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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Thursday, 17 November 2011

(10.30 am)

(Proceedings delayed)

(10.34 am)

THE CHAIRMAN: Good morning, ladies and gentlemen. Thank you very much to everyone for their written submissions, which we have read. You are going to start this morning, are you, Mr Lasok?

Submissions by MR LASOK

MR LASOK: Yes. We have circulated rather late in the day, I am afraid, a speaking note. We would have preferred to have done it earlier, but for logistical reasons it wasn't possible to do that.

Does the Tribunal have a copy?

THE CHAIRMAN: Yes.

MR LASOK: I don't propose to read this out, but to go through it. The topics into which it's divided are essentially the following, after some introductory remarks I am going to go through the OFT's case as it currently stands and the associated theory of harm, and then I am going to look at how it fits into or what is the relationship between it and the decision, and then after that I am going to turn to consider the Tribunal's jurisdiction, and on how we submit the Tribunal can and should exercise its jurisdiction in the present case.

To start off with, and this is a point I think at which I will read something, and it's just the first preliminary paragraph in the speaking note.

The OFT does consider that the evidence before the Tribunal indicates that the agreements or concerted practices used to implement the manufacturers' parity and differential pricing strategies at issue in these appeals involved the retailers in playing a more passive or compliant role than the OFT had previously believed. We therefore consider that the proceedings should continue on the basis of that case and that any procedural concerns which the Tribunal or the appellants might have can be addressed by an appropriate exercise of the Tribunal's powers.

That is the gist, the long and short of the submissions that I am going to make. It's obvious to everybody why the OFT has taken that view. The OFT has explained why already to the Tribunal. I think, however, it is worthwhile bearing in mind that the suggestion made about some of the appellants that there was a previous change in the OFT's case is incorrect. We refer to where this is suggested in paragraph 3 of the speaking note. The OFT has simply re-stated what its case as set out in the decision was, and it was only after the evidence had turned out as it did that there

was a change to the OFT's case, and that followed on from the cross-examination of witnesses.

Until that time, the OFT's understanding was based largely upon the contemporary documents and accounts provided by the parties and their witnesses during the administrative part of the process, and when one bears in mind the hierarchy of evidence that the Tribunal established in JJB and Allsports, that's the 2004 decision, which is the one where the Tribunal analysed the significance of evidence and drew attention to the fact that contemporary documentary evidence not intended to be seen outside the scope of the parties to the correspondence tends to be rather more probative than ex post facto rationalisations, particularly those given by people involved some time after the event.

That approach, based on placing the greater weight on the contemporary documentary evidence, was, in our submission, entirely reasonable. But it was also, in our submission, entirely reasonable for the OFT to pay attention to the evidence of the witnesses as it came out in cross-examination for the purpose of evaluating its credibility, its consistency with other evidence, and then to reach a conclusion as to whether that led the case.

That is the reason why we are now where we are. But

it remains the case that there cannot be any doubt at all that ITL and Gallaher had and operated P&D strategies involving the linking of the shelf price of competing brands.

In opening -- and I'll give the Tribunal the reference, I am now on paragraph 7 of the speaking note, the reference is to Day 4, page 39, line 15, running to page 40, line 1 -- the OFT had pointed out that the real issue in these appeals concerned what had been agreed or concerted, not the fact that agreements and concerted practices existed.

Another way of putting it is that the question was how exactly the P&D strategies were operated in practice.

Now, under the refined case that the OFT is putting forward, the starting point is that the agreement or concerted practice between the manufacturer and the retailer existed for the purpose of enabling the manufacturer to achieve its P&D pricing strategy in the retailer's stores. The retailer understood the manufacturer's P&D strategy and was a party to an agreement or concerted practice concerning its implementation.

That brings us to the restraints that the OFT submits can clearly be seen on any view emerging from

the evidence which are set out in paragraph 10 of the speaking note and replicates the two restraints that were referred to in the OFT's previous written submission on this subject.

So in paragraph 10, in the two subparagraphs, it's an agreement or concerted practice restricting the retailer's ability to determine its retail prices for competing linked brands, in that (a) it was agreed or concerted that the retailer would price certain of manufacturer A's brands at specific retail prices relative to the retail price of a competing linked brand, in the context of A's P&D strategy, and (b) it was agreed or concerted that the retailer was required or expected to adhere to manufacturer A's P&D strategy in the absence of a wholesale price change or alternative instruction made by either manufacturer.

THE CHAIRMAN: So you are clear, are you, that the two restraints set out in paragraph 10 of your speaking note are intended to be identical to the restraints described in paragraph 2 of the earlier submissions?

MR LASOK: Yes, that's correct.

So in our submission, the manufacturer was able to achieve its P&D strategy on the basis that the retailer would set shelf prices for the manufacturer's brands at the level instructed or requested by the manufacturer in

the context of that strategy, and we refer in the speaking note to that as manufacturer led implementation, and the other aspect was that the retailer would not itself disturb the maintenance of the P&Ds.

So in the next part of the speaking note, we pass to consider different factual situations which arose in the -- in relation to --

THE CHAIRMAN: Sorry, are you going to come back in more detail to the content of these restraints?

MR LASOK: I hadn't intended to do so, otherwise than in the context of an exploration of the theory of harm associated with them.

THE CHAIRMAN: Right.

(Pause)

MR LASOK: What I was going to do now is turn to consider how those two restraints operated in particular factual situations, but I don't know whether that was the thought behind the question that the Chairman put to me just now.

THE CHAIRMAN: What wasn't clear to me when I was looking at 2(a) before was whether it was part of the OFT's case and whether it needed to be part of the OFT's case that the retailer knew that the specific pricing points being put to it by the manufacturer were chosen because of the

manufacturer's P&D strategy.

MR LASOK: Well, the way we would put it is that as long as the retailer knew that the manufacturer -- we are talking about manufacturer A -- was operating a P&D strategy, the retailer didn't need to know that, didn't need to be told that a particular price at any given point in time had been selected by the manufacturer to that end. Because what the retailer was doing was signing up to complying with the manufacturer's instructions or requests concerning the pricing on the shelves of the manufacturer's brands, knowing in a general sense that the manufacturer was operating a parity and differential strategy. Because as long as the retailer knew that that was what was going on, they didn't have to know that each and every price that it was being asked to move to was a reflection of that strategy.

THE CHAIRMAN: And the second point on 2(a), if I can continue to call it that, even though it's now 10(a), is whether the restraint is accepted or alleged to be accepted in respect of particular instances where a price point is instructed, if I can say that, or whether the allegation is that there was a preceding agreement or concertation that they would comply with pricing instructions as and when given. Because in 2(a)

it looked as if the restraint was an agreement or concertation of the particular prices at the point that the instruction was given, whereas 10(a) looks more like a broader agreement that when pricing instructions are given, you will comply with them, if that makes sense.

MR LASOK: It's that.

THE CHAIRMAN: The latter?

MR LASOK: Yes. It's not a situation in which you home in on each communication, and you seek to derive an agreement or concerted practice from a single exchange such as a single email. The contention advanced by the OFT is based on the assertion that you either had, through a written trading agreement or through a -- how can one put it? It's a concerted practice that has emerged, that when an instruction or request to move to a particular price point would be issued by the manufacturer, the retailer would make the move. I can illustrate that by taking Asda, because in Asda's case, you have basically two periods of time. There was one period of time running from the agreement that Mr Jolliff had signed with ITL, shortly before his departure from acting as tobacco buyer. Before then, the role played by the previous trading agreement is a little unclear, but we have written communications at that earlier point in time indicating that Asda knew of

the parity and differential strategy in the form of the ITL strategic pricing requirements.

We see not only documentation such as the internal ITL reports indicating, or rather evidencing that they had been operating criteria for measuring Asda's compliance with the strategic pricing requirements, and there was reporting back on Asda's performance.

But we actually see exchanges between Asda and ITL that are consistent with the view that, even if you ignore the written trading agreement that was in effect at that time, an understanding had emerged as between ITL and Asda that when ITL issued an instruction or request, however you call it, to move a shelf price for the ITL brand, Asda would comply.

Now, obviously there is a -- I don't anticipate that Asda are going to accept that that interpretation of the facts and the evidence is correct, because in Mr Jolliff's witness statement, for example, he says that compliance with the prices in the price files that he was sent by ITL was entirely voluntary, that he did it after a process in which he looked at all kinds of things, that he wasn't acting, as it were, on the basis of some kind of understanding with ITL that he would simply do whatever it was that they told him to do.

But there is a dispute on the evidence about that,

because bluntly the OFT's case is that when you look at the evidence in the round, Asda's explanation simply lacks credibility, and the truth of the matter is --

THE CHAIRMAN: Well, we don't want to get into the evidence too much. I was just trying to clarify, really, the scope of the restraints that it's now alleged.

MR LASOK: Yes.

DR SCOTT: Just so we understand what you are saying in relation to the evidence, without going into the detail of it, as I understand it you are relying on paragraphs like 287 and 288 in the case to which you referred, which is JJB Sports and Allsports and sentences like:

"As regards the contemporaneous documents, it seems to us that a document prepared at the time, which the author never anticipated would see the light of day, is likely to be more credible than explanations given later."

And in 288:

"As far as witnesses are concerned, in this case we have no independent witness in the sense of an impartial third party who is free of the suggestion that he may have an axe to grind."

Is that basically what you are saying to us?

MR LASOK: Yes. But I wasn't proposing to go into that today.

DR SCOTT: No, I understand.

MR LASOK: Because that's rather more the submission that would be made in closing submissions on the facts when the parties would make their submissions as to how the Tribunal should approach the evidence.

But the reason why I referred to that case was to make the observation that the OFT's original stance, which was based upon the contemporary documentary evidence, was entirely rational and consistent with the general approach that one takes to evidence in cases of this sort.

But in JJB and Allsports, the Tribunal never said that you simply ignore witness statements and the evidence given in cross-examination. What it does show is that you have to evaluate carefully what that evidence is, and it's that evaluation that we carried out that led us to the position in which we are currently in.

THE CHAIRMAN: I think you have clarified now, as far as I am concerned, what the content of 2(a) is.

MR LASOK: Yes. Is there anything about 2(b)?

THE CHAIRMAN: Not for the moment.

MR LASOK: Thank you.

What I would then go to is paragraph 13 of the speaking note, which deals essentially with the payment

and withdrawal of tactical bonuses.

Paragraph 13 is just a summary of the many examples that one sees in the annexes to the SO, where we have, looking at the subparagraphs of 13, ITL stating the price to which it wished the retailer to move, often expressly stating that the price move was intended to achieve a particular relativity, and then adjusting the level of the wholesale price, specifically the level of the tactical bonus.

You will recall that this type of evidence is, in our submission, quite illustrative because the letters almost invariably are couched in the form "please move the price to", and then it is followed by the information concerning the adjustment of the wholesale price through the tinkering with the level of the bonus being paid.

In paragraph 14, we move on to a different point, which is the fact, as we see it, that the agreement or concerted practice concerning shelf prices wasn't limited to reactive price moves, because we do see situations where, for example, ITL would implement a wholesale price increase and instruct the retailer to increase the shelf price to a particular level. In those cases, the shelf price would depart from ITL's stated parity or differential.

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

up because they wanted to move the market upwards.

When one looks at the pricing over the entire period, one can see that the pricing of Richmond and Dorchester had been rising since certainly early 2001, and it seems to have plateaued in about May/June 2002, but then we have the 10p rise that took place in the period from about, I think it was effective from something like 2 September 2002 to late October, because it was a rise that was staggered by ITL in two stages.

THE CHAIRMAN: Am I right in thinking that where you say in the penultimate sentence of paragraph 14, "ITL anticipated that its parity or differential would be restored through a change in the retail price level of the Gallaher brand following a wholesale price increase made by Gallaher", that there are two elements in that which may or may not be significant. The first is that it's not now your case that ITL's anticipation arose from the terms of its agreement or concertation with the retailer?

MR LASOK: Yes.

THE CHAIRMAN: That's right?

MR LASOK: That's correct.

THE CHAIRMAN: And, second, that any change in the retail price level of the Gallaher brand was dependent on there being a wholesale price increase made by Gallaher and

would not therefore happen in the absence of that wholesale price change?

MR LASOK: I think that's right, yes. The reason why I say I think that's right is because that appears to be the pattern of the evidence, and I am getting whispers from either side of me saying that that is the pattern of the evidence --

THE CHAIRMAN: There is nodding going on, I can tell you.

MR LASOK: It's always comforting when this happens. What's slightly less comforting is when there are frowns and shaking heads behind one.

THE CHAIRMAN: At the moment there is nodding.

MR LASOK: So I'm on the right track at the moment. We will see whether I can surprise those behind me at some later stage.

So the upshot is that -- this is paragraph 15 of the speaking note -- where the bonus was paid or withdrawn, it was agreed or concerted that the retailer would price at the level instructed or requested by the manufacturer on the basis of the bonus being paid or withdrawn in circumstances where the retailer understood that the manufacturer is seeking to implement its P&D strategy in the retailer's stores.

That paragraph is not intended to go back on an answer that I gave a few moments ago to a question

from the Tribunal about whether we were asserting that you have to look at each pricing communication and decide whether that is or amounts to an agreement or concerted practice.

Paragraph 15 is simply intended to place the payment or withdrawal of the bonus and the consequent movement in the shelf price within the context of an agreement or concerted practice between the retailer and the manufacturer, of the sort that I've already described.

Now, the next page deals with manufacturer price increases, and essentially we have two kinds of situations that arise in connection with them. The first is where the MPIs occur in quick succession, because there, on the evidence, they were commonly identical in content, so as a general proposition MPIs didn't result in a departure from the pattern of pricing, and that is what is said in paragraph 17.

The second situation is where the MPIs didn't happen in quick succession or weren't identical in content, giving rise to new or different P&D requirements. The classic example of that is what happened in May to September 2002, where the Gallaher MPI was announced to take place, I think, on 25 June. It did not take place in terms of real prices for certain brands, and ITL's MPI was held over until 2 September, which is, I think,

the date on which that became effective.

What you then see, in cases like that, is what is stated in paragraph 18. In between times, the retailer was expected to adhere to the P&D strategy. So you have a kind of steady state scenario in between periods of movement in which the retailer is expected to adhere to the manufacturer's P&D strategy.

THE CHAIRMAN: That's the 2(b) restraint?

MR LASOK: Yes. I think it's worthwhile reading the second sentence of paragraph 17, which refers to the first situation where the MPI occurs in quick succession, and there it's said that in the event of any departure from that pattern of events such as the implementation of a price hold by the rival manufacturer, the manufacturer was able to ensure that shelf prices continued to reflect P&Ds by instructing or requesting a specific shelf price move as necessary, for example by giving an instruction to hold the shelf prices of its own brand by paying a level of tactical bonus accordingly.

Moving on to Budgets, the Budget position, in our submission, is much simpler, because of the fact that the Budget price increases were uniform for the manufacturers, and they were always implemented by the manufacturers simultaneously, so the position basically is no different from the MPI scenario.

Then moving on to paragraphs 20 to 21, that's the point about the between MPIs and in the absence of any manufacturer led promotional activity, the retailer was expected to adhere to the P&Ds at shelf price level.

THE CHAIRMAN: And there you use the word "expected" meaning expected because of the --

MR LASOK: Of the 2(b) --

THE CHAIRMAN: -- restraint?

MR LASOK: Yes, and in our submission, where you have -- it's best illustrated by the written trading agreements because where you have a retailer who signs up to a trading agreement which contains a provision requiring compliance with ITL's SPRs, then the one thing that you can be sure about is, in our submission, that the understanding between the parties to the agreement is that absent any manufacturer activity that puts the P&Ds out of line, the understanding was that the retailer would not itself act so as to put the P&Ds out of line, and that, I think, from recollection is the evidence of Fiona Corfield.

THE CHAIRMAN: What do you say now in relation to whether those P&Ds were maxima or fixed?

MR LASOK: Well, in our submission, the practical implementation was in the form of fixed P&Ds. Obviously there are some agreements in which you have the parity

or differential expressed as a fixed parity or differential in any event. In relation to those where they are not so expressed, we are focusing on the practical implementation of the agreements. And in our submission, the practical operation was as fixed. Again, one sees that through the correspondence, because typically the contemporary correspondence doesn't use the language of "maximum", it uses language indicating a fixed relationship, words like "parity", "matching", and so on and so forth.

THE CHAIRMAN: You said that this was illustrated by the trading agreements, but is it the OFT's case that this applied in all 15 bilateral arrangements throughout the period of the infringement?

MR LASOK: That's correct, yes.

THE CHAIRMAN: Yes.

MR LASOK: The point made in paragraph 21 of the speaking note is one that's been made before, which is that the manufacturers did not try to get the retailer out of step with the retailer's own pricing policy, whether that was a pricing policy that put their absolute price levels at a premium level or at RRPs or at a discount from RRPs or whether they were benchmarking their prices by reference to some other retailer. We have always tried to draw a distinction between the absolute price

levels and price relativities. Our case is concerning the price relativities.

So that brings me to the next section, which concerns the anticompetitive object of the restrictions. And this, I think, probably is worthwhile going through rather slowly, and perhaps reading it out, regrettably. If we start off at paragraph 22, our contention is that the agreement or concerted practice in each case required the retailer to follow the manufacturer's instructions in order to enable the manufacturer to implement its P&D strategy, and by its nature, that enabled manufacturer A quickly and precisely to match any change in B's retail price.

Moving on to 23, we turn to the restriction on the ability of the retailers independently to change the retail price of one brand relative to its rival linked brand, and the nature of the agreed or concerted practice was such, we say, that by restricting the retailer's ability to price independently, A was able effectively to implement its P&D policy, and that ensured that A had the ability quickly and precisely to match any change in the rival manufacturer's retail price, and there you have the reference to the first restriction in paragraph 10.

Then moving on to the second restriction in

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

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

Then we are passing on to paragraph 25.

DR SCOTT: Sorry, just pausing on 24 for a moment. Are you saying in 24 that there was something here over and above the inferences that a manufacturer would draw from the relativities in the published RRPs?

MR LASOK: Yes.

DR SCOTT: Yes.

MR LASOK: Because if you had relativities in the published RRPs, you couldn't guarantee that the shelf pricing would necessarily conform. However, there would

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

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

So once you know that --

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

MR LASOK: No, the manufacturer.

THE CHAIRMAN: The other manufacturer ...

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

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

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

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

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

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

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

THE CHAIRMAN: Yes.

MR LASOK: Yes, I apologise for that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE CHAIRMAN: Yes, thank you.

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

MR LASOK: It's not intended to be literal, because it's really, you know, at about the same time, it's ...
DR SCOTT: So it's a turn of phrase rather than a difference that you are expressing in those two sentences?
MR LASOK: Yes, because if you took it literally, it would be impossible, because "at the same time" means, as it were, instantaneously.
DR SCOTT: That takes us back to automaticity, which you are not pleading?
MR LASOK: Yes. It's not automaticity, it's the sense that if you look at it again in terms of the competitive uncertainties that would otherwise have existed, those have decreased because it is possible to observe the movements and the manufacturer would draw the ordinary and natural conclusion from what was going on.

As I say, we accept that there would be a time lag, but we are not talking about a time lag that would render the inference meaningless, it's the time lag is sufficiently close that the ordinary and natural inference that you would draw from events is that your uncertainties as to what's going to happen next are reduced. It's a sort of common sense thing.

Then again, paragraph 27 deals with the existence of the parallel agreements each manufacturer had, which of course affects also the manufacturer's anticipation or

the conclusion that it draws, as an ordinary and natural conclusion of what is going to happen as a result of its own act.

It's well worth pointing out that paragraph 27 in the second half does cater for the possibility that the manufacturer, manufacturer A, would have to effectively re-establish the relevant parity or differential, because we are not asserting that these arrangements produced complete transparency so that everything was wholly predictable. What we are arguing is that these arrangements produced a reduction in uncertainties that, in their absence, would not have existed.

Then paragraph 28 deals with the position over time.

Paragraph 29 makes the point that the theory of harm, in its essentials -- I am talking now about the theory of harm explored in the paragraphs of the speaking note that we have just been going through. That theory of harm in its essentials is the same as the theory of harm in the decision. That means that the criticisms of the OFT's current case that have been advanced, in particular we refer to ITL's skeleton argument, are misplaced.

Paragraph 30 is really there for the sake of completeness, and to deal with the margin parities argument that appears to have resurfaced. Our case

isn't anything to do with margin parities, we are not asserting that there was a margin parity restraint, and in fact, as we see it, there is no evidence that there was a margin parity restraint.

That leads to the conclusion in paragraph 31, and paragraph 31 is just taking it at a relatively high level -- that we have here a situation where manufacturers are implementing policies that dampen the degree of price rivalry between themselves, and our case is that that kind of behaviour is anticompetitive, it's in nature rather like straight horizontal pricing agreements, and has the same interbrand harm, competition is reduced and consumers pay higher prices.
DR SCOTT: So to be clear, one of the points that you made earlier on was that if we had moved by this time to expert evidence, we needed to be clear what points were being put to the experts. What you appear to be saying is that you believe that 10(a) and 10(b) fall within the theory of harm as broadly expressed in the decision, even if 10(a) and 10(b) were not put in detail to any of the experts?
MR LASOK: That's correct, yes. Would this be a convenient moment for the mid-morning break?
THE CHAIRMAN: Yes, subject to one point: when you refer to "margin parities" in paragraph 30 as being focused on

particularly by Dr Jenkins, could you say what you understand the difference to be between a margin parity arrangement and an arrangement that you have outlined?
MR LASOK: The arrangements that we are focused on, or at least the arrangements that we say existed in the present cases are concerned with relativities between shelf prices of competing linked brands. Now, as I understand the margin parities case, it seems to be about maintaining the retailer's margins at parity as between the ITL brands on the one hand and the Gallaher brands on the other.

Now, in fact there is evidence to demonstrate that the margins were not at parity, so this can't be what these arrangements are about.
THE CHAIRMAN: So that's margin parity as between competing brands, rather than maintaining the margin on the same brand before and after a price change?
MR LASOK: Yes, that's right.
THE CHAIRMAN: Thank you. That is a convenient moment, then. We will come back at five to 12.
(11.42 am)
(A short break)
(12 noon)
MR LASOK: I've come now to the heading before paragraph 32 of the speaking note, which raises the question: do the

restrictions set out at paragraph 10 of the speaking note form part of the infringing agreements identified in the decision?

Before embarking on that topic, the OFT submits that it is important from the perspective of the Tribunal's jurisdiction and how it would exercise the powers that the OFT submits that the Tribunal has, to be clear about where exactly lie the common features between the decision and the case that the OFT is currently advancing, and where lie the divergences between those two positions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

that, from the OFT's perspective, the number of elements that you have got goes to the degree of the anticompetitive harm.

THE CHAIRMAN: What we haven't got to at this stage of this hearing is an analysis from the OFT as to which of the 15 bilateral arrangements contained an opportunity to respond clause, either expressly or in fact from practice, and which of the 15 do not contain all of the four restraints in paragraph 40.

MR LASOK: That's quite right, but the position as stated by the OFT a few days ago was that we considered that, applying the correct legal standard, we might be able to establish the one constraint plus the opportunity to respond position, but that was then.

THE CHAIRMAN: Yes.

MR LASOK: So what you have in the decision is a particular understanding of the role played by the retailer in these P&D arrangements, and it's that understanding which has altered as the OFT sees it. But the common features are things like, there were P&D arrangements, there were the trading agreements, the P&D strategies were concerned with the linking of the shelf prices of competing brands.

Now I want to move on from that rather general description of the common features to look at the

question of the particular restrictions that were identified in paragraph 2 of the earlier document, the earlier submission that the OFT produced and that are now in paragraph 10 of the speaking note.

Paragraph 35 of the speaking note summarises them and now what I want to do is go to the decision to look at the bits where the restrictions that we are now focusing on appear.

The first one, which is dealt with in paragraph 36 of the speaking note, is the retailer pricing manufacturer A's own brands at prices implementing manufacturer A's pricing relativities between its brands and those of a competing manufacturer.

That paragraph gives some examples of where this appear. The first one is paragraph 1.6 of the decision. (Pause). That restriction is actually articulated in 1.6 as being a restriction contained within the infringing agreements.

In paragraph 1.8(ii), the same restriction is said to have been in the written trading agreements.

6.15(ii), which is on page 80, is effectively a repetition of paragraph 1.8.

6.29, which is on page 84 is to the same effect.

The associated --

THE CHAIRMAN: Well ... (Pause). Just say again for what you

rely on these paragraphs in the decision.

MR LASOK: If you look at paragraph 6.29, for example, on page 84, it says:

"Pursuant to these written trading agreements, the retailer concerned agreed to price the manufacturer's leading brands at parity with or at a specified differential to competing linked brands."

That is the first restriction in paragraph 10. Because this is -- paragraph 6.29 is concerned with an agreement, a trading agreement between manufacturer A and the retailer under which the retailer agrees to price A's brands at parity with or at a specified differential to competing linked brands.

THE CHAIRMAN: Yes.

MR LASOK: This point was also associated with the instructions that were issued from time to time, but there the fact that movements by a retailer of A's brand prices pursuant to a communication from A, and the associated inducement of a move by the grant of bonuses, again it features in the decision as being a part of the infringing agreements.

If you go back to 1.8, 1.8 talks about what the infringing agreements involved, and in (ii) I've already drawn attention to the provision in the written trading agreements; (iii) is divided into three bits but the

first of (iii) deals with the contacts between the manufacturer and the retailer regarding the retail prices for the manufacturer's brands; (iv) is the payment or withdrawal of bonuses and so forth to incentivise the retailer to set retail prices in accordance with the manufacturer's retail pricing strategy.

If you go to 1.11 on the next page, in the middle, it's the second sentence:

"However, taking the evidence as a whole, the OFT considers that the infringing agreements in fact provided for parity and fixed differential requirements which were implemented by communications from the manufacturer to the retailer pursuant to which the retailer was to move to a specific retail price point. The retailer's compliance with such communications was induced by the grant of ongoing and tactical bonuses."

Then there is a reference to the monitoring.

DR SCOTT: Just to be clear, here we are dealing with the generality; would it be your submission in overall terms -- not going into the detail at the moment -- that in relation to each of the 15, these points are substantiated later in the decision?

MR LASOK: I think they are. The example that I had considered was Asda, simply because it was the first

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

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

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

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

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

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

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

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

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

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

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

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

MR LASOK: I apologise.

THE CHAIRMAN: 8.2.

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

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

How would you characterise 8.2 in this context?

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

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

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

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

Where I think we are ending up to is this: we don't dispute the fact that the decision proceeded on a particular basis, and having regard to a particular line of reasoning taken in the decision, it generated a particular conclusion that is summarised in the conclusory paragraphs at the end of the decision in paragraphs 8.2 and 8.3. We don't shrink from that.

The point that I am making is that although in the OFT's current case there is a departure from part of a line of reasoning that led to the conclusory paragraphs in 8.2 and 8.3, the starting point and parts of the reasoning remain applicable to the current case. To anticipate what I was going to say later, we are in one of those situations in which, in our submission at any rate, we are not dealing with a case advanced by the

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

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

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

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

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

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

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

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

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

But the point is that in the decision, those paragraphs weren't elevated into an alternative case.

So what you had was a situation in which the decision goes down one particular route, it contains we would say, all or virtually all of the elements for an alternative way of arriving at the same end result, but that alternative was never articulated as an alternative case.

DR SCOTT: Would you say that -- and we may come to this from the other side -- there was a sufficiency of reasoning from fact through theory of harm to conclusion -- in other words, getting to 8.2 -- that in the absence of those elements that you may now choose to decide you can't make stick on the evidence, would lead to a safe finding in 8.2?

MR LASOK: Well, we would say that it would lead to a safe finding in 8.2, but it's not the kind of exercise in which you could simply run a blue pencil through parts of the decision and say "Well, there you are, you have the fully fledged reasoning". You see, if that was the case that we were confronted with, we wouldn't have this difficulty, because it would be simple for the Tribunal to say, in the normal exercise of its jurisdiction, if it found that the alternative case articulated in the decision corresponded to the facts whereas the primary

case didn't, that what you would then do is to confirm the alternative line of reasoning in the decision but you would set aside the rest of it.

What we have in the present case, and what causes the difficulty, as we perceive it -- the appellants don't perceive the difficulty, but what we perceive to be the difficulty is that when you look at the decision, it's got all these elements in it, but they are not articulated as an alternative case.

DR SCOTT: And what that means is that the appellants have attacked the reasoning of the case that currently leads up to 8.2, thinking that that is what they are expected to do in an appeal. But as a matter of procedural fairness, they will say it's difficult for them to attack a different line of reasoning because that line of reasoning was not adequately articulated in the decision as published.

MR LASOK: Yes, and that's in summary I think what the issue really boils down to. But the discussion about whether the current case falls within the decision or falls outside the decision or bits of it are in and bits of it are out, is something that, in our submission at any rate, goes to a question of the Tribunal's jurisdiction and its powers, because does its jurisdiction cover that type of situation? We know it covers a situation where

an alternative case is articulated in the decision. Does the Tribunal's jurisdiction cover the situation we are presented with at the moment? And if so, which are the powers that would be applied in order to deal with the situation?

Of course, our case is based on the submission that, as the case currently advanced by the OFT does arise out of the factual matrix found in the decision, and does contain the restrictions that are described in the decision, that on any view is a material factor because, having regard to the purposive construction of the statutory provisions dealing with the Tribunal's jurisdiction, it is something that the Tribunal has jurisdiction to deal with, however you express it. You may have a debate about which power is exercised --

THE CHAIRMAN: What do you mean in that context about "we have jurisdiction to deal with it"?

MR LASOK: In our submission, I think the way I put it orally the other day was that the decision and the appeal against the decision brings a matter before the Tribunal. The Tribunal's jurisdiction is to resolve that matter by reference to the merits, and it is at that point that you get into this debate about the relationship between provisions such as the provision that says that the Tribunal decides the appeal on the

merits by reference to the grounds of appeal, but then you have provisions -- the provision in schedule 8, paragraph 3(2)(e) that is actually difficult to reconcile with a restricted view of the Tribunal's jurisdiction.

THE CHAIRMAN: Well, that's a point that crops up later in your speaking note. At the moment we are trying to focus, or I am trying to focus, on what it means or what you say it means to say that the restraints in 2(a) and (b) are within the decision. Is it enough that there are findings of fact in the decision that those restraints exist? Or do you have to show, and can you show, that the actual infringement found in the decision incorporated those restraints?

MR LASOK: Yes. This was what I was about to come to, because when one looks at the summary in 8.2, perhaps if we look at it, it's the last sentence of 8.2 which says:

"The infringing agreements restricted the retailer's ability to determine its retail prices for competing tobacco products and had the object of preventing, restricting or distorting competition in the supply of tobacco products in the UK in breach of the Chapter 1 prohibition."

Now, that summary of the position encompasses the restrictions that are set out in paragraph 10 of the

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

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

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

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

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

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

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

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

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

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

MR LASOK: Yes.

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

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

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

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

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

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

I think, is just have a quick run through to see what I've covered. What I suppose I ought to do is to --

THE CHAIRMAN: Perhaps, Mr Lasok, if I can interrupt you, there are a couple of points that I think we want to make now which may then result in you turning to that section after the short adjournment.

The first question from me, just to clarify: in respect of the restriction in 2(a), 10(a), would you accept or not that it is a key element of that restriction that the prices included in the instruction or request were not understood as being maximum prices? Or would you maintain that that was still a restraint, even if the price instructed was intended to be understood and was understood as a maximum price? There I have regard particularly to what's said in paragraph 6.274 of the decision.

The other point, whilst you are just looking at that, is a point for the appellants: you have now all seen each others' submissions, some of the appellants have said expressly in their submissions that they adopt the submissions of others, but as we have intimated, there are instances where people are making different points, it would be helpful for us to have an indication -- and no doubt also helpful for Mr Lasok -- as to whether we should assume that the

appellants are speaking as one, largely, in the points that they want us to consider, or whether there are material differences between their respective cases on this point and if so, could they clarify what those differences are.

I don't know whether you have been making any particular assumption on that point, Mr Lasok?

MR LASOK: No.

THE CHAIRMAN: Is there something you can usefully say about the maximum price point at this stage?

MR LASOK: I would prefer, if the Tribunal permits, to take instruction upon that point.

THE CHAIRMAN: Well, let's rise slightly early, then, and come back at 2 o'clock.

(12.57 pm)

(The short adjournment)

(2.00 pm)

MR LASOK: Madam, in answer to the question that you put to the OFT just before lunch, the OFT submits that what I'll describe as the paragraph 10(a) restriction, which is the first one in 10(a), and the same as 2(a), was in fact a restriction about pricing at a fixed price, not a maximum, so as a matter of fact, that was what it was in these cases, and the OFT is not asserting in these cases that it was an agreement or concerted practice for

a maximum price. The assertion is that it was for a fixed price.

The OFT doesn't rule out the possibility that in a parity and differential context, an agreement or concerted practice on a maximum could be anticompetitive, but that's not the case that is being advanced by the OFT in these appeals. It's for another case.

So that brings me now to submissions on the Tribunal's jurisdiction, and to some extent I've already embarked upon this, because if one goes to paragraphs 53 to 54 of the speaking note, I've already made the point before lunch that if we look at paragraph 3(1) of schedule 8, we see that the Tribunal must decide appeals on the merits by reference to the grounds of appeal set out in the notice of appeal. But in our submission, the point is that if that were the full and indeed only extent of the Tribunal's function in an appeal, then paragraph 3(2) of schedule 8 wouldn't have contained (d) or (e). As the case law on this has developed, there has emerged, in our submission, a broader understanding of the scope of the Tribunal's jurisdiction.

In that connection, we do, I think, forcefully make the point in paragraph 55 that the understanding of the scope of the Tribunal's jurisdiction has developed over

time and relatively early Tribunal decisions reflect relatively early views of its jurisdiction.

In fact, when one just looks at the cases, you can see an evolution in the thinking of the Tribunal about the relationship between paragraph 3(1) and the other powers in paragraph 3(2) of schedule 8.

Our case really is based upon the Court of Appeal's decision in Albion Water in 2008, and the Tribunal's decision in that case, which had been upheld by the Court of Appeal.

There should be a file 13 in the bundle of authorities which has Albion Water in it.

(Pause)

DR SCOTT: Which tab? We have it separately, but which tab should it be?

MR LASOK: It should be in tab 183. The Court of Appeal judgment should be at tab 183 in file 13.

Because I am sure that the Tribunal is very familiar with the problem in Albion Water, I'll just go to the material parts of the Court of Appeal's judgment. The discussion of the jurisdictional issue starts in the copy that I have at the bottom of page 27. It's paragraph 112 of the judgment. There is a heading there which says "The Jurisdictional Issue".

At paragraph 123, the Court of Appeal refers to the

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

123, the submission in the second sentence was that:

"The power under paragraph 3(2)(e) wasn't limited to a power to make a decision that the regulator could have made at the time it took the decision under appeal. The language embraced any decision of a kind that the regulator could have made, that is a decision within the meaning of section 46(3) of the Act, in particular as to whether there has been a relevant infringement."

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

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

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

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

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

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

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

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

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

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

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

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

it makes sense from the perspective of efficiency.

Now, there is also a kind of safety valve to this, and the safety valve lies in the extent of the Tribunal's discretion in relation to procedural matters to ensure that there is procedural fairness.

It is through the Tribunal's procedural powers that one can achieve a reconciliation between the public purpose served by the Tribunal, which ultimately is to determine whether or not there are infringements of the Competition Act by reference to the merits, that is to say what actually happened, and the procedural fairness problems that may be caused where you have developments in a case, as has happened in the present case.

I fully accept that the appellants take the view that the developments in the present case are not of the same sort as those, for example, in Albion Water and the earlier cases. But in our respectful submission, that isn't actually the point, because when one looks at a ruling such as that made by the Court of Appeal in Albion Water, one is not looking at it from a perspective of what were exactly the facts of that particular case; one is looking at what is the explanation given of the meaning of the statute, because that explanation determines the scope of the Tribunal's jurisdiction. The application to in a particular case

is another matter.

So --

THE CHAIRMAN: Do we know from this judgment or the previous judgments what the relief sought by Albion -- I should know this, I suppose -- in its original notice of appeal, was? Is it stated there at all?

MR LASOK: Yes, I think it may be in the Tribunal's judgment. I was just looking at paragraph 5 of the -- 51, is it? I think paragraph 51 looks like something different. The full appeal is in tab 186.

THE CHAIRMAN: Perhaps somebody could just check out whether that appears anywhere. I do not want to take up more time with that.

(Pause)

MR LASOK: Well, I think somebody else will have a look to see where there is a convenient point at which the -- I suppose it could be paragraph 51 of the full judgment of the Tribunal. It's 50 and 51.

(Pause)

THE CHAIRMAN: Yes. I have just been pointed to paragraph 208 of the Tribunal's judgment at tab 186, where it does seem to say that the final relief sought by Albion was a finding by the Tribunal that the decision should be set aside and a declaration that Dwr Cyrmu had abused its dominant position by charging

excessive price, et cetera.

The logic of your submissions must be that what the Court of Appeal said in Albion places greater emphasis on the powers in paragraph 3(2) that on the Tribunal's duty in paragraph 3(1) --

MR LASOK: Quite so.

THE CHAIRMAN: -- in terms of the grounds of the appeal the relevance of the grounds of the appeal.

MR LASOK: Yes, and in the Tribunal's decision, one can see a similar shift in emphasis, for example, if you would go to paragraph 188, but it's also at paragraphs 193 to 195.

THE CHAIRMAN: Is this still at tab 186?

MR LASOK: Yes, it's 186.

It's particularly evident in 194. The discussion effectively starts with the citation of the passage in Burgess which is at paragraph 188, and if one just goes through it very, very quickly, paragraph 190 shows that the Tribunal didn't consider that, so far as the issue of dominance was concerned, it was acting under 3(2)(e) because it thought that it was acting under 3(2).

What it did then was to consider the Burgess criteria which it regarded as criteria relating to 3(2)(e). You see that at 194, after considering an argument advanced by Dwr Cymru concerning the two

tier system of the Act, which is very much an appeal based view of the Tribunal's jurisdiction, the Tribunal says in 194, in giving its first answer to that submission, that under the Competition Act, the Tribunal in its merits jurisdiction acts in many cases as the primary decision-maker on matters of fact.

What had happened was that in earlier cases the Tribunal had been ambivalent on its position as a primary fact finder as opposed to a body that was simply ruling upon the merits of the points raised in the appeals. But by this stage, the Tribunal had been shifting to a more broadly based understanding of its role to dispose of the litigation brought before it in the notice of appeal, on the merits but actually by engaging in primary fact finding.

Later on in the judgment, for the sake of completion, one can see that the Tribunal distinguished between the dominance issue which it had been dealing with at this point and which it had considered fell within the first sentence of paragraph 3(2), and the excessive pricing issue, because the excessive pricing issue was an issue that it considered to fall within 3(2)(e), and that's at paragraph 240 of the Tribunal's decision.

DR SCOTT: Mr Lasok, it seems to me that both in Albion and

in Burgess there were aspects of the case which were forward looking as distinct from simply backward looking. In Burgess, as is rehearsed at paragraph 189 of Albion, you point out that the Tribunal had before it all the material necessary for it to decide the issue of dominance.

Then in the quotation from paragraph 138:

"In addition, as already pointed out, there is no question of a penalty being imposed on Austins."

Here we have an interesting situation where it would no doubt be useful for posterity to know whether 10(a) and (b) are indeed infringing or not, if we found it necessary to make that decision, but as Mr Howard will no doubt reiterate, in this case we do have the matter of substantial fines which will have to be taken into account in the exercise of any discretion by ourselves as to procedural fairness. And that would, it seems to me, differentiate it from a pure Burgess situation.

MR LASOK: Yes. There are, I suppose, two responses that one can make to that. The first is that the Tribunal, both in Burgess and in Albion Water, was very careful not to, as it were, pigeonhole itself or paint itself into a corner which, in our submission, was the right thing to do because a jurisdiction is a jurisdiction, and it's not something that magically appears in one

case and --

DR SCOTT: It's the "can"/"should" differentiation.

MR LASOK: The "can" and "should "is different, yes. But we would therefore start off on the basis that the Tribunal was right in Albion Water, and obviously the Court of Appeal decision is binding in any event in its explanation of what the scope of the jurisdiction is, and as I've submitted, it's entirely consistent with the obvious statutory purpose. Why else does the Tribunal have the powers that it has, if it doesn't have --

THE CHAIRMAN: Well, it has that power, one can see in Albion, the finding by the OFT was that there had been no margin squeeze, say. That was challenged on appeal, Albion said there had been a margin squeeze. So the Tribunal then decides that appeal, the issue being: was there a margin squeeze or wasn't there? If it decides that there was a margin squeeze, it can do two things. It can simply set aside the OFT's decision and say "OFT, you were wrong to decide there wasn't a margin squeeze" and leave it at that, and I suppose in ordinary civil litigation, if one can read across some analogy, that would be what the court would do. But here we have power to say not only do we find that the OFT had been wrong in deciding that there was no margin squeeze, but we will make a finding of infringement, and that has all

sorts of consequences which are now being played out.

But it still seems that in that situation the decision to find an infringement rather than simply decide that the OFT erred in finding that there wasn't an infringement, can still be seen as an extension of the relief that's given following on the determination of the appeal. Isn't what you are asking us to do something rather different from that?

MR LASOK: Well, we would say no. Going back to Albion Water, it's relevant to bear in mind that in relation to excessive pricing an investigation had to be carried out, and certain matters were remitted to the authority to investigate. Now, it's true that on one reading of the decision the Tribunal's judgment in Albion Water, the Tribunal might have come to the same conclusion even if that investigation had not been carried out, but in fact the Tribunal did ask for that investigation to be carried out so that it could make its decision. That therefore was an indication that the Tribunal was stepping outside a strictly appellate role, even an appeal on the merits, because it wasn't simply taking the facts as found by the decision-maker and saying "Well, on the basis of those facts, you have got it wrong, we are going to re-make your decision", but it was actually going outside the confines of the

original decision, which is not something that one normally does in the exercise of a purely appellate jurisdiction.

Turning to the present case, and advancing the second answer to Dr Scott's enquiry, if in the present case you have a situation in which the appellants were infringing the Chapter 1 prohibition, because the evidence shows that they were, and that they should have been fined, then why is it that they should not be fined?

Now, the problem is this: it's easy to say: well, in circumstances like that, a purely appellate jurisdiction would, if it considered that the facts as found didn't stack up to an infringement or that certain facts had not been found which should have been found and could have been found on the evidence, and therefore you remit the matter to the original decision-maker. That's an appellate function. But the function as described by the Court of Appeal in Albion Water is not an appellate function of that nature, and in our submission, there is a reason why, and that is that it is actually efficient to proceed on the basis that the evidence gathered before the Tribunal logically leads to a decision that there has been an infringement.

If you have gone to all the trouble of gathering

together all this evidence, what on earth is the point of remitting the matter to the original decision-maker, which then has to start the process all over again?

Now, obviously within the context of the Tribunal proceedings, procedural fairness has to be observed. But if there is a way of protecting procedural fairness, the proper way, we submit, of ensuring that the statutory purpose is going to be fulfilled in an efficient way is for the Tribunal to carry on with the case and reach a decision.

There is nothing in Albion Water to suggest otherwise. That's putting it in a slightly negative way, but in Albion Water, the Court of Appeal does make the point that the procedural safeguards that you find in the administrative procedure don't apply, but you ask yourself: well, why is it doing that? In other words, why is the Court of Appeal making this point? It's only relevant if the jurisdiction before the Tribunal is such that it would be engaging in this broader investigation than an ordinary appellate jurisdiction would engage.

So that's why we submit that the Court of Appeal's ruling on this point is actually quite clear and resolves matters. One of the reasons for mentioning that in Albion Water and the Tribunal, the Tribunal looked at different parts, dominance and the excessive

pricing, in different ways, was to show that the Tribunal, even at that stage and following Burgess, regarded its role as going beyond the appellate role. It saw it moving in two different ways. One way was under the first sentence of paragraph 3(2), the other way was under 3(2)(e).

That leads back to the submissions that I made earlier about how the OFT's current case falls within the scope or relates to the decision. But I've made my submissions on that point, which I don't think I need to elaborate any further.

DR SCOTT: If we think about the point that we had reached in almost getting to the end of the factual evidence, but not getting to the expert evidence, we are, I suppose, going to have to consider how far the factual findings in the decision relate to the suggestions in 10(a) and 10(b), and also from the point of view of procedural fairness, how far those were put to the witnesses during that factual evidence.

Now, there may be a differentiation there because of the way things progressed as we went along. Then we would have to consider how procedurally one proceeded from there if it was accepted that there was not a proper line through the theory of harm to 8.2. And how would you suggest that we approached that area?

MR LASOK: Well, that was what I was going to come to next, because I think that is the -- I am just trying to see whether -- what I could do is to go straight to paragraph --

THE CHAIRMAN: Don't let us take you out of your train of thought.

MR LASOK: I was just wondering whether there was anything that I needed to draw the Tribunal's attention to specifically in paragraphs 59 to 68. Because in those paragraphs, we address certain of the points made by the appellants in various parts of the skeleton argument. I think it's worth mentioning, perhaps, it's really paragraphs 62 and 63, because 62 addresses a suggestion made by Morrisons and Safeways and by ITL about the decisions of the Tribunal, which is the heading to paragraph 3 of schedule 8. Of course it's well worth bearing in mind that paragraph 3 of schedule 8 simply identifies action that the Tribunal can take that takes the form of a decision, and it doesn't restrict the Tribunal as to the time in the course of the proceedings at which any of those decisions is taken. But it's trite to point out that if the Tribunal terminates the proceedings before it, then it is, to put it mildly, controversial as to whether the Tribunal has any residual powers. That was the issue in the

Floe Telecom, and it was the concerns about what happens when the proceedings are brought to an end but there are residual matters, that led to the Tribunal in Albion Water doing what it did, that's paragraph 63.

So the long and short of it is, in relation to that particular part of the exercise, the Tribunal, if it's acting under, for example, paragraph 3(2)(e), still has to keep the proceedings before it in existence, it can't simply bring the proceedings to an end. So technically what happens is that it makes the decisions that it needs to make, preparing the way for a final judgment, and it's in the final judgment that it grants the final relief that it needs to grant which, as in the case of Albion Water, could be a combination of the setting aside of the decision appealed against, the making of a different decision under 3(2)(e), and so on and so forth.

THE CHAIRMAN: Is that effectively your answer to the point that ITL make in their skeleton, which seemed to be that if they are right that paragraph 2(a) and 2(b) restraints are not within the decision so that what we are talking about is the Tribunal setting aside the decision, that once we have arrived at that position -- I think this is what they say -- the Tribunal must set aside the decision and does not have power to continue

with the appeals, delaying the setting aside of the decision in order to decide whether it wants to exercise any of the other powers in paragraph 3(2)?

MR LASOK: Quite so, because the problem is that if you adopt that interpretation, then effectively you deprive part of the jurisdictional provisions of their legal effect. And that was something that the Tribunal in Albion Water was clearly aware of, and decided not to go down that road, because the point in Albion Water had been reached at a relatively early stage, at which the Tribunal had come to -- I should call it loosely a provisional conclusion that the decision appealed against was wrong. But nonetheless, the proceedings carried on so the Tribunal could exercise its jurisdiction and provide the resolution of the litigation that it perceived was mandated by the statutory provisions.

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

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

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

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

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

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

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

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

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

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

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

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

proceedings, or a decision that takes the form of a description of the infringing agreements such as that which the OFT is currently advancing, it doesn't follow that the decision has to be replete with references to some expert's report. What you actually see is an articulation of the theory of harm and then, when it's challenged, the OFT gets an expert in order to support its view of the theory of harm or of the anticompetitive consequences of the arrangements.

So things like experts' reports would in any event come after the complaint, if you like, had been articulated. We also canvass in the speaking note, but very, very briefly, the exemption arguments, and things like reliance on the vertical restraints order. But in our submission, all these are manageable, not least because in relation to exemption point, that argument is largely based upon, if not entirely based upon, the appellants, particularly ITL's own submissions as to what the nature of the P&D arrangements with the retailers were. ITL has never really addressed the case that was made out by the OFT even in the original decision. In any event, we already have got evidence on the purpose and objectives of the ITL parity and differential strategy, and how it was implemented. So there is already material on which an informed view can

be reached as to the viability of these arguments based on exemption of the arrangements. So that we don't perceive to be a problem.

At the end of the day, in our submission, we have a situation in which it is, we would submit, efficient and perfectly possible to take advantage of the investment that all the parties have made thus far in the litigation, but instead of wasting that, proceed further to a final determination of these matters, so that we know whether or not there was an infringement of the Chapter 1 prohibition.

Now, I've noticed that in the speaking note there is a reference to some of the evidence in relation to Co-op. I have given the Tribunal the references so you can see where we got that from. There is also a point made by ITL in its skeleton argument -- this is dealt with at paragraph 88 of the speaking note -- that the OFT could always have run the new case, and the answer to that is that the OFT was entitled to evaluate the evidence before it and adopt a decision that it considered fitted that evaluation.

The two points made by ITL in support of the suggestion that the OFT's case was misconceived from the start concern Ms Corfield's statement which we provided to the OFT by Sainsbury, and the Somerfield transcript.

Now, so far as Ms Corfield is concerned, the point is a very short one, and that is that if one actually reads Ms Corfield's original statement, a lot of what she said did support the OFT's interpretation of events.

She said, for example, that the P&Ds were respected virtually all the time, over 90 per cent or something like that, and she had identified only one scenario in which P&Ds might temporarily be unoperational, but the OFT had taken that into account when it made its decision. What, of course, the OFT hadn't seen was the full extent of Ms Corfield's evidence which came out when she was cross-examined and re-examined.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR LASOK: Yes.

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

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

THE CHAIRMAN: Right, thank you.

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

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

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

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

to truncate what they want to say as well.

Submissions by MR HOWARD

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

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

an assertion of a theory of harm.

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

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

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

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

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

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

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

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

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

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

(3.00 pm)

(A short break)

(3.15 pm)

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

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

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

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

THE CHAIRMAN: The consensus which emerged.

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

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

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

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

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

paragraph 40 points, they were outside the decision. That you see is put. What's interesting is to see the current case that's sought to be proved. If one starts at line 18 he says that:

"... the OFT has considered the evidence as it has emerged in the course of the proceedings, and it appears to the OFT in the light of the evidence that each and every one of the specific circumstances relied on [note the words] in the decision in support of the finding of an object infringement may or may not be established ..."

That is important because what he was actually recognising there was, as is actually clearly the case, that paragraph 40 is a reflection -- not a reflection, it is a statement of what is in the decision. The only difference between paragraph 40 and the paragraphs of the decision is that it set out in paragraph 40 in each context considering a Gallaher price increase, a Gallaher price decrease, an Imperial price increase and an Imperial price decrease.

He then, at line 25, says:

"For example, if the price moves take place through manipulation of the wholesale price, that may reflect a restraint that is not referred to in paragraph 40 of the OFT's skeleton ..."

Now, just remember those four lines are the same as paragraph 2(a) of the document they produced last week, price moves through changes in the wholesale price.

He then goes on to say:

"If the Tribunal were to find in relation to any one of the infringing agreements ... that none of the constraints in paragraph 40 of the OFT's skeleton argument were present, it does not follow that there was no object infringement. In other words, putting matters in the statutory language ... there are reasonable grounds for suspecting an object infringement that worked in the absence of the four constraints as they are described in paragraph 40 ..."

Now, that language of course, as I said the other day, and we have said in our written document, reflects section 25. But the important thing is line 16. Now, that is a departure from the decision as currently formulated. So in other words the basis on which he came along to court on that day was "If I can't prove a case in paragraph 40 and if, for instance, I can only prove the case at page 1, line 25 to page 2, line 3, I am outside of the decision".

I would respectfully suggest that it is truly remarkable for a representative of the Office of Fair Trading on November 3rd to have said that to

the Tribunal and yet today, when he is saying "No, no, this case is within the decision", that he has not sought to explain that to you, the basis on which he made that statement two weeks ago and today is making a different statement.

That's particularly in the context, this is not self-evidently litigation between private individuals when it would be bad enough that counsel says one thing one day to the court and something else two weeks later. But this is a very important public prosecution where Mr Lasok is in the role of a prosecutor, and in my submission, it is just an improper position, and the Tribunal has no reason at all not to hold the OFT to what was said.

Now, the next very important point to note about this is that what Mr Lasok on this day was accepting he could not prove, even then, was the central plank of the case. It's actually fundamental, this. The central plank was paragraph 40(b) of their skeleton argument. That was when the retail price of Imperial's brand increases, the retail price of Gallaher's brand must also increase. That, even on Day 26, was recognised to have gone. So that even on Day 26, the Office of Fair Trading was saying "Our case has fundamentally changed because we can no longer prove that".

Just interposing for a moment, there has been a lot of discussion in this course of this case about how paragraph 40 fits in with the opportunity to respond clause. The thing that's absolutely fundamental to remember is that the opportunity to respond clause has absolutely nothing to do with 40(a), which is a Gallaher brand increase, (b), ITL's price increase or (c), an ITL brand decrease.

In other words, those were situations in which the OFT's case was that there is an absolute obligation on the retailer where any one of those things happens to make a corresponding move in the price of the competing linked brand.

That is why the so-called lock-step was absolutely central to the theory of harm. The only area where their case was somewhat less clear or more ambivalent was in the case of a Gallaher price decrease. We have set out -- and I'll come to it a bit later, but you will remember the way Mr Lasok tried to explain their case on opening, it was still that there was a requirement to move the price, but saying, "Well, the retailers might be a bit sticky". So that effectively they were still saying there was a requirement, but one accepts that the case was slightly ambiguous about that.

But in relation to the other parts of the case,

there was absolutely no ambiguity at all, no case as to why this doesn't operate in an absolutely rigid way.

The reason that's important to remember is that this case, the basis of the Office of Fair Trading's case, is that although the agreements are vertical agreements, they have sought to avoid the difficulty of saying "These are restraints in vertical agreements which are a matter of everyday life", to say that the restraints in fact are in effect the same as a horizontal link. That's why, if one stands back from it, they felt they could say this was an object case and not an effects case. Because we can say, and they say it absolutely unequivocally in their skeleton argument, this is exactly the same as if the manufacturers had entered into these arrangements between themselves.

The only point that Mr Lasok was seeking to cling on to on Day 26 was a suggestion that they were still running this paragraph 40(a) case. Now, you will have seen in this speaking note -- he didn't take you to it -- the position about that still is or has become somewhat equivocal. I'll explain to you why there is absolutely no continued room for equivocation in a moment.

What we then had, following that hearing, was the document that the OFT produced with the statement of

case, where they put forward two different restraints. What one found in that document, if you have it there, previously on Day 26, so where we were on Day 26, was it was recognised absolutely clearly that if we are not within paragraph 40 then we cannot maintain the decision as it stands, and there are two choices, you either set aside the decision and allow the appeal or the schedule 8 argument. There was no other position.

So when they come forward with their document today, they appear to be making a different point, so that the document, it comes up with what is a new basis of the case, they call it a refinement but it's actually perfectly clear this is a different restriction, and I'll explain why it's a different one in a moment, but they are then saying that this all falls within the decision.

Now, as I've already said, that they should make a volte face like that without explaining the position we would suggest is highly unsatisfactory. Then on Day 27, when we came back before you last week, they flip again, recognising that this case is not within the infringing agreements. We have given you the reference to that. It's Day 27, page 68. It's absolutely clear, at line 17 --

DR SCOTT: Just pause a moment, Mr Howard, we have turned to

our files and we have a slight --

MR HOWARD: I see. In fact, it's set out in my document.

THE CHAIRMAN: It is set out in your skeleton. Our documents don't seem to have quite caught up with --

MR HOWARD: It's set out absolutely clearly in our skeleton or whatever you want to call it, it's less skeletal and more fleshy, at paragraph 9. It's the second paragraph:

"If you put the broad question: is the infringing agreement arising from the restraints in paragraph 2 of the Wednesday document the same as the infringing agreement which is described in the decision? The answer is no."

The question is the right question. Imperial have been fined, and so have the retailers, for being involved, being parties to agreements or concerted practices which are defined as the infringing agreements. If you want to say "Well, it's not that infringing agreement, it's a different infringing agreement", you can't say that is within the decision or a reflection of the decision. It may be that you want to try and strip out something from what you have already said and say "Well, there is a fact which I could rely on to support a different allegation", but it is not the same allegation. It's actually quite difficult to do justice to the point beyond saying that.

THE CHAIRMAN: Is that the same point that I was putting to Mr Lasok, that the important question is not so much: is it within the decision in the sense that there are findings of fact that those restraints existed, and one can find in the decision findings of fact as to those --

MR HOWARD: Yes.

THE CHAIRMAN: -- but to be within the decision should, in this context, mean to be found to have been an infringement of the Chapter 1 prohibition?

MR HOWARD: Quite so. Just ask oneself this: what has Imperial purportedly been fined £112 million for? What are they supposed to report to their shareholders? Just understanding why, if they were to pay the fine, would they be paying it? Because I have been found to be guilty of participating in this or these infringing agreements. If I want to challenge it, to take Dr Scott's point, I come and challenge that. I haven't been fined for something else. That's what I have been fined for. So to say, "Oh, well, it's in the factual matrix that you did this, and we have set out some facts that you did that", the answer is that may be true, it may not be true, let's assume it is, it doesn't advance the OFT's position, because that isn't the basis of the decision, the decision is in respect of particular infringing agreements.

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

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

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

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

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

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

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

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

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

Now --

DR SCOTT: Sorry.

MR HOWARD: Yes.

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

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

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

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

At the moment, today is not the day for us to argue about whether the restraints in 2(a) and 2(b) are or are not proven. A lot of Mr Lasok's submissions create confusion because he is going into whether he can or can't prove something, whereas the question is at the moment: taking 2(a) and 2(b) at face value, then the question only is: is that within the decision? Then you have a jurisdictional question. Then if you say, well, either -- you then have a question of discretion, if you have decided the jurisdiction point in a particular way.

But taking the point, if one said, well, he has a cogent case for restraints 2(a) and 2(b) as restraints; in other words, saying we don't have to decide it now, but is there an arguable case that there were restraints of this type in the contract, or contracts.

The next stage is: but has he got any material at the moment which establishes -- (a), is that the restraint he was relying on? Answer, no. Therefore is that part of the infringing agreement? Answer, no. Even if one goes beyond that and says: is there material here which is relevant to establish a theory of harm?, the answer again is no. There is no analysis at all in the decision and there is no expert evidence which supports any object infringement by reference to what he

is putting forward here.

I'll come back to this in the course of my submissions, but I'll say this now: what he is talking about from paragraph 2(a) is something which is fundamentally different to what they were talking about in the decision. The decision is all about linking the two brands and so one going up, the other goes up, as a matter of requirement one going down, the other going down.

What he is now talking about is simply a situation where one manufacturer, here Imperial, can, by changing its wholesale price, be satisfied that the change in wholesale price would be reflected in the retail price.

If you are going to say that that is anticompetitive by object, if one only thinks about it for a moment, you are taking an enormous jump, because that's then a manufacturer led situation. All you are saying is the manufacturer, who has an arrangement with the retailer whereby he can be secure that, for instance, his lower price is reflected in a lower shelf price, you are saying that that is necessarily anticompetitive by object. Whereas of course you start off thinking: well, actually that's all about passing through your lower price. So one's immediate reaction is: how on earth can you just assert -- which is all we have at the moment --

that is anticompetitive by object?

Then you have to add into the equation, because this is the interesting thing, what Mr Lasok's submissions today seem to involve was this: if you ask him what's the counterfactual that you are talking about, the counterfactual appeared to be from his submissions today a situation where, with the P&D, Imperial could ensure that a lower wholesale price is reflected in a lower shelf price, because the retailer will not set prices, will not do actually what you heard evidence about, Imperial being concerned that their lower prices wouldn't be reflected in lower shelf prices.

But if you say the counterfactual is one where that's what is going to happen, that you may have a lower wholesale price but you find the retailer doesn't reflect that, you would then have to consider with an economist: well, what is the effect in that situation going to be? If you can't feed through your lower wholesale price to a lower shelf price, why would you lower the prices?

So that's one thing that would have to be considered. Another thing an economist would have to consider is what I explored in the evidence with the witnesses, which is the Pepsi/Coca-Cola thing, which is that it's actually perfectly standard in the supermarket

world for when Coca-Cola sees Pepsi at 89p a bottle or whatever it is, to say "Well, I'll bonus you to reduce my brand so I can match it". In other words, there is nothing unusual at all going on.

Now, if we go back to the decision, the first question that has been raised -- and again there has been some shifting of the ground -- is the decision, if we take it, how does that actually define the infringing agreements?

Now, when he addressed this last week, Mr Lasok said paragraph 1.1 was the important paragraph, which at the time you will remember I said was a slightly odd position to take, because that paragraph at 1.1, he wanted to say this was the definition of the infringing agreement, and so he could say that his new case was within this because infringing agreement was defined in rather bland and plain vanilla terms, namely, one sees about four lines down, it's the:

"... participating in agreements and/or practices which had as their object the prevention, restriction or distortion of competition in the supply of tobacco products in the UK."

So what he appeared to be saying last week was "Well, there we are, it's a very general description, so anything we like more or less can fall within it".

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

We have set out then in our document --

THE CHAIRMAN: You would say that where it says "the retailer would apply", again those words are rather ambiguous, but you say that what it means is that they agreed to apply or accepted a restraint under which they would apply?

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

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

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

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

1.4, the last sentence:

"The infringing agreement [this is where the restriction comes in] restricted the retailer's ability to determine its retail prices for competing tobacco products."

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

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

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

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

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

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

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

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

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

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

and if you put it up, you expect to see the shelf price go up.

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

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

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

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

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

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

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

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

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

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

all the other references we have given, but 6.251 is worth picking up:

"The restrictive nature of the infringing agreements resulted from the link between the retail price of competing brands, as described in sections (a) and (b) above. It is the fact that the requirement itself that created a link between the price of brand A and the price of the competing linked B that was capable of restricting competition."

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

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

Then at the top of the next page:

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

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

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

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

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

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

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

competition."

All because of this linking. Once you take away the linking, the basis for saying you were negligent and therefore ought to be fined goes.

Now, that's showing that the restriction that they are talking about is a restriction in relation to pricing competing linked brands. When you come to the theory of harm, I've already shown you 1.13, we don't need to go back to that, but what I wanted you to look at is where 1.12 and 1.13 then get explained and that's at page 129.

Again, it's very difficult for the OFT to deny that what they were putting forward was a theory of harm which was based on this very specific type of restriction, so that at 6.205 they again say in the last sentence:

"As a result of the P&D requirements, each infringing agreement restricted the ability of the retailer to determine its retail prices for competing linked brands."

Then 6.206, again just look at what it is saying:

"The P&D requirements involved linking the retail price of a particular brand to the price of a competing brand and precluded a retailer from making price changes that fostered interbrand competition within the

retailer's premises. As described in further detail below, the OFT considers that it was by its very nature capable of restricting competition", and so on.

They then explain the restriction starting at 6.213 onwards. This is the theory of harm. What they do in 6.213 is they refer to the SO, and you will see that footnoted, paragraphs 585 and 586. We have set out those paragraphs in our document at paragraph 28. The point to note about those is that it's self-evident from those paragraphs that they are at the absolute lock-step case. It is the lock-step case, therefore, that they are saying at 6.213 which restricts the retailer's ability to determine the retail prices of competing linked brands, because the relative prices are fixed on the basis of a required parity or differential. If a parity or fixed differential requirement is implemented, an increase or reduction in the retail price of one brand leads to a corresponding increase or reduction.

I think the other day the Tribunal said, "Well, at times it's appeared that Imperial may be trying to box the OFT in". That's actually not fair at all. That is what this is all saying, and that's what the SO says, and those paragraphs that we are looking at, that this is why it's anticompetitive, because you are restricted

as the retailer from doing anything whereby you must move up the prices together, and if one manufacturer changes his price, then you have to move the other one.

I am obviously not going to read it out, what they go on to explain in these paragraphs is the counterfactual compared to the P&D. What they say is that the counterfactual is at 6.215, so that's where you don't have a parity or differential requirement. What happens if you raise your price? Basically if you raise your price, you expect to lose market share because the other price isn't being raised. Whereas at 6.216, they put forward the contrast that if you have the P&D, then you can raise your price without fear of losing market share, therefore you may as well put up your price, because you can do it without fear.

Equally the converse they are saying is if, in our example, Gallaher can't get any advantage by reducing its price, because Imperial's price automatically comes down, why would it reduce its price? There is no point. So that's the basis of their case for saying that there is a horizontal type link, or an actual horizontal link, which means that price competition will be eliminated.

This theory is put in the skeleton argument. It's not only paragraphs 11 and 12. Again, if I can ask you to turn up the OFT's skeleton argument.

THE CHAIRMAN: The original skeleton argument?

MR HOWARD: No, the skeleton argument for the appeal. The lengthy one for the appeal.

THE CHAIRMAN: The one with paragraph 40 in it?

MR HOWARD: Yes, the paragraph 40 document.

When you see this, you might raise an eyebrow as to what the OFT is now saying. I have it loose, but I think it's in core 4.

(Pause)

Does everybody have it? {C4/45/1}

THE CHAIRMAN: I think we have now.

MR HOWARD: Could you go just to paragraph 1 first? Let's compare paragraph 1 with what we have been hearing from Mr Lasok today:

"The infringing agreements constitute object agreements because by their very nature, they were anticompetitive. They can be expected to be anticompetitive in that the restrictions are not pro-competitive."

Then they criticise CGL, who say that it's impermissible because it is too highly dependent on specific factual considerations.

Then they say:

"This is rather a strange complaint. Since the OFT is concerned only with the infringing agreements and not

with some factual variations of them."

Oh, really? I thought we heard today that it's all a refined case based upon variations.

Then they say:

"A consistent theme of CGL's argument is that alternatively formulated agreements may not be object infringements and may not be subject to the OFT's theory of harm."

Well, that's true. They say:

"The Tribunal is concerned only with the infringing agreements as found by the OFT. It goes without saying that the OFT must establish the existence of an agreement or practice in each case of the nature described in the decision to the requisite standard of proof."

Apparently this has now all gone out of the window. The OFT not only says "I can't establish it to the requisite standard of proof, I am not even seeking to do so".

Then if one goes to paragraph 6, I won't read it out, they explain that they are not saying that it's sufficient to say the agreements are capable of restricting competition in some general or ill-defined way, and at paragraph 8 they say that:

"The appellants' reliance on the vertical nature of

the infringing agreements is misplaced."

Then skipping over their quote, they say:

"As noted above, although the infringing agreements are agreements or concerted practices between manufacturers and retailers, the agreements required the linking of horizontal competitors' retail prices."

They then, at the end of that paragraph, again repeat the point that there was a requirement of linking of horizontal competitors' retail prices. Then in paragraph 9 they criticise Asda, in the penultimate sentence:

"Again, Asda turns a blind eye to a crucial aspect of the infringing agreements in this case, that they involve the linking of horizontal competitors' retail prices through a vertical agreement. As the OFT has repeatedly pointed out, each aspect of the infringing agreement must be considered in determining whether they constitute object agreements."

Then look at this:

"There is little to be gained from considering alternative agreements of a different nature."

Well, that's precisely, of course, where we are. The OFT, the scales have fallen from their eyes, the case they were putting forward based upon these agreements was wrong, now we say "We want to put forward

a different agreement, but we say it is a different agreement but somehow it must have the same effect", and that's just by assertion. Whereas previously their criticism of the appellants was that, "You appellants are putting forward a different basis of the agreements" and they say "You are just missing the point, why are you doing that? That's not the agreement, that's not what we're concerned with, we are not concerned with, for instance, whether wholesale prices trigger the movements in retail prices because that's not our agreement, that's not what we are on about". Yet now that's exactly what they are trying to say.

That then leads you to the paragraphs that you have seen many times before, which are the fundamental proposition. And again their case here is absolutely clear about what is going on here is that the P&Ds create the same horizontal link as if there had been a horizontal link between the manufacturers. That's why they were saying this was pernicious, because, in essence, their case was that this was price-fixing between two manufacturers. Now that case has gone. To try and say "Oh, well, somehow it's still the same" is a point we simply don't understand.

The point they are making in paragraph 12, I don't say it was right, but one can see what they describe as

a logical and simple case. And that logical and simple case was that the manufacturers had created a horizontal link, via the retailers, that was precisely the same as if they had agreed always to price at the same relativities as set out so that you can never win or lose customers, and that was what they described as the obvious proposition. So that their anticompetitive nature of the whole thing is based upon what appears at the end of paragraph 12, that in this environment the manufacturers will only have an incentive to put up prices and so prices increase for everyone, note what they say, manufacturers and retailers alike, so they are all in it, is the argument that's being run, and the profits can be divided between them.

That is about a million miles from what the OFT is now saying to you is the case they want to put forward.

How this operated, that's why one -- when we have had the debates in the past, when I have -- and you will remember the debate about paragraph 40 emerged particularly because I had made it clear on a number of occasions how unsatisfactory it was that Mr Lasok and his team failed to put their case to the witnesses based on paragraph 40 and that I was repeatedly putting that case. That's how we came to have the debate on days 16 and 17.

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

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

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

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

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

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

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

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

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

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

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

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

opportunity to respond didn't actually alter the nature of the requirement. He said something different today. It's quite interesting. The way in which we get this flip-flopping according to what suits them on a particular day.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DR SCOTT: Of the skeleton.

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

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

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

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

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

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

MR HOWARD: Absolutely.

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

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

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

which is that you may lose market share by becoming --

THE CHAIRMAN: And the fact that they may be restricted -- just thinking this through -- the fact that the retailer may be restricted from initiating its own price reduction doesn't disincentivise the manufacturer from triggering a price reduction if the manufacturer believes that there is no obligation on the retailer to drop the competing brand at the same time.

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

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

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

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

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

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

MR HOWARD: Yes, that is.

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

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

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

we don't have a theory of harm that relates to them, nevertheless somehow the Tribunal should proceed with that. We say you can't and shouldn't. But if one got to the stage where one was saying "Yes, this is part of the infringing agreement", and you had discretion, we say there is only one way to exercise the discretion, which is to refuse, bearing in mind the lateness of this and all the other prejudicial points.

THE CHAIRMAN: Perhaps overnight, we should all just have another look at what Mr Saini's submissions say about the position if we were against you on the first issue about whether the restraints 2(a) and 2(b) are part of the decision, whatever that means, what -- and I am not at all saying that's where we are, but just to fill in the matrix, what would we need to decide in addition in that case, because I think Mr Lasok's submissions seemed to be, "Well, that's all you would need to decide, then the case just carries on on that basis and at the end of the day, you just uphold the decision in part". But if you say something different from that, then I think we need to be clear about what other issues we would have to address in addition to that --

MR HOWARD: The problem is there is a complete lack of logic in the approach. The first stage is what is the decision as to what is the infringing agreement. If you

agree with me that it is a very particular infringing agreement, as they have defined it and as set out, that is the end of the point and saying well, within broadly the decision as opposed to what is in law the decision, I can find allegations of fact, findings of fact that support 2(a) and (b). In my submission, that doesn't get the OFT anywhere because it's not part of the decision.

But if you said "Well, no, we are going to take this very, very broad-brush approach and then consider what the position is", you are back in the situation where the OFT is having to say to you "I want permission to amplify this case. In order to run the refined case I need to set it out in what is a proper document, then I need leave to put in additional expert evidence", and that's why we say the answer to that is this is mucking around of about the worst order and it's unfortunate that it's mucking around at the behest of what should be a responsible regulator, and we say this is not what this Tribunal should in any way contemplate. So that's where, if we got to that stage, we would say you can --

THE CHAIRMAN: Then we are into the exercise of a discretion.

MR HOWARD: Yes. But we say --

THE CHAIRMAN: Well, let's leave it like that for the moment. That's something we may need to look at. 10.30 tomorrow morning. Is that going to give us a chance to finish by the end of tomorrow?

MR HOWARD: I would have thought so.

THE CHAIRMAN: 10.30.

(4.45 pm)

(The court adjourned until 10.30 am on Friday, 18 November 2011)

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