asked leading questions, she
 8 usually answered without a moment's hesitation with the
 9 word "correct". When asked non-leading questions, she
 10 had to think about the answer. That means inevitably
 11 that one has to look at the totality of the evidence
 12 that she has given.

13 **THE CHAIRMAN:** Right, thank you.

14 **MR LASOK:** I think that unless there is anything further
 15 I can help the Tribunal with?

16 **THE CHAIRMAN:** Thanks very much, Mr Lasok, very helpful.
 17 Who is going next? Are we hearing from the other
 18 appellants or are we hearing from you, Mr Howard?

19 **MR HOWARD:** Whichever you would find more convenient.
 20 Probably, since I am making the main submissions, it's
 21 more convenient for me to go first.

22 **THE CHAIRMAN:** Yes. That cuts both ways in the sense that
 23 we have also had the fullest written submissions from
 24 you. Perhaps it would help the other appellants to know
 25 what your going to say first, and then they may be able

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1 to truncate what they want to say as well.

2 Submissions by MR HOWARD

3 **MR HOWARD:** Maybe I can just make one opening remark and
 4 then we will take a break, which is this: it's necessary
 5 just to stand back, before we get involved in the
 6 debate. There are a lot of points that Mr Lasok has
 7 manifestly not addressed, he has not addressed anything
 8 to do with the concessions that have previously been
 9 made, and I am afraid we will have to go back on that,
 10 because these are very important concessions made, as
 11 you said the other day, on a considered basis and they
 12 can't just be ignored and turn up today and make some
 13 different point.

14 Leaving that on one side for the moment, what one
 15 needs to think about at this juncture is: what is it the
 16 OFT is actually saying about these proceedings? As
 17 I say, forget the arguments about jurisdiction and so
 18 on. And what they are actually saying to you is: I want
 19 permission to prove what they call the refined case. So
 20 what they are actually asking you for permission to do
 21 is to set out -- because they have not actually done
 22 it -- in a new document their case. The reason they
 23 would need a new document is that they have to set out
 24 a theory of harm, because at the moment we just have
 25 really two lines, I think it is, which contain

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1 an assertion of a theory of harm.

2 Then what they are asking you to do is to give them
 3 permission not only to put forward this economic
 4 analysis but also to support it with an expert's report,
 5 because they recognise they need to underpin this with
 6 expert analysis.

7 So that if one actually -- they don't want to say to
 8 you "that's actually what I am seeking permission to
 9 do", because once you have put it in those terms, even
 10 if one says there was a jurisdiction, even if you are in
 11 discretion, the answer is absolutely obvious. One would
 12 say in litigation of this sort at this stage it would be
 13 a very rare thing indeed to give permission.

14 You were referred by Mr Saini to a decision of the
 15 Court of Appeal and Lord Justice Waller put the matter
 16 particularly graphically. That was on the first day of
 17 the trial where somebody was seeking to amend, and the
 18 Court of Appeal said that this was frankly not something
 19 that one should generally permit, and the reason is
 20 litigants should not, in the words of
 21 Lord Justice Waller, be mucked about in this way.

22 When you transpose that to what are criminal
 23 proceedings where what Mr Lasok actually recognised in
 24 answer to a question from Dr Scott, is that we have come
 25 along to knock down the decision, the reasoning that led

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1 to the conclusion at 8.2. If you ask yourself: have we
2 done that?, although the OFT is continually mealy
3 mouthed about the position, the position is completely
4 clear and they are not really in a position to say
5 otherwise. The reasoning falls away, the conclusion at
6 paragraph 8.2 -- and I'll come back to how that fits in
7 later -- falls away, so that the appellants have
8 succeeded.

9 What is then being said is, "Well, never mind all of
10 that, never mind the interests of the finality of
11 litigation, I am recognising that an appellant who has
12 purportedly been fined, I think it's £112 million,
13 should then be entitled, as it were, to walk free", what
14 is now said is, "Well, I should have an opportunity to
15 bring a different case".

16 In our submission, once you think of it in those
17 terms it really is an outrageous position that the
18 Office of Fair Trading has taken, and you shouldn't have
19 any difficulty at all, even if you thought it was
20 a matter of discretion, in disposing of the matter. As
21 you know, we say in fact you don't get there because, in
22 the light of the way this case has come forward, and the
23 light of where we have got to, the only thing that you
24 can properly do now is set aside the decision and allow
25 the appeal. You can't keep the case alive in order that

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1 the OFT might come up with a new case which might be
2 proved. At the moment you are not in a position to say
3 "Yes, that's a case that could be established", all we
4 know is we have rather a lot of speculation about it,
5 nothing more.

6 That's what I wanted to say just at the outset.

7 **THE CHAIRMAN:** Thank you. We will come back at quarter
8 past 3.

9 (3.00 pm)

10 (A short break)

11 (3.15 pm)

12 **MR HOWARD:** Having made those introductory remarks, I want
13 to -- obviously I have only seen the speaking note this
14 morning -- try and pick up the points by reference to
15 our skeleton, also make clear the points that really
16 have not been addressed at all, just blithely ignored by
17 Mr Lasok.

18 The first point is to actually understand how we
19 have got here, and it does require you to go back to the
20 transcript on Day 26.

21 What was clear on Day 26, and one has got this
22 constant, really, flip-flopping in the OFT and Mr Lasok
23 as to what the case is, but this was a very important
24 juncture in the proceedings, it wasn't actually, as it
25 were, immediately following Fiona Corfield's evidence

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1 that this came out, that's completely untrue and of
2 course the Tribunal will remember that. Fiona Corfield
3 gave her evidence, the OFT blithely sought to carry on
4 nevertheless, and the only reason we actually got to
5 what happened on Day 26 was because I made extensive
6 submissions on the morning of, I think, the Monday,
7 I think that was Day 22, I suppose, or whatever that day
8 was, and in the course of those I pointed out that the
9 case was in tatters, and you said "Well, what do you
10 want us to do?" And the position we arrived at --
11 whether that was what I wanted you to do is a different
12 matter, but certainly the consensus, as it were, that we
13 arrived at --

14 **THE CHAIRMAN:** The consensus which emerged.

15 **MR HOWARD:** The consensus which emerged, that's right, I'm
16 not in any way being critical, but that's what happened,
17 the point is the Tribunal yet again directed the OFT to
18 provide clarity as to its case. That's why Mr Lasok
19 came forward on Day 26. It wasn't that suddenly, oh,
20 the scales had fallen from the OFT's eyes. The same
21 problem had emerged at earlier stages in the litigation.
22 For instance, I had asked, in Mr Lasok's opening, with
23 some prescience as it turned out, "What is the
24 requirement that you are talking about?", and of course
25 that was when Mr Lasok sought to put me down by saying

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1 that the decision wasn't written in Greek or Arabic or
2 some such point.

3 But that question was in fact an absolutely
4 pertinent question: what is it you mean by the P&D
5 requirement? Because that remains shrouded in mystery
6 today. One can see what they were saying in the
7 decision. Mr Lasok never wanted to be pinned down, but
8 one still sees today a lot of difficulty with actually
9 understanding or their stating clearly what their case
10 is.

11 We then had Day 16, where you will remember on
12 Day 16 Mr Lasok sought to say that paragraph 40 of the
13 skeleton argument didn't represent their case. Day 17,
14 where they acknowledged it did represent their case, but
15 what they did on Day 17 was to say "It's not necessarily
16 our case that each element is proven". Then we got to
17 Fiona Corfield's evidence, and then we got to Day 26.

18 Now, the critical point was the effect of Day 26
19 was, as I said last week, the Office of Fair Trading
20 seeking an indulgence from the Tribunal on the eve of
21 expert evidence. But what's important is to see
22 actually what was being said at that stage. The OFT, at
23 that stage, if you go to page 1 of the transcript, and
24 going on to page 2, what they were accepting
25 unequivocally is that if they could not prove any of the

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1 paragraph 40 points, they were outside the decision.
 2 That you see is put. What's interesting is to see the
 3 current case that's sought to be proved. If one starts
 4 at line 18 he says that:
 5 "... the OFT has considered the evidence as it has
 6 emerged in the course of the proceedings, and it appears
 7 to the OFT in the light of the evidence that each and
 8 every one of the specific circumstances relied on [note
 9 the words] in the decision in support of the
 10 finding of an object infringement may or may not be
 11 established ..."
 12 That is important because what he was actually
 13 recognising there was, as is actually clearly the case,
 14 that paragraph 40 is a reflection -- not a reflection,
 15 it is a statement of what is in the decision. The only
 16 difference between paragraph 40 and the paragraphs of
 17 the decision is that it set out in paragraph 40 in each
 18 context considering a Gallaher price increase,
 19 a Gallaher price decrease, an Imperial price increase
 20 and an Imperial price decrease.
 21 He then, at line 25, says:
 22 "For example, if the price moves take place through
 23 manipulation of the wholesale price, that may reflect a
 24 restraint that is not referred to in paragraph 40 of the
 25 OFT's skeleton ..."

1 Now, just remember those four lines are the same as
 2 paragraph 2(a) of the document they produced last week,
 3 price moves through changes in the wholesale price.
 4 He then goes on to say:
 5 "If the Tribunal were to find in relation to any one
 6 of the infringing agreements ... that none of the
 7 constraints in paragraph 40 of the OFT's skeleton
 8 argument were present, it does not follow that there was
 9 no object infringement. In other words, putting matters
 10 in the statutory language ... there are reasonable
 11 grounds for suspecting an object infringement that
 12 worked in the absence of the four constraints as they
 13 are described in paragraph 40 ..."
 14 Now, that language of course, as I said the other
 15 day, and we have said in our written document, reflects
 16 section 25. But the important thing is line 16. Now,
 17 that is a departure from the decision as currently
 18 formulated. So in other words the basis on which he
 19 came along to court on that day was "If I can't prove
 20 a case in paragraph 40 and if, for instance, I can only
 21 prove the case at page 1, line 25 to page 2, line 3,
 22 I am outside of the decision".
 23 I would respectfully suggest that it is truly
 24 remarkable for a representative of the Office of Fair
 25 Trading on November 3rd to have said that to

1 the Tribunal and yet today, when he is saying "No, no,
 2 this case is within the decision", that he has not
 3 sought to explain that to you, the basis on which he
 4 made that statement two weeks ago and today is making
 5 a different statement.
 6 That's particularly in the context, this is not
 7 self-evidently litigation between private individuals
 8 when it would be bad enough that counsel says one thing
 9 one day to the court and something else two weeks later.
 10 But this is a very important public prosecution where
 11 Mr Lasok is in the role of a prosecutor, and in my
 12 submission, it is just an improper position, and
 13 the Tribunal has no reason at all not to hold the OFT to
 14 what was said.
 15 Now, the next very important point to note about
 16 this is that what Mr Lasok on this day was accepting he
 17 could not prove, even then, was the central plank of the
 18 case. It's actually fundamental, this. The central
 19 plank was paragraph 40(b) of their skeleton argument.
 20 That was when the retail price of Imperial's brand
 21 increases, the retail price of Gallaher's brand must
 22 also increase. That, even on Day 26, was recognised to
 23 have gone. So that even on Day 26, the Office of Fair
 24 Trading was saying "Our case has fundamentally changed
 25 because we can no longer prove that".

1 Just interposing for a moment, there has been a lot
 2 of discussion in this course of this case about how
 3 paragraph 40 fits in with the opportunity to respond
 4 clause. The thing that's absolutely fundamental to
 5 remember is that the opportunity to respond clause has
 6 absolutely nothing to do with 40(a), which is a Gallaher
 7 brand increase, (b), ITL's price increase or (c), an ITL
 8 brand decrease.
 9 In other words, those were situations in which the
 10 OFT's case was that there is an absolute obligation on
 11 the retailer where any one of those things happens to
 12 make a corresponding move in the price of the competing
 13 linked brand.
 14 That is why the so-called lock-step was absolutely
 15 central to the theory of harm. The only area where
 16 their case was somewhat less clear or more ambivalent
 17 was in the case of a Gallaher price decrease. We have
 18 set out -- and I'll come to it a bit later, but you will
 19 remember the way Mr Lasok tried to explain their case on
 20 opening, it was still that there was a requirement to
 21 move the price, but saying, "Well, the retailers might
 22 be a bit sticky". So that effectively they were still
 23 saying there was a requirement, but one accepts that the
 24 case was slightly ambiguous about that.
 25 But in relation to the other parts of the case,

1 there was absolutely no ambiguity at all, no case as to
 2 why this doesn't operate in an absolutely rigid way.
 3 The reason that's important to remember is that this
 4 case, the basis of the Office of Fair Trading's case, is
 5 that although the agreements are vertical agreements,
 6 they have sought to avoid the difficulty of saying
 7 "These are restraints in vertical agreements which are
 8 a matter of everyday life", to say that the restraints
 9 in fact are in effect the same as a horizontal link.
 10 That's why, if one stands back from it, they felt they
 11 could say this was an object case and not an effects
 12 case. Because we can say, and they say it absolutely
 13 unequivocally in their skeleton argument, this is
 14 exactly the same as if the manufacturers had entered
 15 into these arrangements between themselves.
 16 The only point that Mr Lasok was seeking to cling on
 17 to on Day 26 was a suggestion that they were still
 18 running this paragraph 40(a) case. Now, you will have
 19 seen in this speaking note -- he didn't take you to
 20 it -- the position about that still is or has become
 21 somewhat equivocal. I'll explain to you why there is
 22 absolutely no continued room for equivocation in
 23 a moment.
 24 What we then had, following that hearing, was the
 25 document that the OFT produced with the statement of

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1 case, where they put forward two different restraints.
 2 What one found in that document, if you have it there,
 3 previously on Day 26, so where we were on Day 26, was it
 4 was recognised absolutely clearly that if we are not
 5 within paragraph 40 then we cannot maintain the decision
 6 as it stands, and there are two choices, you either set
 7 aside the decision and allow the appeal or the
 8 schedule 8 argument. There was no other position.
 9 So when they come forward with their document today,
 10 they appear to be making a different point, so that the
 11 document, it comes up with what is a new basis of the
 12 case, they call it a refinement but it's actually
 13 perfectly clear this is a different restriction, and
 14 I'll explain why it's a different one in a moment, but
 15 they are then saying that this all falls within the
 16 decision.
 17 Now, as I've already said, that they should make
 18 a volte face like that without explaining the position
 19 we would suggest is highly unsatisfactory. Then on
 20 Day 27, when we came back before you last week, they
 21 flip again, recognising that this case is not within the
 22 infringing agreements. We have given you the reference
 23 to that. It's Day 27, page 68. It's absolutely clear,
 24 at line 17 --
 25 **DR SCOTT:** Just pause a moment, Mr Howard, we have turned to

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1 our files and we have a slight --
 2 **MR HOWARD:** I see. In fact, it's set out in my document.
 3 **THE CHAIRMAN:** It is set out in your skeleton. Our
 4 documents don't seem to have quite caught up with --
 5 **MR HOWARD:** It's set out absolutely clearly in our skeleton
 6 or whatever you want to call it, it's less skeletal and
 7 more fleshy, at paragraph 9. It's the second paragraph:
 8 "If you put the broad question: is the infringing
 9 agreement arising from the restraints in paragraph 2 of
 10 the Wednesday document the same as the infringing
 11 agreement which is described in the decision? The
 12 answer is no."
 13 The question is the right question. Imperial have
 14 been fined, and so have the retailers, for being
 15 involved, being parties to agreements or concerted
 16 practices which are defined as the infringing
 17 agreements. If you want to say "Well, it's not that
 18 infringing agreement, it's a different infringing
 19 agreement", you can't say that is within the decision or
 20 a reflection of the decision. It may be that you want
 21 to try and strip out something from what you have
 22 already said and say "Well, there is a fact which
 23 I could rely on to support a different allegation", but
 24 it is not the same allegation. It's actually quite
 25 difficult to do justice to the point beyond saying that.

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1 **THE CHAIRMAN:** Is that the same point that I was putting to
 2 Mr Lasok, that the important question is not so much: is
 3 it within the decision in the sense that there are
 4 findings of fact that those restraints existed, and one
 5 can find in the decision findings of fact as to those --
 6 **MR HOWARD:** Yes.
 7 **THE CHAIRMAN:** -- but to be within the decision should, in
 8 this context, mean to be found to have been
 9 an infringement of the Chapter 1 prohibition?
 10 **MR HOWARD:** Quite so. Just ask oneself this: what has
 11 Imperial purportedly been fined £112 million for? What
 12 are they supposed to report to their shareholders? Just
 13 understanding why, if they were to pay the fine, would
 14 they be paying it? Because I have been found to be
 15 guilty of participating in this or these infringing
 16 agreements. If I want to challenge it, to take
 17 Dr Scott's point, I come and challenge that. I haven't
 18 been fined for something else. That's what I have been
 19 fined for. So to say, "Oh, well, it's in the factual
 20 matrix that you did this, and we have set out some facts
 21 that you did that", the answer is that may be true, it
 22 may not be true, let's assume it is, it doesn't advance
 23 the OFT's position, because that isn't the basis of the
 24 decision, the decision is in respect of particular
 25 infringing agreements.

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1 We will look at the EWS case. All the Court of
2 Appeal there is making is the rather obvious point that
3 the decision is a very important document, and you have
4 to be very clear as to what the decision is and the
5 basis of it, because that is the basis on which somebody
6 gets fined or, in a damages action, a follow-on damages
7 action, that's the basis upon which somebody seeks
8 damages.

9 I mean, the basis of this decision, of course not
10 only exposes parties to the fines, but also could expose
11 them -- I am not saying this has actually happened in
12 this case, but it could happen in a case like this -- to
13 somebody else coming along and saying: based upon that,
14 I am entitled to claim damages against you. Now, the
15 basis for that has to be what has been found to be the
16 infringing conduct, not something else where you say:
17 well, there was a finding of fact by the Office of Fair
18 Trading about something.

19 For instance, and again you can test it in a lot of
20 ways, assume that we had not appealed or you had
21 a decision which hadn't been appealed and somebody comes
22 along and says "Well, I can see in this 500-page
23 document that the Office of Fair Trading has referred to
24 something as a fact, and I want to rely on that". Well,
25 one would say that's not part of the infringing

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1 agreement and I am perfectly at liberty to defend myself
2 and say "No, no, there was no such fact, I am not bound
3 by that finding of fact in any way". The critical point
4 is: what is it they have found?

5 As I think the Chairman is saying, we say that what
6 you have to look at are the agreement or concerted
7 practice which the OFT found to have as its object the
8 restriction of competition. That they found was one
9 which restricted the retailers in their ability to
10 determine prices for competing products, and was
11 anticompetitive for a particular reason, because of that
12 effect on the incentives of Imperial and of Gallaher.

13 So we say in relation to the issues here, the new
14 case, the refined case, is not the basis of the decision
15 and it's not within the decision as properly understood,
16 and that you should refuse to allow the proceedings to
17 continue on the basis that, if they produced a new case,
18 or they pursued their refined case, that that ultimately
19 might lead you to make a decision under 3(2)(e).

20 If I just stop for a moment there, what 3(2)(e) is
21 not intended to do is to give the Tribunal, as it were,
22 some independent roving jurisdiction where it says
23 "Well, OFT, we don't think much of your case, but we are
24 really quite interested in your investigating some other
25 case". Just imagine the situation, if Mr Lasok, instead

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1 of being what I would describe as somewhat coy and
2 evasive about the position, actually came forward and
3 said "We acknowledge that the decision cannot stand but
4 we are interested in pursuing other matters and we would
5 like to put forward a reformulated or a new case in
6 front of you and for you to consider it".

7 In my submission, the only thing that the Tribunal
8 could properly do in that situation is to say "The
9 appeal has to be allowed, because you are not supporting
10 the decision, it's not our function -- because we are
11 obliged to do that -- to conduct an investigation. If
12 you really believe it's in the public interest to
13 conduct an investigation, OFT, that's a matter for you.
14 We are at this stage functus, we don't have material in
15 front of us that allows us to make any other decision",
16 and that's the point today: the OFT doesn't say you have
17 the material that would allow you to come to any other
18 decision other than allowing this appeal and setting
19 aside the decision. What they are asking you to do is
20 to let them prove a new case before this court, rather
21 than, if they think there is an case, investigating it
22 themselves.

23 Now --

24 **DR SCOTT:** Sorry.

25 **MR HOWARD:** Yes.

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1 **DR SCOTT:** Going back to the discussion we had with Mr Lasok
2 earlier on about the pathway that takes us to the
3 factual matrix to 8.2, a moment or two ago you talked
4 about something being anticompetitive for a particular
5 reason, because of the effect on the incentives for the
6 manufacturers.

7 Does the argument you are making now embrace the
8 situation that would exist if we were to find that this
9 basic factual matrix reflected restraints (a) and (b),
10 hypothetically, reflected 10(a) and 10(b), but that the
11 anticompetitive -- for a particular reason -- bridge
12 between that factual matrix and 8.2 was not the correct
13 approach to get from one to the other, for the reasons
14 that you have been expounding.

15 Are you suggesting that in that situation
16 schedule 8, 3(2)(e) would be inappropriate?

17 **MR HOWARD:** Yes, I am. One has to look at what stage this
18 question arises. We are at the stage where the Office
19 of Fair Trading, when you actually analyse both their
20 concessions and what their case now is, is saying "The
21 decision as it stands cannot stand, I do not support it
22 any longer and therefore the appellants' notice of
23 appeal has to succeed." So that the question then, what
24 they are actually saying is "I want to keep this alive
25 to prove a different case".

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1 At the moment, today is not the day for us to argue
 2 about whether the restraints in 2(a) and 2(b) are or are
 3 not proven. A lot of Mr Lasok's submissions create
 4 confusion because he is going into whether he can or
 5 can't prove something, whereas the question is at the
 6 moment: taking 2(a) and 2(b) at face value, then the
 7 question only is: is that within the decision? Then you
 8 have a jurisdictional question. Then if you say, well,
 9 either -- you then have a question of discretion, if you
 10 have decided the jurisdiction point in a particular way.
 11 But taking the point, if one said, well, he has
 12 a cogent case for restraints 2(a) and 2(b) as
 13 restraints; in other words, saying we don't have to
 14 decide it now, but is there an arguable case that there
 15 were restraints of this type in the contract, or
 16 contracts.
 17 The next stage is: but has he got any material at
 18 the moment which establishes -- (a), is that the
 19 restraint he was relying on? Answer, no. Therefore is
 20 that part of the infringing agreement? Answer, no.
 21 Even if one goes beyond that and says: is there material
 22 here which is relevant to establish a theory of harm?,
 23 the answer again is no. There is no analysis at all in
 24 the decision and there is no expert evidence which
 25 supports any object infringement by reference to what he

1 is putting forward here.
 2 I'll come back to this in the course of my
 3 submissions, but I'll say this now: what he is talking
 4 about from paragraph 2(a) is something which is
 5 fundamentally different to what they were talking about
 6 in the decision. The decision is all about linking the
 7 two brands and so one going up, the other goes up, as
 8 a matter of requirement one going down, the other going
 9 down.
 10 What he is now talking about is simply a situation
 11 where one manufacturer, here Imperial, can, by changing
 12 its wholesale price, be satisfied that the change in
 13 wholesale price would be reflected in the retail price.
 14 If you are going to say that that is anticompetitive
 15 by object, if one only thinks about it for a moment, you
 16 are taking an enormous jump, because that's then
 17 a manufacturer led situation. All you are saying is the
 18 manufacturer, who has an arrangement with the retailer
 19 whereby he can be secure that, for instance, his lower
 20 price is reflected in a lower shelf price, you are
 21 saying that that is necessarily anticompetitive by
 22 object. Whereas of course you start off thinking: well,
 23 actually that's all about passing through your lower
 24 price. So one's immediate reaction is: how on earth can
 25 you just assert -- which is all we have at the moment --

1 that is anticompetitive by object?
 2 Then you have to add into the equation, because this
 3 is the interesting thing, what Mr Lasok's submissions
 4 today seem to involve was this: if you ask him what's
 5 the counterfactual that you are talking about, the
 6 counterfactual appeared to be from his submissions today
 7 a situation where, with the P&D, Imperial could ensure
 8 that a lower wholesale price is reflected in a lower
 9 shelf price, because the retailer will not set prices,
 10 will not do actually what you heard evidence about,
 11 Imperial being concerned that their lower prices
 12 wouldn't be reflected in lower shelf prices.
 13 But if you say the counterfactual is one where
 14 that's what is going to happen, that you may have
 15 a lower wholesale price but you find the retailer
 16 doesn't reflect that, you would then have to consider
 17 with an economist: well, what is the effect in that
 18 situation going to be? If you can't feed through your
 19 lower wholesale price to a lower shelf price, why would
 20 you lower the prices?
 21 So that's one thing that would have to be
 22 considered. Another thing an economist would have to
 23 consider is what I explored in the evidence with the
 24 witnesses, which is the Pepsi/Coca-Cola thing, which is
 25 that it's actually perfectly standard in the supermarket

1 world for when Coca-Cola sees Pepsi at 89p a bottle or
 2 whatever it is, to say "Well, I'll bonus you to reduce
 3 my brand so I can match it". In other words, there is
 4 nothing unusual at all going on.
 5 Now, if we go back to the decision, the first
 6 question that has been raised -- and again there has
 7 been some shifting of the ground -- is the decision, if
 8 we take it, how does that actually define the infringing
 9 agreements?
 10 Now, when he addressed this last week, Mr Lasok said
 11 paragraph 1.1 was the important paragraph, which at the
 12 time you will remember I said was a slightly odd
 13 position to take, because that paragraph at 1.1, he
 14 wanted to say this was the definition of the infringing
 15 agreement, and so he could say that his new case was
 16 within this because infringing agreement was defined in
 17 rather bland and plain vanilla terms, namely, one sees
 18 about four lines down, it's the:
 19 "... participating in agreements and/or practices
 20 which had as their object the prevention, restriction or
 21 distortion of competition in the supply of tobacco
 22 products in the UK."
 23 So what he appeared to be saying last week was
 24 "Well, there we are, it's a very general description, so
 25 anything we like more or less can fall within it".

1 That submission was misleading, not only is it
 2 obviously a hopeless point because you need to look at
 3 the decision as a whole, but if you go back to the
 4 glossary at page 7, it actually defines "infringing
 5 agreements" in a way which undermines the point, because
 6 the infringing agreement is an agreement or concerted
 7 practice between each manufacturer and each retailer
 8 whereby the retailer would apply retail pricing
 9 relativities between competing tobacco brands required
 10 by the manufacturer. In other words, it's the linking.
 11 That's what the nature is of the infringing agreements.

12 We have set out then in our document --
 13 **THE CHAIRMAN:** You would say that where it says "the
 14 retailer would apply", again those words are rather
 15 ambiguous, but you say that what it means is that they
 16 agreed to apply or accepted a restraint under which they
 17 would apply?

18 **MR HOWARD:** It means, and this is again -- I've given you
 19 all the references, it actually means "were required
 20 to". That's what "would" there means because that's the
 21 restraint. You are required to do this. That's why the
 22 word "required" features prominently in the decision,
 23 and it features prominently in paragraph 40.

24 **THE CHAIRMAN:** Because he might say "Well, we still fit
 25 within that under 2(a) because, by abiding by the

1 instructions and those instructions in fact being based
 2 on the manufacturer's P&D strategy, in fact as it turns
 3 out, they do apply them but that's not -- Mr Lasok
 4 concedes now -- as a result of having accepted
 5 a restriction so to do, but simply the result of them
 6 complying with the instructions, that's that what they
 7 end up doing.

8 **MR HOWARD:** More importantly, one needs to follow this
 9 through, and the restrictive nature that they are
 10 talking about is the obligation to price the two
 11 together. That is what the whole of the decision is
 12 actually about. We will come on to separately why it
 13 was said to be anticompetitive. If, for instance, you
 14 go to 1.4, I mean, these points are, we have set them
 15 out but I think I have to just go through them quickly
 16 or at least some of the key ones.

17 1.4, the last sentence:
 18 "The infringing agreement [this is where the
 19 restriction comes in] restricted the retailer's ability
 20 to determine its retail prices for competing tobacco
 21 products."

22 It's a very important paragraph, that, because what
 23 you see is lots more flows from it.

24 Paragraph 1.12. What's interesting is in his little
 25 excursus through some of the paragraphs today, Mr Lasok

1 jumps over some of these points, and he seized on
 2 1.8(ii) and 1.11, but the point is: the restriction that
 3 is being spoken about isn't what's in those paragraphs,
 4 it's the explanation firstly at the end of 1.4 and then
 5 1.12:

6 "The restrictive nature of the infringing agreements
 7 resulted from the linking of the retail prices of
 8 competing brands since that restricted the retailer's
 9 ability to determine its retail prices for the
 10 manufacturer's brands and those of competing linked
 11 brands to any extent that differed from the proscribed
 12 parity or differential. The restriction on a retailer's
 13 ability to determine its retail prices for competing
 14 linked brands is by its very nature capable of
 15 restricting competition. In particular, such
 16 a requirement precluded a retailer from favouring the
 17 brand of one manufacturer over those of another and was
 18 capable of significantly reducing uncertainty", and so
 19 on.

20 When you look at Mr Lasok's speaking note, and if
 21 you turn in that to paragraph 26 -- perhaps it's
 22 paragraphs 24 and 26, particularly paragraph 26, though.
 23 If you look at the second sentence, he says:

24 "The difference between the case made out in the
 25 decision and the OFT's refined case is that the OFT's

1 refined case makes it clear that implementation was
 2 manufacturer led."

3 That sentence is glossing over the enormously
 4 different case that they were running in the decision,
 5 on all sorts of respects.

6 Firstly, their case now, in relation to 2(a), or
 7 10(a) -- I will go by 2(a) because that is their
 8 document which is setting out their case, and as
 9 Mr Lasok said to you, that 10(a) is intended to be
 10 a faithful reflection of 2(a), so I am sticking to 2(a).

11 The point is firstly they are now recognising that
 12 the movements that are being spoken about in 2(a) are
 13 all dependent upon wholesale prices. I say they are now
 14 recognising that; Mr Lasok, when you asked him, didn't
 15 actually seem to know the answer to that question, which
 16 you might think is truly remarkable. But eventually,
 17 when pressed, he accepts, I think he way he put it was
 18 the quid pro quo, but if one actually asks oneself
 19 sensibly, OFT, what is your case, if we properly spell
 20 it out? Properly spelt out, they are now saying in 2(a)
 21 that it is all dependent upon whether or not the
 22 manufacturer adjusts his wholesale price. So in other
 23 words, it is what one would have thought was a rather
 24 conventional position, that if you put your wholesale
 25 price down, you expect to see the shelf price go down,

1 and if you put it up, you expect to see the shelf price
 2 go up.
 3 The next vice is that this is completely different
 4 to the case in the decision. We have just looked at
 5 1.12 and 1.13. That was all about the retailer being
 6 precluded from favouring the brand of one manufacturer
 7 over another, and the effect that that had on the
 8 manufacturer. The case now is the retailer isn't
 9 precluded at all in relation to 2(a), if Gallaher wants
 10 to come along and fund a price reduction, they are
 11 entitled to do it, and it's simply a question of
 12 competition. Equally, if Gallaher puts up its price,
 13 you can move Gallaher's price up without moving
 14 Imperial. And if Imperial puts up its price, you don't
 15 move Gallaher. In other words, it's a completely
 16 different case.

17 When we come to section 6 and we see the theory of
 18 harm that's explained, it all comes out of
 19 paragraph 1.12 and 1.13. Section 6, where it deals with
 20 the theory of harm, is simply a development or
 21 amplification of what is in 1.12 and 1.13.

22 If you turn forward to section 6, that point I've
 23 just made is clear, because at page 129 is the section
 24 on the restrictive nature of the infringing agreements.

25 I will come back to that in a moment, 205, but just

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1 along the route, just so one can see this case on
 2 restriction being what I've said, it's at 6.2 where we
 3 have an overview of the anticompetitive object. Having
 4 set out various things to do with the agreement, the
 5 last sentence of 6.2:

6 "In that way, the infringing agreement between each
 7 manufacturer and each retailer restricted the retailer's
 8 ability to determine its retail prices for competing
 9 brands."

10 I won't take you to the other ones in 6 until 6.30.
 11 6.30 is worth going to because of Mr Lasok's submission
 12 today. Mr Lasok, I think, took you to 6.29 and says
 13 "Ah, there you are, here is, I think, our case on the
 14 P&Ds". But what he ignored was 6.30, and if you go to
 15 what actually they were saying, it's the last sentence
 16 of 6.30:

17 "As set out in each of the sections below, whether
 18 as part of a formal written agreement or otherwise, the
 19 infringing agreement in each case involved each
 20 manufacturer co-ordinating with the relevant retailer in
 21 setting of the retail prices for competing tobacco
 22 brands in order to achieve parity and differentials."

23 Again, it's all about a case that the competing
 24 brands were being affected.

25 If you go forward, just whilst we are on this point,

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1 all the other references we have given, but 6.251 is
 2 worth picking up:
 3 "The restrictive nature of the infringing agreements
 4 resulted from the link between the retail price of
 5 competing brands, as described in sections (a) and (b)
 6 above. It is the fact that the requirement itself that
 7 created a link between the price of brand A and the
 8 price of the competing linked B that was capable of
 9 restricting competition."

10 7.32, which is where they are dealing with the
 11 prevention, restriction and distortion of competition,
 12 the anticompetitive object, and:

13 "The anticompetitive object was by its nature
 14 capable of restricting competition. The evidence
 15 demonstrates that each manufacturer co-ordinated the
 16 setting of the retailer's retail prices for tobacco
 17 products in order to achieve the parity and differential
 18 requirements between competing linked brands."

19 Then at the top of the next page:

20 "The infringing agreement between each manufacturer
 21 and retailer restricted the retailer's ability to
 22 determine its retail prices for competing linked brands.
 23 In the context in which it operated, the OFT has
 24 therefore concluded that each infringing agreement had
 25 its object prevention", and so on.

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1 It's perfectly clear, in their numerous paragraphs,
 2 how they build up their case.

3 You have already seen 8.2 today, which is the --
 4 I have not taken you to every single paragraph --

5 **THE CHAIRMAN:** No, well, you have set those out helpfully in
 6 your skeleton.

7 **MR HOWARD:** We have set those out. 8.2 is just setting
 8 things in the context, or it is the conclusion of what
 9 is said in all those other paragraphs that I've referred
 10 you to.

11 8.34 is, page 561, the section on negligence, it is
 12 important, because here, of course you will be familiar
 13 with the fact that if somebody has participated in
 14 an agreement unwittingly then they don't get fined.
 15 What, at paragraph 8.34, the OFT is doing is saying why
 16 it doesn't consider this was unwitting. Look at what
 17 they have said in the second sentence:

18 "The OFT considers it was clear to each party to
 19 an infringing agreement that it restricted the ability
 20 of the retailer to determine its retail prices for
 21 competing linked brands. As such, the OFT considers
 22 that, even if the parties may genuinely have been
 23 unaware of the anticompetitive nature, they at the very
 24 least ought to have known the infringing agreements
 25 would result in a restriction or distortion of

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1 competition."
 2 All because of this linking. Once you take away the
 3 linking, the basis for saying you were negligent and
 4 therefore ought to be fined goes.
 5 Now, that's showing that the restriction that they
 6 are talking about is a restriction in relation to
 7 pricing competing linked brands. When you come to the
 8 theory of harm, I've already shown you 1.13, we don't
 9 need to go back to that, but what I wanted you to look
 10 at is where 1.12 and 1.13 then get explained and that's
 11 at page 129.
 12 Again, it's very difficult for the OFT to deny that
 13 what they were putting forward was a theory of harm
 14 which was based on this very specific type of
 15 restriction, so that at 6.205 they again say in the last
 16 sentence:
 17 "As a result of the P&D requirements, each
 18 infringing agreement restricted the ability of the
 19 retailer to determine its retail prices for competing
 20 linked brands."
 21 Then 6.206, again just look at what it is saying:
 22 "The P&D requirements involved linking the retail
 23 price of a particular brand to the price of a competing
 24 brand and precluded a retailer from making price changes
 25 that fostered interbrand competition within the

1 retailer's premises. As described in further detail
 2 below, the OFT considers that it was by its very nature
 3 capable of restricting competition", and so on.
 4 They then explain the restriction starting at 6.213
 5 onwards. This is the theory of harm. What they do in
 6 6.213 is they refer to the SO, and you will see that
 7 footnoted, paragraphs 585 and 586. We have set out
 8 those paragraphs in our document at paragraph 28. The
 9 point to note about those is that it's self-evident from
 10 those paragraphs that they are at the absolute lock-step
 11 case. It is the lock-step case, therefore, that they
 12 are saying at 6.213 which restricts the retailer's
 13 ability to determine the retail prices of competing
 14 linked brands, because the relative prices are fixed on
 15 the basis of a required parity or differential. If
 16 a parity or fixed differential requirement is
 17 implemented, an increase or reduction in the retail
 18 price of one brand leads to a corresponding increase or
 19 reduction.
 20 I think the other day the Tribunal said, "Well, at
 21 times it's appeared that Imperial may be trying to box
 22 the OFT in". That's actually not fair at all. That is
 23 what this is all saying, and that's what the SO says,
 24 and those paragraphs that we are looking at, that this
 25 is why it's anticompetitive, because you are restricted

1 as the retailer from doing anything whereby you must
 2 move up the prices together, and if one manufacturer
 3 changes his price, then you have to move the other one.
 4 I am obviously not going to read it out, what they
 5 go on to explain in these paragraphs is the
 6 counterfactual compared to the P&D. What they say is
 7 that the counterfactual is at 6.215, so that's where you
 8 don't have a parity or differential requirement. What
 9 happens if you raise your price? Basically if you raise
 10 your price, you expect to lose market share because the
 11 other price isn't being raised. Whereas at 6.216, they
 12 put forward the contrast that if you have the P&D, then
 13 you can raise your price without fear of losing market
 14 share, therefore you may as well put up your price,
 15 because you can do it without fear.
 16 Equally the converse they are saying is if, in our
 17 example, Gallaher can't get any advantage by reducing
 18 its price, because Imperial's price automatically comes
 19 down, why would it reduce its price? There is no point.
 20 So that's the basis of their case for saying that there
 21 is a horizontal type link, or an actual horizontal link,
 22 which means that price competition will be eliminated.
 23 This theory is put in the skeleton argument. It's
 24 not only paragraphs 11 and 12. Again, if I can ask you
 25 to turn up the OFT's skeleton argument.

1 **THE CHAIRMAN:** The original skeleton argument?
 2 **MR HOWARD:** No, the skeleton argument for the appeal. The
 3 lengthy one for the appeal.
 4 **THE CHAIRMAN:** The one with paragraph 40 in it?
 5 **MR HOWARD:** Yes, the paragraph 40 document.
 6 When you see this, you might raise an eyebrow as to
 7 what the OFT is now saying. I have it loose, but
 8 I think it's in core 4.
 9 (Pause)
 10 Does everybody have it? {C4/45/1}
 11 **THE CHAIRMAN:** I think we have now.
 12 **MR HOWARD:** Could you go just to paragraph 1 first? Let's
 13 compare paragraph 1 with what we have been hearing from
 14 Mr Lasok today:
 15 "The infringing agreements constitute object
 16 agreements because by their very nature, they were
 17 anticompetitive. They can be expected to be
 18 anticompetitive in that the restrictions are not
 19 pro-competitive."
 20 Then they criticise CGL, who say that it's
 21 impermissible because it is too highly dependent on
 22 specific factual considerations.
 23 Then they say:
 24 "This is rather a strange complaint. Since the OFT
 25 is concerned only with the infringing agreements and not

1 with some factual variations of them."
 2 Oh, really? I thought we heard today that it's all
 3 a refined case based upon variations.
 4 Then they say:
 5 "A consistent theme of CGL's argument is that
 6 alternatively formulated agreements may not be object
 7 infringements and may not be subject to the OFT's theory
 8 of harm."
 9 Well, that's true. They say:
 10 "The Tribunal is concerned only with the infringing
 11 agreements as found by the OFT. It goes without saying
 12 that the OFT must establish the existence of
 13 an agreement or practice in each case of the nature
 14 described in the decision to the requisite standard of
 15 proof."
 16 Apparently this has now all gone out of the window.
 17 The OFT not only says "I can't establish it to the
 18 requisite standard of proof, I am not even seeking to do
 19 so".
 20 Then if one goes to paragraph 6, I won't read it
 21 out, they explain that they are not saying that it's
 22 sufficient to say the agreements are capable of
 23 restricting competition in some general or ill-defined
 24 way, and at paragraph 8 they say that:
 25 "The appellants' reliance on the vertical nature of

1 the infringing agreements is misplaced."
 2 Then skipping over their quote, they say:
 3 "As noted above, although the infringing agreements
 4 are agreements or concerted practices between
 5 manufacturers and retailers, the agreements required the
 6 linking of horizontal competitors' retail prices."
 7 They then, at the end of that paragraph, again
 8 repeat the point that there was a requirement of linking
 9 of horizontal competitors' retail prices. Then in
 10 paragraph 9 they criticise Asda, in the penultimate
 11 sentence:
 12 "Again, Asda turns a blind eye to a crucial aspect
 13 of the infringing agreements in this case, that they
 14 involve the linking of horizontal competitors' retail
 15 prices through a vertical agreement. As the OFT has
 16 repeatedly pointed out, each aspect of the infringing
 17 agreement must be considered in determining whether they
 18 constitute object agreements."
 19 Then look at this:
 20 "There is little to be gained from considering
 21 alternative agreements of a different nature."
 22 Well, that's precisely, of course, where we are.
 23 The OFT, the scales have fallen from their eyes, the
 24 case they were putting forward based upon these
 25 agreements was wrong, now we say "We want to put forward

1 a different agreement, but we say it is a different
 2 agreement but somehow it must have the same effect", and
 3 that's just by assertion. Whereas previously their
 4 criticism of the appellants was that, "You appellants
 5 are putting forward a different basis of the agreements"
 6 and they say "You are just missing the point, why are
 7 you doing that? That's not the agreement, that's not
 8 what we're concerned with, we are not concerned with,
 9 for instance, whether wholesale prices trigger the
 10 movements in retail prices because that's not our
 11 agreement, that's not what we are on about". Yet now
 12 that's exactly what they are trying to say.
 13 That then leads you to the paragraphs that you have
 14 seen many times before, which are the fundamental
 15 proposition. And again their case here is absolutely
 16 clear about what is going on here is that the P&Ds
 17 create the same horizontal link as if there had been
 18 a horizontal link between the manufacturers. That's why
 19 they were saying this was pernicious, because, in
 20 essence, their case was that this was price-fixing
 21 between two manufacturers. Now that case has gone. To
 22 try and say "Oh, well, somehow it's still the same" is
 23 a point we simply don't understand.
 24 The point they are making in paragraph 12, I don't
 25 say it was right, but one can see what they describe as

1 a logical and simple case. And that logical and simple
 2 case was that the manufacturers had created a horizontal
 3 link, via the retailers, that was precisely the same as
 4 if they had agreed always to price at the same
 5 relativities as set out so that you can never win or
 6 lose customers, and that was what they described as the
 7 obvious proposition. So that their anticompetitive
 8 nature of the whole thing is based upon what appears at
 9 the end of paragraph 12, that in this environment the
 10 manufacturers will only have an incentive to put up
 11 prices and so prices increase for everyone, note what
 12 they say, manufacturers and retailers alike, so they are
 13 all in it, is the argument that's being run, and the
 14 profits can be divided between them.
 15 That is about a million miles from what the OFT is
 16 now saying to you is the case they want to put forward.
 17 How this operated, that's why one -- when we have
 18 had the debates in the past, when I have -- and you will
 19 remember the debate about paragraph 40 emerged
 20 particularly because I had made it clear on a number of
 21 occasions how unsatisfactory it was that Mr Lasok and
 22 his team failed to put their case to the witnesses based
 23 on paragraph 40 and that I was repeatedly putting that
 24 case. That's how we came to have the debate on days 16
 25 and 17.

1 But paragraph 40 of the document, the famous
2 paragraph 40, contains the four restraints. It is again
3 worth turning it up, because what is set out there is
4 absolutely unequivocal. The four restraints, if the
5 retail price of Gallaher's brand increases, then the
6 retail price of ITL's brand must also increase and so
7 on. You are very familiar with them.

8 But the point that one needs to remember is that
9 these points were points that, at this stage, they said
10 they were seeking to prove, and so they footnoted the
11 documents which they said proved it, and this is what
12 one needs to get very clear. Once you see the way the
13 matter was put in the decision, once you see those
14 earlier paragraphs of this document, the suggestion that
15 somehow this was their being cornered by Imperial to set
16 out a case which wasn't their case is just complete and
17 utter nonsense. That was their case. And the
18 opportunity to respond was only relevant in relation to
19 (d) of these.

20 **THE CHAIRMAN:** Yes, and the only other caveat that has been
21 expressed, as I understand it, is that not all of those
22 four might have been made out in respect of each of the
23 15 bilateral relations, but they haven't so far
24 conceded, or they hadn't, before we got to the stage
25 where we are at, pinned their colours to the mast as

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1 regards which of them had been accepted by which
2 financial agreement.

3 **MR HOWARD:** The lie of the land was this: when they write
4 the decision, the decision is on the basis of all of
5 this, and the theory of harm is actually on the basis of
6 all of this, subject to the question of how (d) works
7 and the opportunity to respond.

8 The reason, stopping there for a moment, that's very
9 important is that a theory of harm, an economic theory
10 which is that you have these four things that operate
11 and that is going to have an effect, it's just a matter
12 of common sense to see that if bits fall off your theory
13 of harm, it's no longer the same theory. That's one of
14 the difficulties with just adopting that approach.

15 Now, the approach of which of these applied, at the
16 moment assume their case is fixed, because where it's
17 maxima their case was two, but where it was fixed, they,
18 until Day 17, had no case other than that all four
19 applied. On Day 17, what Mr Lasok then said was, "Well,
20 it's not our case necessarily that all four have to be
21 there on fixed", and he said "It's a matter for the
22 experts and submission which ones have to be there". We
23 at that stage said that's highly unsatisfactory and not
24 a proper way to proceed.

25 But we have then moved on from there, from Day 17,

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1 to a situation where, as I'll show you in the morning,
2 why actually none of this is sought to be established.

3 But what is critical, because one gets very diverted
4 by it, is what are the, as it were, exceptions to this?
5 The only exceptions that they have ever put forward are
6 two. One is suspending these requirements, and I think
7 that's what they talk about in the June to September
8 2002 period. Of course suspending doesn't inform you of
9 anything. The question is: what was the requirement?
10 So in other words, you can have an agreement that you
11 are going to do something. I can then say to you "don't
12 worry for the moment", and I am suspending it. But the
13 agreement, and if it was anticompetitive, was still
14 there.

15 So that the only context in which any of this, on
16 their case, was not absolutely a rigid lock-step, the
17 only potential one was (d). In all other situations
18 there saying the prices have to march up and down
19 together, whatever the other manufacturer has done.

20 That, probably before we break, takes me to the
21 point that we were addressing at paragraph 38 of our
22 document, which is: what actually was their case on the
23 opportunity to respond clause? What we have set out is
24 the two possibilities, and that until recently, what one
25 sees is that Mr Lasok's case in opening was that the

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1 opportunity to respond didn't actually alter the nature
2 of the requirement. He said something different today.

3 It's quite interesting. The way in which we get this
4 flip-flopping according to what suits them on
5 a particular day.

6 Today I think Mr Lasok said to you "Well, where
7 there was an opportunity to respond clause, there wasn't
8 any requirement". That's not what he said to you in
9 opening on Day 5. What he said was this:

10 "... The opportunity to respond clauses recognise
11 a commercial reality, which is that a retailer is likely
12 to be sticky, when faced with a P&D arrangement that
13 requires him to move a price downwards, but he's moving
14 it downwards in response to a reduction made by the
15 rival manufacturer. He may do it, and in fact he is
16 supposed to do it, unless there is an opportunity to
17 respond clause, it's anticipated that he will do it, but
18 he is going to be a bit sticky.

19 "It's perfectly understandable that in situations
20 like this, the retailer is going to say "That's fine,
21 that's my understanding, we know where we are on this
22 one, but, you know, it helps me to do it if you provide
23 me with some money, if you lot are funding all this'."

24 So the case that he appeared to be suggesting at
25 that stage was: well, there is a requirement as in

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1 40(d), but there is also some understanding which is
2 what the opportunity to respond clause reflects that
3 Imperial will fund.

4 So that was one way of looking at it. The
5 alternative way of looking at the case was that -- which
6 I think is now where the OFT has got to -- the fact
7 there is an opportunity to respond clause must show that
8 the retailer was entitled to give effect to a Gallaher
9 price decrease and not to do anything to the Imperial
10 brand, and that it was up to Imperial whether they cut
11 their price.

12 But in that event, if one says: where did that leave
13 their theory of harm?, that left their theory of harm
14 that they were relying on (a), (b) and (c) because those
15 were absolute strict requirements on the retailer with
16 (d) being what they described as the uncertain
17 compliance.

18 Now, I've referred to the difficulties in actually
19 getting clear the OFT case and their failure to put the
20 case to the witnesses. I think you have already got
21 clear, and I don't think we need to turn it up, what
22 happened on Day 17, which was firstly that was when
23 Mr Lasok said in relation to paragraph 40, "Well, we are
24 not saying that we have to prove all of these things,
25 and it will be a question for the experts and

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1 submission", but then on Day 40 (sic) Mr Lasok raised
2 the spectre of a case based upon the retailers being
3 precluded from, or being required to follow the P&D
4 requirements in circumstances where there hadn't been
5 a wholesale price reduction. Sorry, I am not expressing
6 it very clearly.

7 **THE CHAIRMAN:** That's now what's 2(b).

8 **MR HOWARD:** It is what has now become 2(b).

9 What's curious about this aspect of the case, 2(b),
10 is we have repeatedly said this is not in the decision,
11 and by that, what we mean is it's not within the
12 decision in the sense of there being any theory of harm
13 which is based upon the retailer being restricted from
14 self-funding promotion, say, of one manufacturer's
15 brand.

16 In his document today, Mr Lasok says "Ah, I did
17 refer to this in opening". He says that ...

18 **THE CHAIRMAN:** Well, I think it was in the context of the
19 opportunity to respond clause, in that what I recall is
20 he said where there is an opportunity to respond clause,
21 that means that that part of the restriction only bites
22 where there is no change in the manufacturer's wholesale
23 price.

24 **MR HOWARD:** Yes. But what I had said in opening -- this is
25 the important point -- I referred in opening to

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1 paragraph 41 of the OFT's document. Paragraph 41
2 referred to this, and it criticised us, because it said:

3 "The first thing to note is that ITL fails to
4 consider that retailers might want to change the
5 relativities of prices entirely independent of any
6 manufacturer price changes."

7 I said in opening, I drew your attention to that,
8 and I said --

9 **DR SCOTT:** Sorry, this is 41 of the defence?

10 **MR HOWARD:** Of the skeleton, it is not in the defence.

11 **DR SCOTT:** Of the skeleton.

12 **MR HOWARD:** At this point it appears in the skeleton.

13 I said in opening: this is not in the decision.

14 Mr Lasok, if he is going to rely on this, must tell us
15 whether he says this is in the decision and what the
16 theory of harm is. Mr Lasok, in his customary manner,
17 ignored that. We then got to Day 17, where this point
18 was put in his submission on Day 17, and again Mr Lasok
19 did not rise to the challenge of identifying whether
20 this was in fact part of the case in the decision and
21 part of the theory of harm.

22 Now, the reason he didn't rise to it was because
23 it's impossible. The answer is: there is no theory of
24 harm which is related to a retailer being
25 disincentivised or precluded from promoting one brand

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1 without promoting the other. You understand, we say
2 that is not the effect of what happened, and
3 Fiona Corfield made it absolutely clear, that as far as
4 she was concerned, she was entitled to promote Gallaher
5 or Imperial without promoting the other. People very
6 rarely did it because of the small margins.

7 But the critical point is, for present purposes, is:
8 where does this feature in the decision as part of the
9 restrictive nature of the agreements which gives rise to
10 any theory of harm?

11 **THE CHAIRMAN:** So what you are saying, I think you have to
12 say, is the restraints in paragraph 40(a) to (d),
13 putting the opportunity to respond clause on one side,
14 do not distinguish between price movements which are
15 manufacturer led and price movements which are retailer
16 led, and the trading agreements we have seen also don't
17 purport to distinguish between those two kinds of
18 things, putting aside the opportunity to respond clause.
19 But you say that when you look at the theory of harm,
20 that harm only arises because of the effect of those
21 restrictions on the competitive dynamic between the
22 manufacturers, and there is no theory of harm in
23 relation to an effect of these restraints on the
24 competitive dynamic between the retailers.

25 **MR HOWARD:** Absolutely.

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1 **THE CHAIRMAN:** I think this may actually have cropped up,
2 a question that I raised very early on about whether the
3 effect was price stability at the retail level greater
4 than one might otherwise see, and you did respond that,
5 well, that's as may be, but that's not the theory of
6 harm in the decision.

7 **MR HOWARD:** That's right. The interesting thing, again not
8 making a criticism of the Tribunal, the
9 cross-examination by the OFT of the witnesses was not,
10 as I recall, based upon this point that you,
11 Mr Retailer, are precluded from, off your own
12 initiative, doing something, until just prior to Day 17
13 when I think the Tribunal had asked a question relating
14 to this, and that's when this started to creep into the
15 case.

16 But the simple point is that their case about
17 an obvious anticompetitive effect of the P&Ds was all
18 about the manufacturers. The best way to look at it is
19 paragraphs 11 and 12. It's that the rival manufacturer,
20 Gallaher, will have no incentive to lower its prices
21 because it can never gain an advantage, and it will have
22 no disincentive from increasing its prices, and the same
23 would be true for Gallaher, because you can do that
24 scot-free. Sorry, I shouldn't have put it that way.
25 You can do it without fear of the normal consequence,

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1 which is that you may lose market share by becoming --
2 **THE CHAIRMAN:** And the fact that they may be restricted --
3 just thinking this through -- the fact that the retailer
4 may be restricted from initiating its own price
5 reduction doesn't disincentivise the manufacturer from
6 triggering a price reduction if the manufacturer
7 believes that there is no obligation on the retailer to
8 drop the competing brand at the same time.

9 **MR HOWARD:** The fact that the retailers -- I mean, you have
10 to look at this in the context that it's now accepted
11 that the retailer, if manufacturer A cuts his price and
12 makes it a term that I want to feed that through, the
13 retailer is free to do that and doesn't have to have any
14 effect on the other brand.

15 What's being said now in relation to what is 2(b)
16 and what was being discussed on Day 17, is that,
17 irrespective of anything the manufacturers are doing,
18 it's said the retailer can't himself alter the
19 relativities. Now, there are a number of difficulties
20 with that. For instance, you can see if he wants to
21 promote Imperial, and one would have to think: why would
22 Imperial restrict him from doing that, it doesn't make
23 any sense at all, but if you say therefore the only
24 sense you can actually apply to their 2(b) case is if
25 you say what it's doing is -- I don't say it's right but

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1 as a case, as an analysis, that the retailer is
2 precluded from promoting Gallaher without having
3 an equal promotion in respect of Imperial.

4 Now, if that were true, one would then have to think
5 about: what is the anticompetitive effect of that? Does
6 it have any effect on the manufacturers? We can't at
7 the moment see why that links at all to the
8 manufacturers, because the manufacturers aren't doing
9 anything, they are not cutting their prices. If you ask
10 yourself: does it preclude the -- well, you would have
11 to have a different theory of harm and a different
12 economic analysis. I can speculate as to issues you
13 would want to investigate but there just hasn't been any
14 investigation about that at all whether -- and it's not
15 suggested there has been.

16 So what is bizarre about that case in particular is
17 that it has nothing to do with what they were talking
18 about in the decision, nothing to do with what was in
19 their document. If they were serious and said "This
20 actually does give rise to a theory of harm", why on
21 earth have we not even seen it to this day? It still
22 hasn't been articulated today, notwithstanding the
23 multiple chances they have had to do it.

24 **THE CHAIRMAN:** Is that a convenient moment to break for the
25 day?

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1 **MR HOWARD:** Yes, that is.

2 **THE CHAIRMAN:** I hope that at some point you are going to
3 come back on that question you raised about where all
4 the appellants stand in relation to their different
5 points made in their submissions --

6 **MR HOWARD:** If I can say, I haven't checked with all the
7 other appellants. My understanding is that everybody is
8 in agreement with -- certainly they will speak for
9 themselves. My understanding is that the other
10 appellants are in agreement with what we have said and
11 insofar as those points have been amplified by Morrisons
12 and Safeway and Asda -- they are the ones who have put
13 in a document -- we entirely agree with what they say.
14 I don't think there is anything inconsistent in what
15 they are saying.

16 I think what Mr Saini has addressed is a point
17 which, in our submission, doesn't arise but he is
18 addressing a point which is: if -- perhaps I'll just
19 spend a minute on it now. As I understand it, the point
20 that is being run, and it is what I was really making
21 reference to right at the beginning. If one said, well,
22 as I understand it, the way that Mr Lasok tries to put
23 things is he says the restrictions that we are now
24 putting forward in 2(a) and (b), they are part of what
25 we describe as the infringing agreements, and although

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1 we don't have a theory of harm that relates to them,
 2 nevertheless somehow the Tribunal should proceed with
 3 that. We say you can't and shouldn't. But if one got
 4 to the stage where one was saying "Yes, this is part of
 5 the infringing agreement", and you had discretion, we
 6 say there is only one way to exercise the discretion,
 7 which is to refuse, bearing in mind the lateness of this
 8 and all the other prejudicial points.
 9 **THE CHAIRMAN:** Perhaps overnight, we should all just have
 10 another look at what Mr Saini's submissions say about
 11 the position if we were against you on the first issue
 12 about whether the restraints 2(a) and 2(b) are part of
 13 the decision, whatever that means, what -- and I am not
 14 at all saying that's where we are, but just to fill in
 15 the matrix, what would we need to decide in addition in
 16 that case, because I think Mr Lasok's submissions seemed
 17 to be, "Well, that's all you would need to decide, then
 18 the case just carries on on that basis and at the end of
 19 the day, you just uphold the decision in part". But if
 20 you say something different from that, then I think we
 21 need to be clear about what other issues we would have
 22 to address in addition to that --
 23 **MR HOWARD:** The problem is there is a complete lack of logic
 24 in the approach. The first stage is what is the
 25 decision as to what is the infringing agreement. If you

1 moment. That's something we may need to look at.
 2 10.30 tomorrow morning. Is that going to give us
 3 a chance to finish by the end of tomorrow?
 4 **MR HOWARD:** I would have thought so.
 5 **THE CHAIRMAN:** 10.30.
 6 (4.45 pm)
 7 (The court adjourned until 10.30 am on
 8 Friday, 18 November 2011)

1 agree with me that it is a very particular infringing
 2 agreement, as they have defined it and as set out, that
 3 is the end of the point and saying well, within broadly
 4 the decision as opposed to what is in law the decision,
 5 I can find allegations of fact, findings of fact that
 6 support 2(a) and (b). In my submission, that doesn't
 7 get the OFT anywhere because it's not part of the
 8 decision.
 9 But if you said "Well, no, we are going to take this
 10 very, very broad-brush approach and then consider what
 11 the position is", you are back in the situation where
 12 the OFT is having to say to you "I want permission to
 13 amplify this case. In order to run the refined case
 14 I need to set it out in what is a proper document, then
 15 I need leave to put in additional expert evidence", and
 16 that's why we say the answer to that is this is mucking
 17 around of about the worst order and it's unfortunate
 18 that it's mucking around at the behest of what should be
 19 a responsible regulator, and we say this is not what
 20 this Tribunal should in any way contemplate. So that's
 21 where, if we got to that stage, we would say you can --
 22 **THE CHAIRMAN:** Then we are into the exercise of
 23 a discretion.
 24 **MR HOWARD:** Yes. But we say --
 25 **THE CHAIRMAN:** Well, let's leave it like that for the

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