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IN THE COMPETITION

APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30 September 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 6)

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

APPEARANCES

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

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

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

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

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

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

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1 Friday, 30 September 2011
 2 (10.30 am)
 3 **THE CHAIRMAN:** Yes.
 4 **MR HOWARD:** I am going to call Mr Good now. Can I just
 5 raise a couple of points before we do that? One is we
 6 have scheduled for today Mr Good, Mr Batty and
 7 Mr Goodall. From discussions I have had with the OFT,
 8 it looks unlikely at the moment -- but we will obviously
 9 have to see where we can get to -- that they will be
 10 able to get through the three witnesses today. You have
 11 seen their estimate of time for cross-examination.
 12 We are currently scheduled to hear the ITL and Shell
 13 appeals on Tuesday and Wednesday. Now, as I understand
 14 it -- Ms Rose is not here, but I anticipate that Shell
 15 say that there is no flexibility in that, because those
 16 are the two days she has been booked and, as she puts
 17 it, paid for. Her words, not mine.
 18 **DR SCOTT:** Is there a promotional discount?
 19 **MR HOWARD:** That may be the basis on which her clerk
 20 operates; mine certainly doesn't!
 21 Leaving all that to one side, it would be
 22 unsatisfactory, I think it's agreed, for Mr Goodall to
 23 start his evidence and then be in purdah until next
 24 Thursday, so if we get to, say -- well, it will be up to
 25 the OFT to consider whether, when we have finished

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1 Mr Batty, there is sufficient time, but I anticipate
 2 there will not be, so we may finish slightly early today
 3 and have Mr Goodall on Thursday morning. Although that
 4 means in theory we are behind on the timetable, I think
 5 everybody concerned with the Co-op matter, which is what
 6 comes next on Thursday, Friday and the following Monday,
 7 it's believed that three days is excessive, but we have
 8 a bit of slack there so that we will not fall behind.

9 **THE CHAIRMAN:** Thank you very much.
 10 **MR HOWARD:** The other point I wanted to raise, I think there
 11 has been a direction that the witness statements should
 12 stand as evidence-in-chief, and it's not anticipated
 13 that we would be eliciting evidence-in-chief, but
 14 I would like to ask Mr Good a couple of questions which
 15 arise out of some points that were made by the OFT.
 16 It's simply to clarify something, so could I have leave
 17 to do that, please?

18 **THE CHAIRMAN:** Yes, certainly.
 19 **MR HOWARD:** I am grateful. So I will call Mr Good.

20 MR GEOFFREY GOOD (sworn)

21 Examination-in-chief by MR HOWARD

22 **MR HOWARD:** Mr Good, firstly, for the record, could you
 23 please tell us your full name and address.

24 **A.** Geoffrey Good, [redacted] Bath.

25 **Q.** Thank you. Could you be given core bundle, volume 3,

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1 and could you turn in that to tab 36, {C3/36} and could
 2 you identify -- there should be a statement there of
 3 8 August 2008, which is called your first witness
 4 statement. Could you identify --
 5 **A.** It isn't that, sorry.
 6 **Q.** Core bundle 3. (Pause). Is that --
 7 **A.** Yes.
 8 **Q.** -- your first statement?
 9 **A.** It is.
 10 **Q.** 8 August. So could you identify that and confirm that
 11 it's true?
 12 **A.** Yes, it is.
 13 **Q.** Then at tab 37 {C3/37} there should be what's called the
 14 first appeal witness statement, dated I think
 15 1 June 2010.
 16 **A.** Yes.
 17 **Q.** Just before I come to ask you some questions arising out
 18 of the matter raised by the OFT the other day, can you
 19 just tell us: what do you do now?
 20 **A.** Very little. I am retired.
 21 **Q.** When did you retire?
 22 **A.** In February 2010, about 18 months ago.
 23 **Q.** Right. Up to that date, were you at Imperial?
 24 **A.** Yes.
 25 **Q.** Now, could you please be given annex 13 to the SO

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1 decision. Could you turn in that to tab 19, you have to
 2 go, it's slightly confusing, first to tab 9 and then
 3 behind tab 9 you will see firstly there is A to F, and
 4 then there is 10 to 19. Do you have that?
 5 **A.** I have found 19.
 6 **Q.** Right. If you turn to tab 19, you should have
 7 a document which is "Report on Trade Cigarettes,
 8 May 1989"?
 9 **A.** Yes.

10 **THE CHAIRMAN:** Wait a minute.
 11 **MR SUMMERS:** Mr Howard, may I ask a general question before
 12 you start?

13 **MR HOWARD:** Of course.
 14 **MR SUMMERS:** Will you be handing out an organogram of some
 15 sort which will show the relationship of those who are
 16 giving evidence to the, for instance, ITL board so we
 17 have some sense of how they all fit into the ITL
 18 management structure?

19 **MR HOWARD:** We can certainly do that.
 20 **MR SUMMERS:** It would be very helpful, yes.

21 **MR HOWARD:** I don't think we have that to hand but we will
 22 do that before Tuesday morning, supply it to you on
 23 Monday.

24 Perhaps just in relation to this point, before we
 25 look at this document, perhaps you could amplify

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1 a little bit where, in relation to the structure of
 2 Imperial at the time, so this is now 1989, you fitted
 3 in?
 4 **A.** Yes, of course. I was called Trademarking Manager but
 5 it basically meant I ran the national account managers
 6 and I reported to a sales and marketing director, and he
 7 in turn reported to the chief executive, so I was two
 8 below the chief executive.
 9 Is that sufficient?
 10 **MR HOWARD:** Yes. Did that position change at any time prior
 11 to your retirement?
 12 **A.** Oh, yes. I did that job until 1996, so for six years.
 13 I then did several other roles until 2010, but none of
 14 them related to national accounts.
 15 **Q.** So your role in relation to national accounts terminated
 16 in 1996?
 17 **A.** Exactly.
 18 **Q.** Does everybody now have tab 19, which is "Report on
 19 Trade Cigarettes, May 1989"? If you go to the second
 20 page of that -- firstly, can you tell us, we see various
 21 data here about the price of various cigarettes, the RRP
 22 and then the selling price in multiples.
 23 What's the source of this information?
 24 **A.** Well, first of all, the retail prices are from the
 25 manufacturers' price lists, which we were legally

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1 obliged to produce. So it's our own, Gallaher's, BAT's,
 2 so that is stated fact, if you like.
 3 **Q.** Yes.
 4 **A.** The other numbers there are a result of RAL research,
 5 that stands for Retail Audit Limited, who are
 6 an independent market research company who were employed
 7 by us, and I think Gallaher's as well, to visit various
 8 shops and report back what they found, and it is average
 9 pricing, so there would be various tiers of pricing in
 10 certain shops, so it was the average that they found and
 11 they reported that back to us every month. So it's
 12 research and it's not precise data.
 13 **Q.** Right. Now, we have firstly lists of various
 14 cigarettes.
 15 **A.** Yes.
 16 **Q.** I think we all know that various of those are your
 17 brands, and various are other manufacturers' brands. As
 18 I understand it, those include -- there are Gallaher
 19 brands there and BAT brands?
 20 **A.** Yes.
 21 **Q.** If we compare the RRP with the price in the multiples,
 22 firstly tell us, what is a multiple in this context?
 23 **A.** A multiple at the time was defined as any retailer that
 24 had more than 10 retail shops.
 25 **Q.** And an independent then?

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1 **A.** Less than 10.
 2 **Q.** Right, okay. In relation to the comparison between the
 3 RRP's for your products and the average selling prices
 4 being recorded in the multiples, what was this document
 5 telling you?
 6 **A.** Well, if I can do it through example. Benson & Hedges,
 7 from Gallaher, was by far away the most important brand
 8 in the market, about 20 per cent market share.
 9 The recommended price at that time --
 10 **THE CHAIRMAN:** Can I just -- this is in a box marked
 11 "Confidential", I don't know whose confidentiality that
 12 it, but if it's Gallaher's --
 13 **MR HOWARD:** We are content to treat all of this openly.
 14 Indeed, I have to say for my part I cannot imagine that
 15 there is any sensitivity about prices 20 years previous.
 16 **A.** It was confidential at the time and I think that's
 17 probably why it was stamped, but you are right, it's
 18 certainly not now.
 19 **Q.** I think some of the confidentiality stamps have been
 20 somewhat overzealous. So feel free to --
 21 **A.** Right, to explain. So Benson & Hedges, an opposition
 22 brand, the leading brand was a recommended price of 1.61
 23 which is the fourth price down. Embassy No 1, by
 24 example, one of our leading brands, was £1.60, so there
 25 was a differential in recommended pricing of a penny.

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1 When we look at what was actually happening in the
 2 multiples, Benson & Hedges was 1.49.3, and Embassy No 1
 3 was 1.51.1. So we were almost 2p more than
 4 Benson & Hedges, although our recommended was a penny
 5 below. To put it simply, that was the problem
 6 I recognised. We had a problem in multiples and
 7 I wished to address that problem, we were being
 8 disadvantaged.
 9 **Q.** Right. What I want to do now is, in this bundle are
 10 a series of these documents. What we have done is
 11 prepare a table which sets out a comparison of the type
 12 that the witness has just been explaining. (Handed).
 13 Do you have a copy?
 14 **A.** Yes, thank you.
 15 **Q.** As we can see, the table below sets out the RRP's and the
 16 average selling price of Embassy No 1 and
 17 Benson & Hedges Kingsize in the multiple sector as
 18 calculated by market research from RAL, and these
 19 figures are contained in the trade reports between
 20 May 1989 and September 1991. As we can see, the
 21 left-hand column sets out the months from May 1989
 22 onwards insofar as we have the documents, with
 23 a document reference, and then the RRP's, the average
 24 selling price, the Embassy average discount, the
 25 Benson & Hedges RRP, the Benson & Hedges average selling

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1 price, and the Benson & Hedges average discount to RRP.
 2 Now, so the first one, May 1989, that was the one we
 3 just looked at, wasn't it?
 4 **A.** Yes.
 5 **Q.** Can you then, looking at the rest of this document,
 6 explain to us (a) what was happening, and how things
 7 changed insofar as they did?
 8 **A.** Yes. If I take you to the fifth column from the left,
 9 Embassy average discountable RRP, it begins at 8.9, and
 10 Benson & Hedges on the right-hand column was 11.7, so
 11 they were getting a bigger discount than us. That
 12 carries on, if you would look at the comparison of those
 13 two columns, all the way through. But by the end, by
 14 September 1991, when I took over in early 1990, we were
 15 beginning to get closer, so our discounts were
 16 improving, and that was simply the point, that we had
 17 a problem and we were beginning to improve our
 18 relativity. So our brands were becoming lower in price.
 19 **Q.** Yes. In fact, one sees that you became lower in price
 20 from about, I think, August -- no, just after, from
 21 December 1990 onwards, seem to have got lower in
 22 pricings?
 23 **A.** Mm.
 24 **Q.** So how was it you were achieving that?
 25 **A.** By my initially targeting the national account managers

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1 to achieve at least a 1p differential for Embassy No 1
 2 against Benson & Hedges, and for them negotiating with
 3 the retailers to try and achieve that. So they were
 4 beginning to do a good job and what I asked them to do.
 5 **MR HOWARD:** Good, okay, thank you very much indeed.
 6 **THE CHAIRMAN:** Could I just ask: going back to the document
 7 at tab 19, with the Benson & Hedges figure, what does
 8 the plus 0.3 figure ...
 9 **A.** I think it's a plus 0.5, if I am looking at the same
 10 one, for Benson & Hedges. Is that what you mean, the
 11 figure in brackets?
 12 **DR SCOTT:** I think it's explained in the paragraph above the
 13 table --
 14 **A.** It is, yes --
 15 **DR SCOTT:** -- which says "at the end of May", at the end of
 16 the line "(cf end of January)".
 17 **A.** Yes. It was a movement comparison, yes. Is that clear?
 18 **THE CHAIRMAN:** Yes, thank you.
 19 Cross-examination by MR LASOK
 20 **MR LASOK:** Mr Good, I wonder whether you could look at
 21 something else in annex 13, but it should be the first
 22 volume of annex 13, tab number 1. {D13/1}
 23 If you look at the very first page, this should be
 24 a letter from Ashurst Morris Crisp dated
 25 24 October 2003, and it's Imperial's response to what's

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1 known as a section 26 notice sent to it by the OFT. If
 2 you could turn to the internal page 16, look at
 3 paragraph 4.33, this is a paragraph underneath a heading
 4 "How price differentials/parities arose", and I wonder
 5 whether you could read that paragraph, not out loud but
 6 just to yourself, so that you are familiar with what it
 7 says.
 8 **A.** Mm. (Pause). Yes.
 9 **Q.** Now, that looks like a different explanation for the
 10 origin of the price differentials and parities from the
 11 one that you have given in your witness statement; is
 12 that correct?
 13 **A.** Slightly different. Can I explain?
 14 **Q.** Yes.
 15 **A.** I described just now an ongoing situation, which was out
 16 of line. This amplified the situation, where we had
 17 a price rise and Gallaher did not follow. So the
 18 differentials were widened. And we lost a significant
 19 amount of market share. So we were bad, and we got
 20 worse as a result of this.
 21 **Q.** The explanation for the price differentials given in
 22 4.33 is that, in the light of that, you decided to
 23 ensure that on-shelf retail prices would remain in line
 24 with certain competitor brands --
 25 **A.** Mm.

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1 **Q.** -- so that in future MPIs you wouldn't suffer any
 2 similar loss?
 3 **A.** We couldn't guarantee that situation, if we decided to
 4 have an MPI and Gallaher did not follow, the same thing
 5 could have happened, yeah.
 6 **Q.** But that's the -- you agree -- explanation given in
 7 4.33?
 8 **A.** Yes.
 9 **Q.** Right. But it's not the same as the explanation that
 10 you have given?
 11 **A.** No, I think, as I say, it's an example of making it
 12 worse, but we had an ongoing problem as well.
 13 **Q.** Can you explain to me why we have now two different
 14 explanations for the origin of the parity and
 15 differential requirements?
 16 **A.** They are not two different ones, they are the same.
 17 **Q.** I put it to you that they are different.
 18 **A.** We had an ongoing problem and it was made worse by this
 19 example. That's how I can explain it.
 20 **Q.** In the annex that you were asked questions about, not
 21 this one but 13/19, we were looking at average figures,
 22 weren't we?
 23 **A.** We were.
 24 **Q.** So that was just the average position?
 25 **A.** Yes.

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1 Q. But the average position wouldn't have been
 2 representative of the position in relation to each
 3 individual multiple, would it?
 4 A. No, it wouldn't.
 5 Q. No, it wouldn't, and do you know that Asda has produced
 6 a witness statement stating that manufacturers could be
 7 confident that they would pass through lower wholesale
 8 prices in the form of lower retail prices?
 9 A. It doesn't surprise me that that was so; yes.
 10 Q. And what about Sainsbury's, did you know that
 11 Sainsbury's had an EDLP pricing policy?
 12 A. I can't recall at the time that that was what it was
 13 called, but I can imagine they did, yes.
 14 Q. So large multiples like that, how would they figure,
 15 would they be close to the average in 13/19, or would
 16 they be below or above the average?
 17 A. Again, it would vary, depending on the brand. Maybe
 18 it's a good position for me to explain what else I did.
 19 Q. Yes.
 20 A. So, as you saw, as I have said, they were average retail
 21 prices, that wasn't good enough for me. So first of all
 22 what I started to do was go into retail shops myself and
 23 record prices, and then I got my national account team
 24 to do exactly the same, and we also then recruited
 25 a much bigger merchandising team that would also go into

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1 shops and record prices. So we were then getting
 2 actuals, if you like, and then we could see the problems
 3 where some, as you suggest, might have been in line,
 4 others were way out of line. So we knew precisely the
 5 problem that we had, and then began to address it.
 6 Q. Now, when you introduced this policy, as I understand
 7 it, you got on to all the NAMs and told them to sort it
 8 out?
 9 A. Yes.
 10 Q. In accordance with the policy that you had decided upon?
 11 A. Yeah.
 12 Q. But surely, if you did that, it would mean that a NAM
 13 would be doing it in relation to a multiple whose
 14 individual figure, if you like, was below the average
 15 stated in 13/19?
 16 A. I don't recall any multiples giving us a better than RRP
 17 differential at the time.
 18 Q. What about Asda?
 19 A. I would have -- if they were in line, that would have
 20 been okay, it wouldn't have changed, but I don't think
 21 they were ever cheaper than a penny, in the example of
 22 Embassy No 1 against Benson & Hedges.
 23 Q. Hold on a minute, because you have just told us that the
 24 figure in 13/19 is an average figure?
 25 A. Yes.

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1 Q. It's an average figure; there are some multiples above
 2 it and some below?
 3 A. No. Mathematically that doesn't need to be true. If
 4 they were in line and others were above, then the
 5 average would be above. I don't think there was anybody
 6 giving us an advantage of minus 2.
 7 Q. The point I am getting at is that you have an average
 8 figure; right?
 9 A. Mm.
 10 Q. And an average figure is going to be made up by a lot of
 11 individual figures?
 12 A. Yes.
 13 Q. Right, so arithmetically, some of these figures are
 14 going to be below the average?
 15 A. Yes.
 16 Q. Right.
 17 A. Yes.
 18 Q. Nonetheless, you were applying this policy across the
 19 board, irrespective of the individual figure of
 20 a particular multiple?
 21 A. Yes. I'll try and explain the maths again, if you like.
 22 The example we were showing that we were roughly 3p out
 23 of line. Some customers would have been in line, some
 24 could have been 6p worse. The average is then 3. So
 25 the ones that were in line, we were happy. We would not

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1 necessarily try and do anything to them. But the ones
 2 who were out of line, we had to address.
 3 Q. Now, the other thing that you say is that the purpose of
 4 this policy was to ensure that Imperial's lower
 5 wholesale prices were reflected in -- lower wholesale
 6 prices by comparison with Gallaher -- lower retail
 7 prices?
 8 A. Yes.
 9 Q. I just want to give you an example. Let's suppose you
 10 have two brands, a Gallaher brand and an ITL brand, and
 11 the RRP's are the same.
 12 A. Mm.
 13 Q. How would you know that the actual wholesale price that
 14 you were charging multiples was or would be lower than
 15 the actual wholesale price that Gallaher was charging
 16 them?
 17 A. Right. I'll explain that. First of all, in the price
 18 list were best terms, and these multiple retailers were
 19 all buying at best terms, the biggest quantity. So you
 20 could look in there and see that we were -- the saving
 21 in your example of being at parity with recommended, the
 22 terms would be virtually identical. So the start point
 23 was identical. Now, on top of that, there was ongoing
 24 dealing, there may have been promotional dealing, and we
 25 did not know the deal that Gallaher had struck with the

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1 retailer. So we then had to negotiate a new position to
 2 get ourselves back into parity if we were out of line.
 3 Now, that may have meant giving more money, but it may
 4 have been that we could persuade them to give us
 5 a better margin as well than the similar margins that
 6 they had been giving to Gallaher.
 7 **DR SCOTT:** Can I just ask a question: you referred to price
 8 lists.
 9 **A.** Yes.
 10 **DR SCOTT:** Are those Gallaher's wholesale price lists?
 11 **A.** Yes, I'll make that clear for you. When we both
 12 produced manufacturers' price lists, which as I say, we
 13 were legally obliged to do, it would have the
 14 recommended price in there but it would also have the
 15 terms that you started to sell to multiples at. But on
 16 top of that then there would be other discounts.
 17 **THE CHAIRMAN:** Which weren't in the price list?
 18 **A.** Which were not in the price list, exactly.
 19 **MR LASOK:** If the shelf price of these two brands was the
 20 same within a given multiple, how would you know that
 21 the actual ITL wholesale price was lower than the actual
 22 Gallaher wholesale price?
 23 **A.** By the "wholesale price" there, you mean --
 24 **Q.** The actual -- I am not talking about the price list,
 25 I am --

1 **A.** All the discounts on top.
 2 **Q.** Yes.
 3 **A.** You wouldn't know whether we were giving the retailer
 4 more or less. That was up to the negotiating of the
 5 national account manager of both sides.
 6 **Q.** Now, there were some brands for which there was
 7 a differential?
 8 **A.** Yes.
 9 **Q.** And you could have, for example, an ITL brand that was,
 10 let's say, looking just at the RRP's, was 15 pence above
 11 a Gallaher brand.
 12 **A.** I can't think of any, but yes.
 13 **Q.** I think there may be Lambert & Butler.
 14 **A.** Mm.
 15 **Q.** Or Superkings.
 16 **A.** They are both our brands.
 17 **Q.** Yeah. Perhaps I could take a specific example of this.
 18 You can put 13 away now. Could you go to annex 17, and
 19 go to tab 4, {D17/4} and if you go to the fifth page,
 20 you have an ITL strategy pricing sheet?
 21 **A.** Yes.
 22 **Q.** If you look at the left-hand side, the first -- I don't
 23 think this is confidential -- ITL brand is Superkings
 24 family?
 25 **A.** Mm.

1 **Q.** That's level with -- and then you have on the right-hand
 2 side three comparison brands?
 3 **A.** Mm.
 4 **Q.** Below that, you have on the left-hand side Lambert &
 5 Butler?
 6 **A.** Mm.
 7 **Q.** I just wanted to have a look at the Mayfair brand which
 8 is on the right-hand side, so that's on the second line.
 9 So you have Lambert & Butler not more than 17p above
 10 Mayfair?
 11 **A.** Yes.
 12 **Q.** Well, now, if you had that kind of differential, would
 13 it be the case that the wholesale price that you were
 14 charging the multiple would have been lower than the
 15 wholesale price that Gallaher was charging for Mayfair?
 16 **A.** I have to repeat myself, that we did not know, with all
 17 the discounts, what Gallaher were doing, so I couldn't
 18 answer that question.
 19 **Q.** Do you think it's likely?
 20 **A.** If -- and this was after my involvement -- that was the
 21 recommended retail price differential, which I assume it
 22 was, then our terms would be reflecting that. So if we
 23 end up with the same shelf price, we were probably in
 24 the same area, but only the retailer could tell you who
 25 was giving more or less.

1 **Q.** From an answer that you gave earlier on, am I right in
 2 thinking that one of the first instructions that you
 3 sent out to the NAMs was to ensure that Embassy was
 4 priced on the shelves at 1p below the competing Gallaher
 5 brand?
 6 **A.** Yes.
 7 **Q.** So therefore it's right to say, isn't it, that the
 8 policy was oriented around ensuring that the ITL brand
 9 would be priced at a particular level by comparison with
 10 the linked competing brand?
 11 **A.** Yes. I mean, at least a penny, but yes.
 12 **Q.** But at that level?
 13 **A.** Yes.
 14 **Q.** Yes, and the board decision that you referred to in your
 15 witness statement that fixed the one penny differential
 16 between Embassy and the competing brand --
 17 **A.** Benson & Hedges, yes.
 18 **Q.** That, as I understand it from your evidence, was
 19 a decision that related to the RRP?
 20 **A.** Yes.
 21 **Q.** But I read your witness statement as indicating that the
 22 board's intention was that that should be translated
 23 into actual shelf prices; is that correct?
 24 **A.** Yes. I mean, if the board, as it was then, went to the
 25 trouble of positioning our brands at whatever they felt

1 the brand was worth, it was natural for me, as
 2 responsible for national accounts, to achieve the same
 3 differential. And in fact I think I know, if I didn't,
 4 I would be shouted at.
 5 **Q.** Yes. Did the board make any other decisions of that
 6 nature to your knowledge?
 7 **A.** What do you mean?
 8 **Q.** Were there any other occasions on which the ITL board
 9 looked at the RRP's of ITL brands and said "Well, we
 10 think that there ought to be a parity with a particular
 11 competing brand or a differential", or was this a
 12 one-off decision?
 13 **A.** Oh no, it was constant --
 14 **Q.** It was constant?
 15 **A.** -- because at least twice a year there was a major
 16 upward change in prices, either a duty increase by the
 17 Chancellor or by manufacturers' price increase, and so
 18 they said -- at least two a year, sometimes we had two
 19 manufacturers' price increases, it was a period of high
 20 inflation, so that was happening quite often, and it was
 21 an opportunity for us to reposition a brand if we wanted
 22 to. A lot of the time, we didn't, I hasten to add, but
 23 there was an opportunity to do that.
 24 **Q.** So you were basically implementing board decisions?
 25 **A.** Yes. I mean, we recommended as well, but ultimately,

1 yes.
 2 **THE CHAIRMAN:** You recommended what, to the board, what --
 3 **A.** Yes.
 4 **THE CHAIRMAN:** Yes.
 5 **A.** I and my team would then talk to the sales and marketing
 6 director, who would talk to the chief executive.
 7 **MR LASOK:** Is it right to say that the primary objective, it
 8 may not have been the only one, was to keep the parity
 9 or the differential with the linked -- we are talking
 10 here in this case about Gallaher brands mainly, so just
 11 restricted to Gallaher brands.
 12 **A.** Good shorthand, yes.
 13 **Q.** So the objective was to keep the parity or differential
 14 at shelf price level --
 15 **A.** Or better.
 16 **Q.** -- and the wholesale price followed from that?
 17 **A.** The wholesale prices were relative -- again, it's the
 18 way you are terming it -- the wholesale prices were in
 19 the price list, and that was a mechanical process
 20 largely, but beyond that there were discounts.
 21 **Q.** You see, I quite agree with that. I'll be a bit more
 22 precise about the question --
 23 **A.** The net price of it.
 24 **Q.** -- because what I am thinking of is the explanation
 25 given in paragraph 4.33 of the document at annex 13,

1 tab 1, which you looked at.
 2 **A.** Where there was a differential price --
 3 **Q.** Which I think you confirmed was at least one of the
 4 reasons why the parities and differentials emerged.
 5 **A.** Yes.
 6 **Q.** But that was the situation, I think you agree with me,
 7 where after the MPI problem in June 1990, the decision
 8 was taken to keep the shelf prices at a particular
 9 relativity vis-a-vis the Gallaher price, and so have
 10 a situation in which the wholesale price didn't push the
 11 retail price out of line?
 12 **A.** Indeed. We were trying to get our prices down.
 13 **Q.** So these decisions that were made from time to time by
 14 the ITL board, they were decisions that, what, did they
 15 start off with identifying what the board thought was
 16 the right RRP, or RRP differential with Gallaher? How
 17 did it work?
 18 **A.** You have seen some of the reports on the trade, as
 19 documents, that was produced monthly, so we were all
 20 seeing the same data.
 21 If we saw a brand was not performing well in the
 22 market, if No 1 was losing to Benson & Hedges, we might
 23 have a debate to widen that differential, because it
 24 didn't have the legs to compete. So that would be the
 25 debate we would have at the time. As I say, a lot of

1 the time we decided we would not change it.
 2 **Q.** Now, I think that you said that you were there dealing
 3 with this particular problem in tobacco from something
 4 like 1990 to 1996?
 5 **A.** Yes.
 6 **Q.** Were you involved at any time afterwards?
 7 **A.** No, not at all, I changed company.
 8 **Q.** Because I'll tell you why I am asking that. If you look
 9 at annex 14 -- I think you can put 17 away.
 10 **DR SCOTT:** Before you move on, you have just talked about
 11 changing differentials, if we look at the table that was
 12 handed up, which compares the reports on trade between
 13 May 1989 and September 1991 --
 14 **A.** Yes.
 15 **DR SCOTT:** -- am I correct in saying that in fact the
 16 differential between RRP's was maintained at 1p
 17 throughout that particular period?
 18 **A.** You are right.
 19 **DR SCOTT:** I realise that beyond that, things may have
 20 changed --
 21 **A.** They did --
 22 **DR SCOTT:** -- but in that particular period, you maintained
 23 the RRP differential?
 24 **A.** Yes. As I say, we didn't change them very often,
 25 because they were major strategic decisions, and

1 affected our profitability as well.
 2 **DR SCOTT:** Yes, you had your margin to make as well.
 3 **A.** Exactly. So you are right -- your interpretation is
 4 correct, we did not change the differential in that
 5 period. But it would be discussed every time.
 6 **MR SUMMERS:** Mr Good, may I just ask: when you refer to the
 7 ITL board, was that the group board or was it
 8 a subsidiary board for the UK, or how did it work?
 9 **A.** I only smile because in 1986 we were taken over by
 10 Hanson Trust, who had a very precise style of
 11 management. Lord Hanson sent down a new chief executive
 12 who was very hands-on, I didn't like the man but
 13 I respected him, he was very knowledgeable, very good,
 14 learnt the business very quickly, and it was therefore
 15 not a Plc board, that was at Hanson Trust, we were
 16 a full subsidiary, and he not only was very precise, he
 17 was quite autocratic; he would make a lot of the major
 18 decision. Recommended prices was a major decision, for
 19 two reasons. One, it would affect market shares, and
 20 secondly it would affect our profitability that he was
 21 delivering to Lord Hanson. So a board is -- maybe in
 22 fairness it should have been in quotes, it was just one
 23 man and some of the other Hanson team who were there at
 24 the time.
 25 **MR SUMMERS:** Perhaps more of an executive committee.

25

1 **A.** That would probably be a better way of describing it.
 2 **MR SUMMERS:** A board as we might otherwise interpret it.
 3 I see.
 4 **A.** So apologies if I slightly misled you.
 5 **MR LASOK:** I wonder whether you could look at annex 14,
 6 please, and go to tab 26. {D14/26}
 7 **A.** Yes.
 8 **Q.** You should have a letter from Imperial dated
 9 8 March 2001?
 10 **A.** Yes.
 11 **Q.** Is that it?
 12 **A.** Yes, from Graham Hall, yes.
 13 **Q.** You see that the letter enclosed draft copies of the
 14 price list showing changes in RRP's following the Budget?
 15 **A.** Mm.
 16 **Q.** Then it says, and I'll just read it out:
 17 "Also enclosed is a spreadsheet showing the
 18 increases to be made to our selling prices in your
 19 stores which takes account of our post Budget strategy.
 20 At this stage we are still awaiting confirmation of our
 21 new cost prices, and as soon as these are available we
 22 will commence work on the new price file which will
 23 include any bonus amendments as a result of any changes
 24 to our pricing strategy."
 25 Now, I read that as indicating that Imperial had

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1 worked out what the Asda selling prices ought to be
 2 before they had settled what the wholesale price to be
 3 charged to Asda would be. The first thing is: this is
 4 several years after you had been involved in tobacco, am
 5 I right in thinking that?
 6 **A.** Yes.
 7 **Q.** So actually is it a fair question to put to you, to ask
 8 you about the meaning of this letter?
 9 **A.** Certainly not the detail of it, but I think I can
 10 probably understand the principles behind it, so please
 11 carry on.
 12 **Q.** The question I was putting to you is: do you agree that
 13 this is an incidence which shows that selling prices
 14 were worked out by Imperial before wholesale prices?
 15 **A.** Again, I am almost -- well, it said it, this is
 16 a Chancellor's Budget change. Now, you may recall that
 17 the Chancellor would stand up between 2 and 3 o'clock in
 18 the afternoon and say, "Cigarettes are going up 8p". We
 19 then had to react very quickly to decide what our prices
 20 were going to be and to try and help the retail trade
 21 not lose any margin. So we were giving them the advice
 22 because although it was an 8p increase, because of the
 23 ad valorem element of taxation, cheaper brands may have
 24 gone up 7.5p, expensive brands may have gone up 8.5p.
 25 So we had to make some quick decisions and try and guide

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1 the trade into preserving their margins with a bit of
 2 (inaudible), and we didn't want them to lose money by
 3 putting it up by the wrong amount.
 4 **Q.** Was it quite common to work out the shelf prices first?
 5 **A.** Yes, yes. Yes, because again we had a legal obligation
 6 to produce new price list very quickly, the following
 7 day we were applying new prices, which included a higher
 8 level of taxation.
 9 **Q.** You can put that --
 10 **THE CHAIRMAN:** Just to clarify that answer, when you said it
 11 was very common, is that very common generally or very
 12 common in a post Budget situation, or very common in
 13 a number of different situations?
 14 **A.** It was more likely in a post Budget situation, as
 15 everybody had to move very quickly. If it was
 16 a manufacturers' price rise, we usually gave the trade
 17 three or four weeks' notice of our intention to increase
 18 prices, and everybody could work out where we were going
 19 to be, and where they wanted to be.
 20 **THE CHAIRMAN:** Even in situations other than a post Budget
 21 situation, you would sometimes notify them of what the
 22 new prices --
 23 **A.** Yes.
 24 **THE CHAIRMAN:** What the new selling price was going to be
 25 before you had worked out what the net wholesale price

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1 taking into account all the --
 2 **A.** All the supporting bonuses.
 3 **THE CHAIRMAN:** -- bells and whistles there was going to be.
 4 **A.** Yes.
 5 **THE CHAIRMAN:** Is that fair?
 6 **A.** Yes.
 7 **DR SCOTT:** Just staying with the taxation, we understand
 8 that there are three elements of taxation.
 9 **A.** Very good.
 10 **DR SCOTT:** The basic bit, the ad valorem bit and the VAT
 11 cherry on the cake.
 12 **A.** Yeah.
 13 **DR SCOTT:** In a Budget, you are talking about ad valorem
 14 changes.
 15 **A.** Yeah.
 16 **DR SCOTT:** And 8p sounds like a change to the bottom level,
 17 but in fact in a Budget you get a mixture.
 18 **A.** You do, and the Chancellor just in effect announced
 19 an average, and two or three hours after the
 20 announcement of the Budget we would get a detailed one
 21 from HM Customs, which would actually explain --
 22 **DR SCOTT:** Explaining the breakdown.
 23 **A.** And then we had to calculate our prices quickly. And
 24 broadly what we were trying to do was break even, if you
 25 like. So if it was an 8p increase, some were 7.5, some

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1 were 8.5, then we might choose some brands to be 7p
 2 increase but others to be 9 with an average of about 8.
 3 So we were conscious of ever being accused of
 4 profiteering on the back of a Chancellor's Budget
 5 increase, so we were broadly trying to get it level.
 6 **DR SCOTT:** That's a help, thank you.
 7 **MR LASOK:** Now, could you go to your -- you can put that
 8 bundle away, please -- first witness statement, please,
 9 and look at paragraph 19. When you refer to "our
 10 intention", to what period of time are you referring?
 11 **A.** All the time I was involved.
 12 **Q.** Which was from 1990 to --
 13 **A.** 1990 to 1996.
 14 **Q.** -- 1996?
 15 **A.** Yes.
 16 **Q.** So am I right in thinking, therefore, that your
 17 paragraph 19 doesn't really shed light on what happened
 18 after 1996?
 19 **A.** I wasn't directly involved but I can't imagine it would
 20 significantly change. We were not -- are you talking to
 21 the introduction of that? "It was never our intention
 22 to prevent or discourage retailers from increasing the
 23 relative low price advantage", is that what you are
 24 talking about? I am sure that was still true.
 25 **Q.** I was also interested in your second sentence, where you

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1 say at the end that nothing would be said if there was
 2 a lower price for the ITL product and you would take
 3 advantage of the situation.
 4 **A.** We were terrible people, weren't we, but yes, we were
 5 very happy if we got a 2p differential when we were
 6 aiming for 1.
 7 **Q.** I wonder if you could look, for example, at annex 18,
 8 please, and go to tab 50. {D18/50}
 9 **A.** Yes.
 10 **Q.** This should be a page with two emails on it. The first
 11 email at the top of the page obviously is the later
 12 email, and it was sent on 16 November 2001.
 13 **A.** Yes.
 14 **Q.** Below it you have a message from Breda Canavan of
 15 Imperial, and she says:
 16 "Fiona, looking through your Small Classic and Small
 17 Classic filter prices, it would appear that your stores
 18 are still selling out at £2.31. From the price file
 19 I think the price should be £2.35 post MPI. Could you
 20 have a look at this?"
 21 Then Fiona Bayley responds at the top of the page,
 22 and indicates that -- Fiona Bayley is a Sainsbury's
 23 person -- Sainsbury's was going up to £2.35.
 24 That's an instance in which Imperial had observed
 25 that the ITL product was being sold for a lower price

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1 but raised this with Sainsbury with a view to putting it
 2 up?
 3 **A.** Yes, but I was using an example if we had a 2p advantage
 4 as opposed to 1. That would be ongoing normal business,
 5 if you like. This is a situation whereby there had been
 6 a manufacturers' price increase obviously of 4p, so we
 7 had told everybody that there was a manufacturers' price
 8 rise of 4p and the implication was that they would go up
 9 to that level of 4p. In this case, it's our person
 10 saying "Look, you may have missed that, you are going to
 11 be 4p worse off if you do."
 12 **Q.** That's your interpretation of that email exchange
 13 though, isn't it?
 14 **A.** Yes, it is.
 15 **MR HOWARD:** The point is my learned friend puts an email
 16 exchange which the witness has nothing to do with, he is
 17 asking him for what's happening and when he doesn't like
 18 the answer says "that's simply your interpretation". He
 19 can't have it both ways. He wants to cross-examine
 20 witnesses about documents which they had nothing to do
 21 with and if it elicits answers that he doesn't like, he
 22 can't then say to the witness "That's just your
 23 interpretation". If you don't want a witness'
 24 interpretation of a document he didn't see, don't ask
 25 him about it, and it's not a proper way to cross-examine

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1 witnesses. The witness has already told us --

2 **THE CHAIRMAN:** I think we heard the witness's answer. Do

3 you have any follow-up questions to that, Mr Lasok?

4 **MR LASOK:** Not on this document.

5 **THE CHAIRMAN:** Let's move on to another document.

6 **MR LASOK:** We need to bear in mind -- and I will direct this

7 at you, Mr Good -- I fully accept that you don't have

8 any knowledge of what happened after 1996, because you

9 weren't around at the time, the reason for referring you

10 to that document was because you said that you expected

11 that the pattern of behaviour would have continued.

12 I suppose I can shortcircuit this and say, well, on what

13 basis do you assert that the pattern of behaviour never

14 changed, is that knowledge or just a belief that you

15 had?

16 **A.** An expectation, I think.

17 **Q.** An expectation, but you have no reason for believing

18 that that was actually the case?

19 **A.** No, but I could -- that correspondence didn't surprise

20 me.

21 **THE CHAIRMAN:** That exchange of emails in 2001, now you have

22 seen it, does that lead you to revise the expectation

23 that you expressed in your witness statement? Does it

24 lead you to say "Oh, well, from that, it seems I may

25 have been wrong in thinking that that is the way that

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1 things carried on after I was no longer involved"?

2 **A.** No, I think in my witness statement I was expressing

3 normal business, when there were no price changes,

4 either duty or manufacturers' price rises, that's what

5 I would expect, and if we got a slight advantage, that

6 was great. But when there wasn't manufacturers' price

7 increase -- and this was quite significant to

8 everyone -- we had an ongoing relationship with the

9 trade and we thought it was an oversight and that they

10 had missed that particular packet and we wanted to put

11 that right, because we had business relationships with

12 them.

13 **THE CHAIRMAN:** Would this be fair: that would be your

14 interpretation of this is so it wouldn't cause you to

15 conclude that maybe you were wrong in what you said --

16 **A.** No, I think if that had happened on my watch, I would

17 not have been unhappy and I would not have been

18 surprised.

19 **MR LASOK:** Could you look at annex 17, then.

20 **A.** Same book?

21 **Q.** I am not sure, I don't think that -- were you not

22 looking at 14?

23 **A.** I was looking at 14.

24 **Q.** Or was it 18, I think. I would like to go to 17, so

25 it's in a different volume.

34

1 **A.** Sorry, 18, did you say?

2 **Q.** Yes, 18.

3 **A.** Yeah.

4 **Q.** Sorry, 17, I do apologise, it's annex 17, tab 9.

5 {D17/9} This should be a letter dated 26 September 2000.

6 It's tab 9.

7 **A.** Ah, sorry, I was on 18.

8 **THE CHAIRMAN:** Annex 17.

9 **MR LASOK:** Annex 17, tab 9.

10 **A.** It's 26 September, yes?

11 **Q.** 26 September 2000.

12 **A.** Yes.

13 **Q.** It's a letter.

14 **A.** A long letter.

15 **Q.** It's from Mr Paul Matthews, who was the national account

16 manager for Morrison. You have a heading on the first

17 page of the letter which says "Pricing Movements L&B/JPS

18 Brands" and he says:

19 "I understand that Mayfair brands are moving up from

20 next Monday, 2 October 2000. I believe this is

21 a general increase in the multiple retailers. As

22 discussed, could you increase the shelf price of L&B and

23 JPS brands from £3.60 to £3.65 from that date."

24 Isn't that also an indication that --

25 **MR HOWARD:** Sorry, if you are going to ask a witness to look

35

1 at a document he has never seen, he must have a chance

2 to read the document properly. Mr Lasok can see, as we

3 all can, the next sentence is of some significance in

4 relation to this.

5 **A.** Yes, I was about to raise that.

6 **MR LASOK:** Yes, well, read the page, if you would like.

7 **A.** I am perfectly happy to stay within that paragraph,

8 I think. Our counsel is correct, I was not directly

9 involved but I think I can understand what has happened

10 is that Gallaher's probably had a short-term promotion

11 to lower the price of Mayfair, and it was coming to

12 an end, and we had probably matched that, and so we were

13 then saying we will take away the retro bonuses on our

14 brand because our short-term promotion is now going to

15 end as well.

16 **Q.** Well, the topic that I am trying to address is the

17 statement in your paragraph 19 that the ITL view was to

18 say nothing about low prices of the ITL product and take

19 advantage of the situation. Why did you raise this,

20 then? I am sorry, I fully accept that you can't really

21 talk about the background.

22 **A.** I can talk about the principle, yes. My statement was

23 about ongoing business. Now, there were a lot of times

24 when there were short-term promotional activities where

25 one of the manufacturers would go to one of the

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1 retailers, or sometimes all of the retailers, and say
 2 "We want to bring a price down by 2, 3, 4p, and here is
 3 some money to achieve that". We were then faced with
 4 a series of choices, once we found that out. Sometimes
 5 we would only find out if it was actually a change on
 6 the shelf, sometimes the buyer would tell us, because he
 7 was trying to get money out of us often. So we would
 8 hear that a brand -- an opposition brand -- was going to
 9 go down for maybe a month.
 10 So the first thing we did was: was it real? If
 11 a buyer was telling us, he could have been winding us
 12 up, so often we might wait until the following week when
 13 we could actually see it on the shelf, so it was
 14 happening. We had then to decide whether we had the
 15 resources, the money to match that. Sometimes we
 16 didn't. If it was towards the end of our financial year
 17 and we had profit targets, then we sometimes said we
 18 will not immediately react. But we might go back
 19 a month later in the new financial year when we had more
 20 money.
 21 So that was the first thing we did. Then when we
 22 said yes, we will react, we will match their move, we
 23 would go to the retailer and negotiate a similar
 24 reduction. It wasn't in truth a very difficult
 25 negotiation because the retailer would say "You can come

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1 down 2p if you give us 2p", and so that would often be
 2 matched.
 3 When that period month came to an end, then Gallaher
 4 would go up and then we would go up. Sometimes we might
 5 be a week apart so we would go up a week later. There
 6 are always periods of short-term promotion, reaction,
 7 not always but often reaction, and then we would go back
 8 up again.
 9 So the counsel I think is suggesting that we never
 10 put prices up, or rarely, but we did all the time at the
 11 end of a --
 12 **THE CHAIRMAN:** He is not suggesting that, Mr Good, what he
 13 is suggesting is the same as with the last document that
 14 this seems to be an instance where you were -- ITL, not
 15 you -- drawing to the attention of the Morrisons buyer
 16 the fact that the price of ITL brand had not followed up
 17 the price of the Gallaher brand, or didn't look as if it
 18 was going to; whereas in your statement you said your
 19 understanding was that, if there was a widening of the
 20 differential in your favour, then you wouldn't draw that
 21 to the buyer's attention or the retailer's attention,
 22 because that was to your advantage.
 23 **A.** I'm guessing this was the end of a short-term promotion.
 24 The first paragraph says that "I understand that Mayfair
 25 brands are moving up next week", in effect, so --

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1 **THE CHAIRMAN:** So that was the end of the Gallaher
 2 promotion, you were saying, "We will then end our
 3 promotion and so the price should move up"?
 4 **A.** Yes. I'm guessing, but I think an educated guess.
 5 **MR LASOK:** I fully accept that, because you weren't around
 6 after 1996, this is a bit of a guess, but I'll put it to
 7 you again, that the plain wording here shows that this
 8 is an instance in which the prices were lower, they were
 9 at £3.60, and what Imperial was doing was asking
 10 Morrison to increase the price as a result of a move in
 11 Mayfair, the consequence of that would be the removal of
 12 the additional retro bonus, is wasn't the other way
 13 around?
 14 **A.** No, I don't think it is, I think they -- I assume -- had
 15 reduced their price down and then taken their bonuses
 16 off, so Mayfair was going up, and so we were taking our
 17 bonuses off and our price would go up. We could have
 18 made a decision at the time to say "No, we will go on
 19 a bit longer and we will have a new differential", but
 20 we didn't.
 21 **Q.** It's expressed, though, as you read it, isn't it?
 22 **A.** Which bit?
 23 **Q.** The paragraph beginning "As discussed"?
 24 **A.** Yeah. I am not sure the point you are making.
 25 **Q.** It's expressed as "Could you increase the shelf price",

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1 and then in the next sentence it says "This will be" --
 2 **A.** Yeah. Well, sorry, that's maybe the way he wrote it.
 3 **Q.** It's certainly the way he wrote it, but if I put it that
 4 you can't say whether or not he should have written it
 5 in a different way?
 6 **A.** He could have written it that "From next Monday we are
 7 going to reduce our retro bonuses and if you wish to
 8 maintain your margins, you will have to go up by 5p".
 9 He could have written it, and probably should have
 10 written it, that way.
 11 **THE CHAIRMAN:** Why does he say anything about the shelf
 12 price? Why doesn't he just say "This is to let you know
 13 we are stopping our additional retro bonus next week"?
 14 **A.** Again, I am having to guess, but I would assume that
 15 that was the old price, 3.65, so in effect end of
 16 promotion you are going to go back to where you were.
 17 Now, again, it would be up to Morrisons, they chose
 18 their prices, they could say "No, we don't wish to do
 19 that, we want to go £3.66 or" --
 20 **THE CHAIRMAN:** Why would the ITL person say anything about
 21 the shelf price at all in that circumstance? Wouldn't
 22 you want rather to hope that they would decide not to
 23 put their price up and that the differential would then
 24 widen?
 25 **A.** That is possible, but no, I think it was ongoing

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1 business, maintaining the relationship that you will
2 have the margin that you had before if you go up by that
3 amount, because a month had gone by and maybe the buyer
4 wasn't aware -- well, he would be aware of where the
5 price was. It was just being helpful, I think.

6 **MR LASOK:** You can put that file away, and I wonder whether
7 you could look at annex 29. This should be a letter
8 from Imperial dated 12 July 2000. Is that so?

9 **A.** No.

10 **Q.** The reference should be 19. Did I give you the wrong
11 one?

12 **A.** You said 29.

13 **Q.** I am terribly sorry, it should be annex 29, exhibit 19,
14 tab 19. {D29/19}

15 **A.** 12 July 2000?

16 **Q.** 12 July 2000?

17 **A.** I have that one now.

18 **Q.** Could you just read the letter. I would have suggested
19 that you just read it down to the heading "Advertising &
20 Units" at the bottom of the page.

21 (Pause)

22 Now, this was a situation, the context of it you can
23 get if you turn back to tab 11, because if you have
24 tab 11 {D29/11} it should be the T&S Stores/Imperial
25 Tobacco Business Agreement 1999/2000?

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1 **A.** Yes.

2 **Q.** If you look six pages in --

3 **MR HOWARD:** Can I just say, I wonder whether it is
4 appropriate for cross-examination on a document which is
5 from Mr Culham, who we are going to hear from, where
6 this witness has no involvement at all? There are no
7 questions being asked to establish whether he does know
8 anything about T&S Stores and the trading relationship
9 with them. I just wonder what is the utility of this?

10 **THE CHAIRMAN:** Is this going to the same point?

11 **MR LASOK:** It's a continuation of the same point, because
12 the letter at 19 is one in which there are no bonuses or
13 anything else that were going on currently but they had
14 identified differential errors. The nature of the
15 differential errors can be seen if you look at the
16 pricing requirements. I'm looking at this document just
17 to show what the pricing requirements were.

18 You see, I fully accept that there is a problem,
19 though, and that is that this witness, like a lot of ITL
20 witnesses, has explained in his witness statement his
21 interpretation of all kinds of documents that he was
22 neither the writer nor the recipient of. We also have
23 a situation in which his evidence is being advanced to
24 demonstrate what the position was during the
25 infringement period, when he now tells us that he was

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1 not around after 1996, so his evidence relating to the
2 infringement period is contingent upon what actually
3 happened post 1996 replicating what he saw happening
4 between 1990 and 1996.

5 He has said that he has no reason to believe that
6 there would be any change in behaviour, and I am just
7 exploring that particular aspect. But I have to make
8 this point: I find it extremely unsatisfactory that this
9 witness has been asked to give evidence on matters
10 relating to the period after 1996. I must confess
11 I hadn't realised that that was the position until he
12 told us that he had had no involvement with the matters
13 in issue after 1996.

14 **THE CHAIRMAN:** Well, perhaps a way to deal with this is --
15 probably it's time for us to have our mid-morning
16 break -- can you perhaps say which are the documents
17 which you want to take Mr Good to which are not
18 documents of which he is the author or the recipient, so
19 that -- given that he is going to be in purdah over this
20 break -- he can have a chance to look at them, so that
21 we don't then take time up with him having to look at
22 them and background documents for him to understand what
23 they are.

24 **MR LASOK:** What I intend to do over the break is two things:
25 one is to have a think about the schedule that was

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1 handed up at the start of the morning, and the other one
2 is to re-think my cross-examination, because I think
3 that in fact there is simply no point in me putting most
4 of the questions that I intended to put to him, because
5 he really cannot speak for what happened after 1996.

6 **THE CHAIRMAN:** Yes, I see that, but I also see your slight
7 predicament if we, in due course, are going to be asked
8 to assume what his evidence is as to what pertained
9 before 1996 did carry on into the infringement period.
10 There is that difficulty.

11 **MR LASOK:** My current intention is simply to refer to the
12 documents of --

13 **MR HOWARD:** Can I assist you maybe --

14 **THE CHAIRMAN:** Don't both speak at the same time.

15 **MR LASOK:** -- 29/19 and then move on to matters that I think
16 that Mr Good can properly profitably be cross-examined
17 on. So I have no intention of expanding this particular
18 area of cross-examination at the moment beyond that
19 particular document.

20 **THE CHAIRMAN:** Yes.

21 **MR HOWARD:** I think it's quite important to clarify a couple
22 of things, firstly what my learned friend just said
23 about the witness statement is simply untrue, it is not
24 the case that Mr Good has commented on documents to
25 which he was not a party, and my objection would be

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1 rather hollow if, for instance, he had commented on this
 2 document. Secondly, it's rather surprising that my
 3 friend says he didn't understand the position, because
 4 it says in paragraph 2 of the witness statement, which
 5 I am sure he has read, or certainly should have done,
 6 that he had responsibility for NAMs, national account
 7 customers in 1990 and in 1996 he was appointed as the
 8 cigar marketing director and then he became the managing
 9 director of the cigar division:

10 "I was then appointed international marketing
 11 director in 2002 above the tobacco products."

12 Then he was global brand director. So one can see
 13 what his position was.

14 We rely on his evidence, on the only basis one can,
 15 as to matters of which he has knowledge of which he is
 16 able to talk. We are not relying on his evidence,
 17 therefore -- we have called Mr Good to explain the
 18 position about the origin of these matters when he was
 19 involved. It's obviously open to Mr Lasok and the OFT
 20 to cross-examine other witnesses to show that actually
 21 a different regime, if that is what they wish to say,
 22 operated in 2000 and onwards.

23 **THE CHAIRMAN:** Well, what is the position, then, with the
 24 paragraphs of his statement, for example under the
 25 heading "Price Ceilings", where he refers to all sorts

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1 of aspects of the differentials? Is that intended to
 2 relate to cigarettes between 1990 and 1996, or is his
 3 evidence in relation to cigars, in which we know there
 4 were some differentials in the agreements, in any period
 5 prior to 2002? Or is it a more general statement as to
 6 what he assumes was the position over the infringement
 7 period based on his experience in cigarettes between
 8 1990 and 1996?

9 **MR HOWARD:** It's best for the witness to say what period he
 10 is intending to cover, rather than for me to say, but my
 11 interpretation of it is that he is giving evidence
 12 insofar as he was personally involved.

13 **A.** Yes.

14 **THE CHAIRMAN:** But in relation to --

15 **A.** 90 to 96.

16 **THE CHAIRMAN:** -- 90 to 96, but what about in relation to
 17 cigars up to 2002, were you dealing with these sorts of
 18 issues for cigars once you became --

19 **A.** No.

20 **THE CHAIRMAN:** -- managing director of the cigar division?

21 **A.** No, I was not involved at all with these decisions. The
 22 job was running a division, the factories, producing
 23 cigars ready to be sold, if you like.

24 **THE CHAIRMAN:** Right.

25 **A.** The sales team -- the only thing I might have been

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1 discussing was recommendations on the RRP's of cigars.
 2 I -- giving the strategy, I was certainly not involved
 3 in the slightest in day-to-day execution in national
 4 accounts.

5 **MR SUMMERS:** May I just ask: were you sitting on committees
 6 where these matters were discussed by your colleagues?

7 **A.** No.

8 **MR SUMMERS:** No executive committees or anything like that
 9 where you were party to general discussions?

10 **A.** No, no.

11 **THE CHAIRMAN:** So would this be fair: in relation to the
 12 matters covered in your witness statement -- which are
 13 not directly concerned with the origin of the
 14 differential pricing, your evidence goes to the period
 15 of 1990 to 1996 -- that you are not aware that there was
 16 any particular change in policy thereafter but you might
 17 not have become aware even if there was, because you
 18 were doing different things?

19 **A.** I don't think I knew of any changes, but I wasn't up to
 20 date all the time, no.

21 **DR SCOTT:** Just to talk about something which you -- to
 22 which you can --

23 **A.** Thank you.

24 **DR SCOTT:** -- give evidence. You have talked about the
 25 differential schedules in trading agreements and very

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1 helpfully taken us back, and I think what was put to
 2 you, the later schedules, and it seems to me what your
 3 evidence is suggesting is the differential schedules
 4 start and you expected them to continue and the example
 5 that you were shown is an example of them continuing?

6 **A.** I was guessing that, but yes. Yes. Yeah.

7 **THE CHAIRMAN:** Well, let's take a break there until just
 8 before noon, and that will give you a chance perhaps,
 9 Mr Lasok, to consider your position.

10 As I mentioned, Mr Good, you are now in the course
 11 of giving your evidence, and that means that you mustn't
 12 speak to your legal team or to anyone else about your
 13 evidence until we --

14 **A.** I'll stay here.

15 **THE CHAIRMAN:** -- resume. Is there something else?

16 **MR HOWARD:** No.

17 **THE CHAIRMAN:** Thank you.

18 (11.50 am)

(A short break)

20 (12 noon)

21 **MR LASOK:** Mr Good, could you turn back to annex 29, tab 19,
 22 please. {D29/19}

23 **A.** 12 July 2000?

24 **Q.** That's right, yes. I think when I took you to previous
 25 documents you said that the explanations for those

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1 documents were that it was either an MPI or there was
 2 a bonus change. Did you finish reading that page?
 3 **A.** I did.
 4 **Q.** That looks as though it's neither an MPI nor a bonus
 5 change.
 6 **MR HOWARD:** The reason I interrupted about this before, this
 7 is quite important, this is a document I referred you to
 8 in opening and to the evidence from Mr Culham which
 9 actually explained what was going on. If Mr Lasok wants
 10 to challenge that, obviously he will when Mr Culham
 11 gives evidence, but it's not fair to the witness, who
 12 has not seen this, to ask him what this shows without
 13 explaining to him what Mr Culham at least has said about
 14 it, which actually sets the matter into context.
 15 **THE CHAIRMAN:** Well, I don't see why he needs to know what
 16 Mr Culham says about it. Mr Lasok is asking him at each
 17 stage whether he's content to answer questions about it.
 18 If you are not content to answer questions about it,
 19 then it's perfectly fine for you to say, Mr Good, that
 20 you don't know what this document is and you would
 21 rather not answer questions. But if he is content to
 22 answer questions, then the value of his answers we will
 23 be able to assess in due course.
 24 **MR HOWARD:** It's also a question of whether or not one is
 25 eliciting anything which is actually evidence in the

1 sense of -- I mean, he is not here to give opinion
 2 evidence, he is here to give evidence of fact.
 3 **THE CHAIRMAN:** He is put forward as an Imperial witness and
 4 this is an Imperial document, and let's see whether
 5 there is anything useful he can say about it.
 6 **MR HOWARD:** Okay. I simply make the point that he ought to
 7 be asked whether, if he is going to be asked about the
 8 document, he actually knows what was going on and what
 9 the context is. Otherwise we will just get involved
 10 into a total muddle when we do actually have the witness
 11 who is going talk about it, and who Mr Lasok should then
 12 ask about it.
 13 **THE CHAIRMAN:** Thank you, Mr Howard.
 14 **MR LASOK:** Well, Mr Good, obviously you may not be able to
 15 answer the question I am going to put to you, but
 16 reading that document, I am going to put to you that
 17 this is not an MPI and this is not a bonus issue, and if
 18 you look at the differential errors that are listed,
 19 just below the second holepunch, and take, by way of
 20 example, the Classic Twin, which is the third one down,
 21 that is an error which involves a correction from 5.44
 22 up to 5.54.
 23 **A.** Mm.
 24 **Q.** I put to you that on the face of that letter, in the
 25 absence of some other explanation from some person who

1 can give evidence about it, that looks like a situation
 2 in which Imperial did contact a retailer and raise with
 3 them the fact that the ITL price was too low?
 4 **A.** I can't comment on the detail of it, I am afraid, but
 5 I read that and I wasn't sure in some cases whether
 6 there were movements up or down. The top line, Regal to
 7 go to 20.45, I didn't -- I assume it was downwards.
 8 **Q.** To be quite frank, that's why I took you to the third
 9 one down, because it looks a bit unambiguous.
 10 **A.** True. It's unfair for me to comment on the detail.
 11 I would prefer you to ask Mr Culham.
 12 **Q.** That's a perfectly fair response. Thank you very much.
 13 Now, you can put that document away. If you go back to
 14 your first witness statement --
 15 **DR SCOTT:** Sorry, just to be clear, Mr Lasok, what Mr Good
 16 has referred to in his witness statement is the fact
 17 that -- and this is paragraph 18:
 18 "Recognised retailers employed different pricing
 19 strategies in the tobacco category compared to other
 20 stores and even within their store network would also
 21 change their prices frequently. Taking that into
 22 account, relative price targets were a more practical
 23 means of incentivising them to pass on the price
 24 reductions."
 25 What you seem to be saying here is that this

1 recognises particular situations of the Day & Nite
 2 stores, and that what is being maintained here is
 3 differentials.
 4 Now, Mr Good, am I understanding that right, that
 5 this is tuned to Day & Nite stores, that you are looking
 6 to ensure that the differentials are right as
 7 an Imperial group and that this doesn't surprise you in
 8 terms of a communication in relation to maintaining
 9 differentials?
 10 **A.** No, I don't think that's fair, I don't think it did
 11 surprise me, but I couldn't tell some of those movements
 12 whether they were --
 13 **DR SCOTT:** Whether they were up or down, no, but it looks
 14 like the maintenance of differential, whether they were
 15 up or down.
 16 **A.** Yes.
 17 **DR SCOTT:** Thank you.
 18 **MR SUMMERS:** Mr Good, when this letter was written, you were
 19 in cigars; is that right?
 20 **A.** Yes.
 21 **MR SUMMERS:** Was Classic a cigar?
 22 **A.** Yes, it was and is.
 23 **MR SUMMERS:** So this would be one of your prices --
 24 **A.** Yes.
 25 **MR SUMMERS:** -- which was being dealt with in this letter?

1 A. Yes.
 2 **MR SUMMERS:** I see.
 3 A. But as I said earlier, the only involvement I would have
 4 had is Classic would be targeted against Hamlet, which
 5 was the biggest brand, and so all I would have ever said
 6 or been involved with is "We would like to see Classic
 7 alongside Hamlet in pricing".
 8 **MR SUMMERS:** So this letter would have been written, as it
 9 were, with your knowledge and instruction?
 10 A. No, not that letter at all.
 11 **MR SUMMERS:** Sorry, that particular element of the letter,
 12 with regard to the pricing of Classic?
 13 A. Yeah, it's difficult for me to fully understand what had
 14 gone on before that, but if it was fitting into line
 15 with the policy that I had been slightly involved in,
 16 just the policy, then I would have been happy with it
 17 probably. But I say, I can't understand the context
 18 fully.
 19 **MR SUMMERS:** I had understood you earlier to say that after
 20 1996 you were not involved in these matters in various
 21 committees or you had no other knowledge, but there was
 22 obviously a marketing -- were they fulfilling your
 23 marketing function for you, is that it or were you
 24 buying into their sales --
 25 A. Yes, it was more that, I was buying into their sales --

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1 **MR SUMMERS:** But they were acting to instructions that your
 2 salespeople had given or you had given about what the
 3 prices should be?
 4 A. Yeah, and the example you gave, Classic was launched
 5 against Hamlet, it was a bigger cigar --
 6 **MR SUMMERS:** So they were really providing a sort of service
 7 function for you --
 8 A. Yes, that is a fair description.
 9 **MR SUMMERS:** Thank you.
 10 **MR LASOK:** Mr Good, if you have your first witness statement
 11 in front of you, could you possibly turn to
 12 paragraph 25, and what did you mean by the words "at the
 13 relevant time"?
 14 A. Of my involvement, in 90 to 96.
 15 Q. Okay. So do I therefore take it that the rest of the
 16 statement is also concerned only with the period 1990 to
 17 1996?
 18 A. Yes. Yes.
 19 Q. If you go to the first appeal witness statement, do you
 20 have a copy of that?
 21 A. I do.
 22 Q. You give here, I think, an answer to various points made
 23 by the OFT. If you go to paragraph 16, perhaps, because
 24 paragraph 16 starts off with the words "In the light of
 25 the above", it may be useful if you just refreshed your

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1 memory by reading the statement up until paragraph 16.
 2 I did not ask you, actually, when was the last time you
 3 read the statement?
 4 A. This morning.
 5 Q. This morning, oh, so you are fully familiar with it
 6 then?
 7 A. Well --
 8 Q. Maybe we could pause for a minute while the Tribunal
 9 reads the paragraphs leading up to 16.
 10 A. How far back do you wish to go, you mean 1 to 16?
 11 Q. When you say "in the light of the above", which
 12 paragraphs are you referring to?
 13 A. I think it would be from 11.
 14 Q. From 11, fine.
 15 (Pause)
 16 Now, in paragraph 16 you say that you consider that
 17 providing funding to retailers would have been, if they
 18 had priced below the stipulated absolute maximum prices,
 19 completely impractical because you would have had to
 20 have negotiated a large number of prices. Isn't it
 21 correct that, in fact, it would only be a negotiation on
 22 the prices for those brands that were linked with
 23 a Gallaher brand?
 24 A. Yes, but we had five major cigarette brands at that time
 25 which together accounted for a little over 30 per cent

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1 of our market share, at the time it was 34, so it was
 2 the vast majority of our cigarettes.
 3 Q. Don't you have to negotiate wholesale prices anyway?
 4 A. Yes, in the way you meant it, yes.
 5 Q. If you are bonusing, you have to work out figures as
 6 well individually for each brand?
 7 A. It would be worked out, yes.
 8 Q. So it's really no different from the situation that you
 9 are contemplating in paragraph 16?
 10 A. True, but I think paragraph 18 was much more important,
 11 that the retailers would not have accepted that. They
 12 wanted freedom to move their prices, so they didn't want
 13 absolute maximum.
 14 Q. Now, in relation to paragraph 18, I think we have
 15 a problem about that, because we have already seen
 16 a document in which funding is made conditional on
 17 pass-through, that's the ITL/Morrison agreement in
 18 annex 17 at exhibit 4, {D17/4} from memory. We are now
 19 getting into that problem that we are looking at
 20 a period after you had been involved in all this, so --
 21 and I am being criticised, no doubt absolutely rightly,
 22 for taking you to documents falling within the
 23 infringement period when you don't know what was going
 24 on, so I have to say I suppose I can't take you to these
 25 contemporary documents -- is it therefore simply the

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1 situation that what you are stating in your witness
 2 statement here is your recollection of what the position
 3 would have been in 1990 to 1996?
 4 **A.** Yes. If we had tried to do what was being suggested by
 5 the OFT, yes.
 6 **Q.** Now, in relation to paragraph 17 you say that the
 7 monitoring retailers' compliance with absolute maximum
 8 prices would have been extremely onerous, but wasn't it
 9 the case that monitoring was done to check that shelf
 10 prices were in line with the retailers' pricing
 11 strategy?
 12 **A.** The price files would have been produced and they were
 13 checking that, yes.
 14 **Q.** So that they were actually going around checking
 15 individual shelf prices?
 16 **A.** Yes.
 17 **Q.** Right.
 18 **DR SCOTT:** Just staying with that paragraph --
 19 **THE CHAIRMAN:** Have you finished that line?
 20 **MR LASOK:** Yes, I was going to move on.
 21 **DR SCOTT:** He does refer to the monitoring of price
 22 relativities in the centre there as being easier to
 23 monitor.
 24 **MR LASOK:** You have heard what the member has said.
 25 **A.** Mm.

1 **Q.** Can I put to you the fact that as you were monitoring
 2 the shelf prices anyway, it made no difference?
 3 **A.** We were asking a team of 40 part-time employees to in
 4 effect tell us when there were errors, when we were not
 5 getting the price differences that we wanted. They
 6 became aware of those price differentials and were very
 7 quick to tell us when we were too high in price. But
 8 yes, they could have gone -- they did go into a lot of
 9 detail, but they became very quick at shorthand as well.
 10 **Q.** Now, in paragraph 20, you are now talking about
 11 temporary promotions and you say that:
 12 "It would not have been practical for ITL to use
 13 bonuses on the significantly expanded basis as that
 14 would have been onerous."
 15 I think you agree that ITL did use bonuses and they
 16 were conditional on achieving a pass-through of the
 17 benefit of the bonus?
 18 **A.** Yes, they were short-term temporary activities.
 19 **Q.** So all you're saying here is that it would have been
 20 onerous to do a bit more of that?
 21 **A.** Yes. Yes, it would have been, because each one was
 22 negotiated to bring a price down for a certain period.
 23 If they keep doing that in all the retailers, it would
 24 have been more onerous, yes.
 25 **Q.** More onerous?

1 **A.** Yes.
 2 **Q.** Right. But not impractical?
 3 **A.** No.
 4 **Q.** You then turn to price marked packs, and you say in the
 5 second line, paragraph 21, that:
 6 "Multiple retailers did not like to stock PMPs as
 7 the price marked on the pack restricted their
 8 flexibility to react to moves by their retail
 9 competitors."
 10 Again, this is a time problem, because we have
 11 evidence that, for example, Sainsbury supported PMP
 12 initiatives run by ITL during the infringement period,
 13 but you can't comment on that, can you?
 14 **A.** No.
 15 **Q.** No, so actually what you say about PMPs isn't relevant
 16 to the period that we are looking at, which was long
 17 after you had ceased your involvement?
 18 **A.** That's probably fair, yes.
 19 **Q.** Then paragraph 23, under the heading "Reducing Wholesale
 20 Prices", you say that at the bottom line you recollect
 21 that:
 22 "... ITL did consider reducing wholesale prices as
 23 a marketing strategy, but concluded that this would
 24 simply reduce ITL's margins without increasing sales as
 25 retailers would fail to pass on the wholesale cost

1 reduction."
 2 Now, that's the view that you took between 1990 and
 3 1996?
 4 **A.** Yes, and it wasn't a long debate. In here I was
 5 reacting to the OFT's statements of why could you not
 6 use other methods, so that was a specific reaction about
 7 that. Ironically that was the problem that I had when
 8 I came into the job, because we were giving wholesale
 9 price reductions but we were not achieving a low enough
 10 shelf price.
 11 **Q.** If we have evidence relating to the period that we are
 12 looking at, from a retailer who says that a manufacturer
 13 could be confident that there would be a pass-through of
 14 lower wholesale prices, that would alter your opinion on
 15 this aspect of the case?
 16 **A.** No, not totally. That's one retailer's opinion, not all
 17 of them worked in the same way.
 18 **Q.** I won't press you further on this, because it would be
 19 unfair to ask you to comment on evidence relating to
 20 a period with which you are not familiar.
 21 Now, I see paragraph 24 of your witness statement
 22 also refers to the period 1990 to 1996?
 23 **A.** Yes.
 24 **Q.** Right. Before we move on to the last question that I am
 25 going to put to you, or little group of questions,

1 I wonder whether you could turn back to paragraph 7 of
 2 this witness statement.
 3 **A.** The appeal one, or the original?
 4 **Q.** It's the one we are looking at at the moment.
 5 **A.** The appeal.
 6 **Q.** Yes, the first appeal witness statement. Because in
 7 paragraph 7, as I understand it, you say you explained
 8 the strategy that you started off your evidence, oral
 9 evidence today, with and that strategy was in connection
 10 with B&H and Embassy, and you say in that paragraph, in
 11 the last sentence:
 12 "ITL faced a similar competitive disadvantage and
 13 adopted a similar strategy for its Regal brand which
 14 also competed with the stronger B&H brand."
 15 That's correct?
 16 **A.** Yes.
 17 **Q.** So you can put away that bundle, and I would like now to
 18 go to 13, and effectively go back to where Mr Howard was
 19 asking you questions. I apologise for the fact that
 20 this is going to be a bit raggedy, because --
 21 **THE CHAIRMAN:** Volume 13.1 or 13.2?
 22 **MR LASOK:** It's 13.2, the trade reports.
 23 If we go to --
 24 **MR HOWARD:** What do you mean by 13.2?
 25 **MR LASOK:** I have two 13 volumes, and in the second one

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1 I have all the trade reports.
 2 **THE CHAIRMAN:** Yes, we have two ring binders for annex 13,
 3 tabs 10 to 76 are in the second volume of annex 13.
 4 **MR HOWARD:** I had a different format. That's fine. Thank
 5 you.
 6 **MR LASOK:** I wonder whether you could turn to tab 19.
 7 **A.** Mm.
 8 **Q.** This is the trade report for May 1989, and I think your
 9 attention was drawn to Embassy No 1 and B&H. It's B&H
 10 Kingsize, isn't it?
 11 **A.** Yes, it is.
 12 **Q.** If we are looking at the second page of the trade
 13 report, it's the first item, Embassy No 1, and it's the
 14 fourth item, B&H Kingsize?
 15 **A.** Yes.
 16 **Q.** You were drawing attention to the fact that the RRP for
 17 Embassy No 1 is 160, the RRP for B&H Kingsize is 161,
 18 but when we look at -- and I'll just take for the sake
 19 of simplicity, the multiples -- we see average prices
 20 that show Embassy No 1 at 151.1 -- I can't remember now,
 21 I don't think these are confidential, are they?
 22 **THE CHAIRMAN:** No, they are not.
 23 **A.** No.
 24 **MR LASOK:** Not any more.
 25 And B&H Kingsize at 149.3. Okay? Now, you were

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1 asked questions about that.
 2 **A.** Mm.
 3 **Q.** You say that that illustrates the justification for the
 4 policy that you adopted?
 5 **A.** Mm.
 6 **Q.** Now, we have just seen that you adopted the same
 7 strategy in relation to B&H Kingsize and Regal?
 8 **A.** Mm.
 9 **Q.** So if we move from the fourth item down, which is B&H
 10 Kingsize, to the sixth one, we see Regal Kingsize?
 11 **A.** Yes.
 12 **Q.** If we move, I have a finger so I will move my finger
 13 across to the right, I see that the RRP for Regal is
 14 159, and the RRP for B&H Kingsize is 161.
 15 **A.** Mm.
 16 **Q.** Then moving across again, we see that here the
 17 difference in average prices is between 149.3 for B&H
 18 Kingsize and 146.5 --
 19 **A.** Yes.
 20 **Q.** -- for Regal. So although the RRP is 2p, Regal was
 21 nearly 3p below B&H Kingsize?
 22 **A.** Mm.
 23 **Q.** In fact, when one goes through these documents, let's
 24 have a look at tab 33, so 33 is the trade report for
 25 October 1989?

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1 **A.** Yes.
 2 **Q.** If we go to the second page, here I think it gets
 3 slightly complicated because there are pre MPI and post
 4 MPI figures, but if we look at B&H Kingsize, which is
 5 the fourth item down, and Regal, which is the seventh
 6 item down, we see that both pre MPI and post MPI the
 7 differential between the RRP is 2p in favour of Regal.
 8 **A.** Mm.
 9 **Q.** If we look at the multiples under September, the
 10 difference in terms of the average shelf price is 2p or
 11 thereabouts, it's perhaps 1.9. If we move to October,
 12 it looks as though it's 3, 3.2, in favour of Regal.
 13 **A.** Mm.
 14 **Q.** If we go to 34 -- I'm doing this not because I want to
 15 be boring or time-wasting, it's just to demonstrate that
 16 I'm not identifying an isolated phenomenon. In 34 we
 17 have the trade report for November 1989. If we go to
 18 the second page there, and look at the fifth item, it
 19 looks as though it's B&H Kingsize?
 20 **A.** Yes.
 21 **Q.** And we see Regal, three below that, and again we have
 22 pre and post MPI RRP, and the price differential is 2p
 23 in favour of Regal, but then when we move to the
 24 multiples figure and we look first at October, the
 25 differential in fact is more in favour of Regal, it's

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1 something like 3.2 or something like that, and if you
2 look at the November figure, it's 2-point something.
3 **A.** 2.6.
4 **Q.** Then finally, tab 35, which is the trade report for
5 January 1990, if we look at the third page, at least in
6 my copy it's the third page, and again I am assuming
7 that these figures are not confidential, we have as
8 usual Embassy at the top, B&H Kingsize is the fifth one
9 down, and Regal Kingsize is the seventh one down. If we
10 look at the pre and post MPI RRP's, there is a 2p
11 differential in favour of Regal. Then if we look at
12 what appears to be the December figure for multiples,
13 the differential is 2.6p in favour of Regal.

14 **A.** Mm.

15 **Q.** Now, I did that because the pattern that we are
16 observing in relation to B&H and Regal is not the same
17 as that for Embassy and B&H, yet you applied your
18 policy, as I understand it, in relation to both of these
19 relationships?

20 **A.** Yes.

21 **Q.** Why did you do that?

22 **A.** Well, first of all, these are average researched prices,
23 but obviously the average was in our favour, but there
24 would be some outlets which were not, as you said
25 yourself earlier, on average there are ... so there

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1 would be some that were maybe only be a penny
2 differential and some that may be 3. So we had to
3 address the problems that were wrong.
4 The second reason, which is a little harder to
5 explain, is that Regal was a very regional brand, it
6 basically sold in the north of England and Scotland and
7 Wales, in Midlands and Southern England it was a very
8 poor seller. But in the areas where it was selling
9 well, it was big brand. So the retail trade were more
10 conscious of getting Regal right than they were Embassy.

11 So we had less of a problem, but we still had some
12 problems in some outlets which we wanted to address.

13 **Q.** I am going to put to you this: what you say happened was
14 that a national policy was adopted and applied to
15 retailers and all sorts, we will focus on multiples for
16 the moment, it was applied to all multiples,
17 irrespective of whether they were passing through the
18 benefit of lower wholesale prices or not.

19 **A.** Mm.

20 **Q.** And it was applied across a range of brands, not all
21 brands, but a range of brands, irrespective of whether
22 or not the problem that you had identified existed in
23 relation to that particular ITL brand. Do you agree
24 with me?

25 **A.** Yes, but the scale of the problem varied.

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1 **MR LASOK:** Well, I have no further questions.

2 Questioned by THE TRIBUNAL

3 **THE CHAIRMAN:** There is just one point: in your first appeal
4 witness statement at tab 37, paragraph 14, you say in
5 the second sentence there:

6 "An individual retailer might change its tobacco
7 retail prices weekly to respond to competitive action by
8 other retailers or as a result of increased or decreased
9 funding from Gallaher and the other manufacturers."

10 So there you seem to be referring to changes in the
11 retail prices that were independent of any changes in
12 the wholesale prices, certainly in respect of the first
13 example, responding to competitive action by other
14 retailers. This again relates to your time in charge of
15 national accounts?

16 **A.** Yes, it does.

17 **THE CHAIRMAN:** So that relates to the period 90 to 96?

18 **A.** Yes. Would you like me to expand a little on that?

19 **THE CHAIRMAN:** Yes.

20 **A.** Basically sometimes a retailer would reduce its price,
21 either on its own or with some help from on our terms an
22 opposition company, and so Benson & Hedges may go down.
23 We at that time did not necessarily know why it had gone
24 down, but it had gone down. So we then had the
25 opportunity to react or not, but it was a very

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1 competitive marketplace, not just us and Gallaher, but
2 also amongst the retailers. There were retailers like
3 Morrisons and Asda and Kwik Save which were very low in
4 price. There was Tesco trying to beat Sainsbury's to be
5 number one retailer, so they were competing, and there
6 was a company called Victoria Wine which had a policy of
7 being a penny below whoever was nearest to them
8 physically in their outlets.

9 So there was a lot going on, and so sometimes -- and
10 we didn't even necessarily understand it -- prices were
11 changing within the retail trade, nothing to do with us.

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

13 **DR SCOTT:** Just one question to confirm my understanding of
14 your perspective. Tobacco as a whole is relatively
15 inelastic, in other words --

16 **A.** As a whole?

17 **DR SCOTT:** As a whole, yes.

18 **A.** I might dispute that, only in the sense that over -- you
19 can see the period I was talking about, prices were
20 £1.50, they are now £7. So I think they are sensitive
21 as a whole to duty rises and to some extent manufacturer
22 price rises but they have become more expensive and the
23 market has declined.

24 **DR SCOTT:** But in paragraphs 27 to 33 of tab 36, you talk
25 about the role of differential provisions in encouraging

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1 low shelf prices and the success of the low pricing
2 strategy.
3 **A. Mm.**
4 **DR SCOTT:** And in 33 the attractiveness and volumes of ITL's
5 products sold to consumers. Would I be right in
6 thinking that, in moving consumers from other brands to
7 ITL, what mattered was the elasticity between the
8 brands?
9 **A.** That would be a fair assumption, yes.
10 **DR SCOTT:** So that it was in fact the relativities that
11 mattered rather than the absolute level of prices during
12 the period which we are thinking of.
13 **A.** Yes.
14 **DR SCOTT:** Thank you very much.
15 **A.** I have one point, only because I am proud of it,
16 I think, is that in 1990 we had 34 per cent, by the time
17 I finished in 1996 we had 38.5, so we had had a policy
18 of trying to improve our shelf prices, and consumers
19 were voting for us, there is not a huge amount of
20 shifting but there is enough shifting to move -- and
21 remember, we had been in decline from 1978 to 1990, and
22 so to stop the decline and turn it round was a very
23 pleasing result, the consumers were happy I think that
24 we had done what we had done.
25 **THE CHAIRMAN:** Can I just clarify something else? At the

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1 end of paragraph 6 of your first witness statement, and
2 at the end of paragraph 12, you refer to the competitive
3 prices compared to brands of rival manufacturers,
4 despite the fact that they had lower RRP's and were being
5 offered to the retailers at low cost prices. Then at
6 the end of 12:
7 "... despite the fact that Embassy No 1 had a lower
8 RRP and a lower cost price."
9 There you do seem to be saying there are two
10 factors, the lower RRP and a lower cost price, but as
11 I understand your evidence today, you didn't know what
12 the overall cost price was other than the best terms,
13 I think was the phrase you used, in the price list?
14 **A.** So by lower cost price at the end of 12, I meant the
15 best terms, so we were starting from a lower position.
16 Now, again we did not know what Gallahers were offering,
17 and so we could have had a high net price but it was up
18 to the national account manager to negotiate a lower
19 price using as little money as possible.
20 **THE CHAIRMAN:** Any re-examination, Mr Howard?
21 **MR HOWARD:** Yes, just a few questions, if I may.
22 Re-examination by MR HOWARD
23 **MR HOWARD:** Mr Good, I just want to ask you, which is
24 I think following on from some of those questions, about
25 the policy that you were seeking to introduce with the

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1 differentials and how you intended that to work and be
2 implemented by the national account managers. Okay?
3 I am looking obviously at the period of your
4 involvement, 1990 to 1996.
5 I want you to explain to us this: take various
6 different situations, let's take the first one, Imperial
7 has a strategy of Embassy being priced at, you put it
8 I think at least 1p below Benson & Hedges?
9 **A. Mm.**
10 **Q.** You leave your national account manager to go and
11 provide for that. Now, assume during the course of the
12 year Imperial decides to have a manufacturing price
13 increase whereby it puts up the price of Embassy and
14 other brands by 4p, for the sake of argument. Now, in
15 that situation, how was this policy to operate? What
16 was the requirement or expectation that you had of the
17 retailer where you put up --
18 **MR LASOK:** Can I just interrupt? That's not a relevant
19 question, because the witness can only give evidence as
20 to the period 1990 to 1996.
21 **MR HOWARD:** That's what I said.
22 **MR LASOK:** And we are looking at the period of the
23 infringement, and the problem with the period of the
24 infringement is that this is characterised by documents
25 which may be of a different character from the ones that

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1 were prevailing in 1990 to 1996.
2 **THE CHAIRMAN:** Well, on the basis that we are just at the
3 moment looking at what was Mr Good's understanding when
4 he introduced these agreements, which may or may not
5 have been altered as the arrangements evolved between
6 then and the period that we are interested in, it would
7 be interesting to hear his answer to that, but
8 I understand the point you make.
9 So we are looking at when you introduced the policy.
10 **MR HOWARD:** Yes.
11 **A.** Perhaps I could answer by example.
12 **MR HOWARD:** Let me start again, then it will just be
13 entirely clear. We are dealing with the period of your
14 involvement, I think I made that clear. So you have the
15 P&D differential, whatever one wants to call it, whereby
16 Embassy is to be at least 1p or let's say it is 1p, it
17 doesn't matter for the sake of what I am asking,
18 differential with Benson & Hedges. So the first example
19 I want you to consider is: you decide that the costs
20 increases are affecting you, and therefore there is
21 going to be across the board increase of your
22 cigarettes, which affects Embassy by going up 4p per
23 packet.
24 On the policy that you had, what would, if anything,
25 be the expectation of what, or requirement, whichever

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1 way you want to put it, of what the retailer was to do
 2 if you unilaterally put up your price?
 3 **A.** Right. So if it was our decision to change the
 4 manufacturers' price increase by putting it up by 4p,
 5 then we would expect that to be the situation on the
 6 shelf as well. So if Benson & Hedges was £1.50 and
 7 Embassy No 1 was 1.49, after the price rise we would
 8 expect it to go to 1.53 because it was our decision, it
 9 was not the retailer's fault at all, we had put our
 10 prices up, so the relativities would change, and we
 11 would certainly not penalise a retailer from doing that,
 12 in any way.
 13 **Q.** Assume that you have a unilateral price increase and
 14 Gallaher holds its price --
 15 **A.** Yeah.
 16 **Q.** -- did you have any expectation -- let's break it down
 17 first. Did you intend there to be a requirement that
 18 the retailer should be required to move the price of the
 19 Gallaher brand simply because you had moved the
 20 wholesale price and therefore the reselling price of
 21 Embassy?
 22 **A.** Certainly not, and certainly it would never happen,
 23 nothing had changed with Gallahers in my Gallaher, they
 24 would stay at 1.49 and we would be 1.53. We couldn't
 25 dictate the retailer to do that, no, there is no chance.

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1 **Q.** Could we take a different situation. Where again we are
 2 looking at the Embassy -- I am sorry?
 3 **DR SCOTT:** Sorry, can I stop you, Mr Howard?
 4 **MR HOWARD:** Of course.
 5 **DR SCOTT:** Are these hypothetical or are there instances in
 6 this period where, if we were to extend the table handed
 7 up earlier on, we would find unilateral price changes,
 8 because what's characterised on this table is parallel
 9 changes in RRP's. Are you suggesting to the witness
 10 a hypothetical situation or are you referring to actual
 11 unilateral price changes?
 12 **MR HOWARD:** To answer your question, I am asking him about
 13 what the requirement or expectation was of the retailer.
 14 What this table shows -- and this is of course very
 15 important that one distinguishes the two -- is
 16 manufacturers changing the RRP. So in other words, this
 17 doesn't show anything about unilateral price changes.
 18 **MR LASOK:** Can I --
 19 **THE CHAIRMAN:** Wait. You mean a unilateral manufacturers'
 20 price increase, not a unilateral retailer's price
 21 increase?
 22 **MR HOWARD:** Sorry, maybe I misspoke.
 23 **THE CHAIRMAN:** But the point that's being made is: are you
 24 asking Mr Good a hypothetical on Day 1 after signing the
 25 agreements before any MPIs or anything had taken place

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1 what was his expectation, and perhaps a subsidiary
 2 question is what was his thought about how likely such
 3 a situation was to occur, given that what we tend to see
 4 is increases occurring at roughly the same time and at
 5 roughly the same amounts for the two manufacturers.
 6 **MR HOWARD:** The reason I am stripping it out is because of
 7 course that's the case that the OFT makes. The OFT says
 8 that there was a requirement on a retailer where
 9 Imperial put the price up to move the price of
 10 Gallaher's brand.
 11 **THE CHAIRMAN:** Yes, so if you are putting this to Mr Good,
 12 I think we just need to be clear about what the
 13 implications of whatever answer he gives are.
 14 So are you asking: on day one of the agreement what
 15 was his expectation, rather than what was his experience
 16 of how these operated over the time?
 17 **MR HOWARD:** Absolutely, and we can separate them out.
 18 **MR LASOK:** Could I just interrupt? My learned friend has
 19 explained that he wants to ask a question about the
 20 expectations of the retailer.
 21 **MR HOWARD:** Not the expectation of the retailer, I am not
 22 asking about that.
 23 **THE CHAIRMAN:** No, he is not asking about the expectation,
 24 he is asking about ITL's expectation as to what the
 25 retailer would do to the shelf price of the Gallaher

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1 brand if there had been an MPI by ITL of its brand
 2 without there being at the same time an MPI by Gallaher
 3 of its brand, as at the time the agreements were entered
 4 into.
 5 **MR HOWARD:** Exactly.
 6 **A.** Can I --
 7 **THE CHAIRMAN:** You may now answer the question, if you can
 8 remember it!
 9 **A.** I think there was matching of the questions there. It
 10 was reality as well, so often we would put our prices up
 11 and Gallahers wouldn't, and they would probably see our
 12 increase, think about it and maybe a few weeks later
 13 would then adjust theirs, so it was a real situation,
 14 and I've answered already, but we understood that our
 15 brands would go up, and sometimes we suffered as
 16 a result in market share.
 17 **MR HOWARD:** So we can get it clear, I am going to ask you to
 18 consider the position in two circumstances. The first,
 19 as the Chairman pointed out, is when the agreement is
 20 made with the retailer. But I am actually asking you,
 21 because we are not looking at specific agreements, I am
 22 asking you about the policy and what you were intending
 23 and understanding your NAMs were to do when they went to
 24 the retailers.
 25 So at day one, when they enter into the agreement,

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1 the question is: once the differential policy is
 2 established, if you put your price up, was there
 3 an expectation on Imperial's part that the retailer had
 4 to move the price of the Gallaher brand if you put up
 5 your price?
 6 **A.** Again, certainly not, no.
 7 **Q.** Right. As far as you were aware, in the period that you
 8 were involved in this, 1990 to 1996, did anything occur,
 9 as far as you know, whereby in the course of the dealing
 10 Imperial was requiring or expressing an expectation of
 11 the retailers that they must put up the price of
 12 Gallaher's product because you were putting up your
 13 price?
 14 **A.** No. No, we acted independently with the retailer, we
 15 were trying to achieve our prices, we never even
 16 discussed Gallaher pricing, nothing to do with us.
 17 **Q.** Now, conversely, if Gallaher, when you set this policy,
 18 had a price increase so that Benson & Hedges RRP went up
 19 or the price went up for some other reason, because they
 20 had put up the wholesale price, did you have any
 21 expectation, as far as you were concerned, of what the
 22 retailers were then to do in relation to the Imperial
 23 brand, if the Gallaher price went up?
 24 **A.** So just to make it clear, in the example I gave earlier,
 25 Benson & Hedges 1.50, No 1, 1.49 on the shelf, you are

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1 saying maybe Benson & Hedges went up to £1.54. What
 2 would we do?
 3 **Q.** Did you have any expectation of what the retailer was to
 4 do?
 5 **A.** Our expectation was that the retailer would not change
 6 our prices because nothing had changed, so we would
 7 have, in that example, a 5p advantage for a while.
 8 **Q.** Right. Conversely, if you put the price of an Imperial
 9 product down, so you had a price promotion on Embassy,
 10 so it was at 1.49 -- as I understand it a price
 11 promotion works pretty simply, you were telling us
 12 earlier this morning, you want the price to come down 2p
 13 to the consumer so you pay the retailer literally 2p
 14 a pack?
 15 **A.** Mm.
 16 **Q.** So you have a price promotion of that type with Embassy,
 17 reducing the price to 1.47, they were previously selling
 18 Benson & Hedges at 1.51, what do you expect them to do
 19 with Benson & Hedges where you have put down the price
 20 of Embassy?
 21 **A.** I expect them to go through the process that we went
 22 through. First, confirming that that was the situation,
 23 then they would have I assume an internal debate as to
 24 whether they were going to react, and then if they chose
 25 to, they would go to the retailer and give them 2p and

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1 bring their price -- but that was up to them.
 2 **Q.** I think you misunderstood me. That's Gallaher, what you
 3 anticipate Gallaher will do. But I am asking you,
 4 assume Gallaher doesn't do anything --
 5 **A.** Yes.
 6 **Q.** -- what did you expect the retailer to do with the
 7 price of Benson & Hedges? You have reduced the price of
 8 Embassy from 1.49 to 1.47, what did you expect or
 9 require the retailer to do to the Benson & Hedges brand
 10 as a result of what you had done with yours?
 11 **A.** Again, nothing. That was entirely up to the
 12 relationship between the retailer and Gallaher. Our
 13 expectation or hope, if you like, was that we would have
 14 a widened advantage for a while, and hopefully gain some
 15 more market share.
 16 **Q.** What if it goes the other way, what if Gallaher, they
 17 are at 1.51 for Benson & Hedges and you are at 1.49 for
 18 Embassy, Gallaher decide "We don't like this very much
 19 so we are going to have a 4p promotion per pack of
 20 Benson & Hedges" and they pay the retailers that so that
 21 the retailers start to price at 1.47?
 22 **A.** Yes.
 23 **Q.** Did you have any requirement of the retailers as to what
 24 they were to do in that event to the Embassy brand?
 25 **A.** I think our only requirement was the opportunity to

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1 react if we wanted to. So I mean, they didn't have to
 2 tell us because we could see it often on-shelf, but
 3 I would say our hope was at least that we would then
 4 have a negotiation, if we chose to, to bring our price
 5 down.
 6 **Q.** I see, and how would you seek to bring the price down?
 7 **A.** By giving them money, essentially.
 8 **MR HOWARD:** Right. Okay. I think that's all I wanted to
 9 ask.
 10 Further questioned by THE TRIBUNAL
 11 **MR SUMMERS:** Just to help me round up my understanding of
 12 your particular responsibilities. When you were in
 13 charge, up until 1996, were you in charge of the pricing
 14 for both cigarettes and cigars?
 15 **A.** Yes. Yes, all the product categories, there was
 16 roll-your-own tobacco and pipe tobacco.
 17 **MR SUMMERS:** When you became head of cigars --
 18 **A.** No.
 19 **MR SUMMERS:** -- did you make changes to the policy or was
 20 just a straight continuation of the same policy?
 21 **A.** No, my earlier example, Classic was launched to be at
 22 price parity with Hamlet, and it stayed all the time
 23 I was involved in cigars, we didn't change the pricing
 24 position in the slightest.
 25 **MR SUMMERS:** Thank you.

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1 **THE CHAIRMAN:** Just one further question from me. Given
 2 your answers to Mr Howard's questions, you seem to be
 3 envisaging a situation where you have your internal
 4 preferred parities and differentials, you then, you may
 5 increase your price, and then you wait and see what
 6 Gallaher does, you may decrease your price and hope that
 7 Gallaher doesn't follow.
 8 **A.** Mm.
 9 **THE CHAIRMAN:** What additional assistance, then, to that
 10 policy and the implementation of that policy did you get
 11 from entering into these agreements with the retailers
 12 with the schedules of the differentials? Because it
 13 seems to me, unless I am missing something, that
 14 everything that you have described that could happen,
 15 could happen simply by you having your internal policy,
 16 by monitoring carefully what happens on the shelf, and
 17 by making your tactical bonus offers. What were you
 18 gaining by setting out these schedules to the agreements
 19 and offering bonuses to maintain those differentials?
 20 **A.** I think what we were gaining was the retailer
 21 understanding what our preferred position would be. So
 22 by example, we would like to be at least a penny below
 23 Benson & Hedges. I think until I became involved, that
 24 wasn't necessarily clear. So again if they then saw
 25 a movement in Benson & Hedges because Gallaher had given

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1 them money, they were then aware that we might like to
 2 move.
 3 **THE CHAIRMAN:** But you had RRP's before these --
 4 **A.** We had RRP's, yes.
 5 **THE CHAIRMAN:** Wouldn't they be aware from those
 6 relativities as to what your preferred --
 7 **A.** Yes, but it didn't necessarily always reflect on the
 8 shelf price in multiples. So I think the way to answer
 9 your question is to give the retailer clarity of what we
 10 were trying to achieve, that was the advantage.
 11 **THE CHAIRMAN:** And what did you hope or expect that clarity
 12 would lead to?
 13 **A.** As I say, I think if Benson & Hedges came down, then the
 14 retailer would be very quickly on the phone to us saying
 15 "Do you wish to react to retain your relative
 16 position?", because that was good for the retailer as
 17 well, that other brands would then come down. So they
 18 understood that we were keen to achieve that position.
 19 But I accept that sometimes we chose not to. But at
 20 least we had made it clear where we were trying to be in
 21 the marketplace.
 22 **DR SCOTT:** And the retailer would get the bonus, both with
 23 the ongoing bonuses and the tactical bonuses?
 24 **A.** Yes, and as I say, that was good for the retailers
 25 because not only had Benson & Hedges come down, but our

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1 brands had come down as well.
 2 **MR HOWARD:** Could I just ask a question arising out of that?
 3 Further re-examination by MR HOWARD
 4 **MR HOWARD:** Just to pick up the Chairman's question as to
 5 what the purpose was, my questions were of course
 6 directed to the situation which the OFT has been
 7 focusing on where there are price changes after you.
 8 Can you just explain to us, at the beginning, as it
 9 were, at the time at which, if we take whatever the date
 10 is when the RRP gets set at the beginning of the year,
 11 and then for the year you enter into these agreements
 12 with the retailers, what is it achieving at that stage?
 13 What are you seeking to achieve at that stage when you
 14 enter into the agreement vis-a-vis the pricing, can you
 15 explain that?
 16 **A.** At that stage it was to get the underlying position
 17 correct.
 18 **Q.** Sorry, what do you mean by the underlying position
 19 correct?
 20 **A.** Well, excluding manufacturers' price rises and Budget --
 21 price upset in the market, and it often was in January
 22 by your example, so if it was a quietish period and
 23 there were no real price changes, that was what we were
 24 trying to establish, that our brands were at the right
 25 price or below.

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1 **MR HOWARD:** Thank you.
 2 **THE CHAIRMAN:** Yes, thank you very much, Mr Good, that's
 3 been very helpful.
 4 **A.** Thank you.
 5 **THE CHAIRMAN:** I think that's probably a good point to
 6 break. We will come back at 2 o'clock. I can release
 7 you from the witness box at least for the moment.
 8 **A.** Thank you.
 9 (The witness withdrew)
 10 (1.00 pm)
 11 (The short adjournment)
 12 (2.00 pm)
 13 **MR HOWARD:** If we may, we will now call Mr Batty.
 14 MR ROGER BATTY (sworn)
 15 Examination-in-chief by MR HOWARD
 16 **MR HOWARD:** Mr Batty, could you be given core bundle,
 17 volume 3, and go to tab 33, {C3/33} which should be the
 18 copy of your witness statement for the purposes of the
 19 hearing. It's dated 11 June 2010. Could you confirm
 20 that is your statement and that it is true?
 21 **A.** Yes, I confirm that.
 22 **MR HOWARD:** Thank you.
 23 Cross-examination by MR LASOK
 24 **MR LASOK:** Mr Batty, when did you last read your statement?
 25 **A.** Various over the last two or three days.

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1 Q. Could you go to page 37, please. If you have 37, could
 2 you just read through the first five lines at the top of
 3 the page, and then read paragraphs 5.25 to 5.26. I am
 4 not asking you to read it out loud, just read it to
 5 yourself so you have it in the forefront of your mind.
 6 A. Can I clarify, from 5.23?
 7 Q. It's from the first page on the top of page 37, it is
 8 the bit beginning "Although Shell agreed", then it's
 9 5.25 and 5.26.
 10 A. Okay. (Pause).
 11 Q. With those passages in mind, could you turn to tab 35 in
 12 core bundle 3. {C3/35} You have there the first appeal
 13 witness statement of Mr Culham. It's the same bundle
 14 with the witness statement in it. Tab 35, do you have
 15 that?
 16 A. Yes.
 17 Q. Is that Mr Culham's first appeal witness statement?
 18 A. First appeal witness statement, yes.
 19 Q. Could you turn to page 10 of that witness statement. Do
 20 you have page 10?
 21 A. Yeah.
 22 Q. If you look at paragraph 47, and go to the fifth line,
 23 do you have that?
 24 A. Yeah.
 25 Q. Could you read from the words "Although Shell agreed" to

1 the end of paragraph 48, please.
 2 (Pause)
 3 A. Yes.
 4 Q. Now, the passages that I have asked you to look at in
 5 your witness statement and the passages that I have
 6 asked you to look at in Mr Culham's witness statement
 7 are virtually identical word for word. There is
 8 a difference, because if you have Mr Culham, and you go
 9 to the top of page 11, and you look at the second
 10 line -- do you have that?
 11 A. Yeah.
 12 Q. He says:
 13 "I believe that this presentation sets out ..."
 14 If you compare that with your paragraph 526, it
 15 doesn't say "I believe". Now, this is not a trick
 16 question, but did Mr Culham get his paragraphs 47 and 48
 17 from you, or did you get your bits from him?
 18 A. I've no idea.
 19 Q. I am sorry?
 20 A. I don't know. Certainly I compiled my witness statement
 21 independently of Mr Culham compiling his witness
 22 statement.
 23 Q. So you sort of, by coincidence, hit upon exactly the
 24 same words?
 25 A. I don't know how it's happened, but that appears to be

1 the case.
 2 Q. And you wrote your statement yourself?
 3 A. In conjunction with Ashursts, yes.
 4 Q. Did they suggest any wording to go into your witness
 5 statement?
 6 A. I couldn't remember specifically about this section,
 7 I mean, it was as part of a conversation pertaining to
 8 the various documents that were being shown to me and
 9 raised with me.
 10 Q. Well, I did want to ask you one thing about your
 11 paragraph 5.23. Now, I asked you to read a bit, this is
 12 at the top of page 37, and if you look at that part, you
 13 talk about Shell having agreed to run a PMP promotion,
 14 and then you say that it refused to agree to another
 15 one, and you give a reason. I'll just read out the bit:
 16 "... on the basis that its retailer franchisees had
 17 objected to the effect of lower prices in the outlets
 18 which had attracted customers away from other tobacco
 19 products which were not being promoted and had higher
 20 prices and margins."
 21 Do you remember where that came from?
 22 A. Well, I can remember the incident with Shell, even
 23 though it's quite some time ago, because I think we felt
 24 that we had had a major success in persuading Shell to
 25 be involved in that type of activity, because we were

1 very concerned with the pricing of Shell. But where
 2 that precise wording came from in the statement, from my
 3 memory I guess.
 4 Q. So this is just your memory of what the reason was?
 5 A. Mm.
 6 Q. Okay. I wonder whether you could turn back in your
 7 statement to --
 8 **THE CHAIRMAN:** Just wait one moment. (Pause). Yes, sorry,
 9 Mr Lasok.
 10 **MR LASOK:** I wonder whether you could turn back in your
 11 statement to page 17. If you look at paragraph 3.12,
 12 again could you just read that to yourself, please.
 13 (Pause)
 14 Now, the trading agreement in question which you
 15 exhibit as exhibit 9 is also to be found in the SO
 16 annex 16 at tab 7 {D16/7}
 17 Do you have the trading agreement?
 18 A. The First Quench --
 19 Q. It should be in the --
 20 A. Dated 26 November.
 21 Q. That's right. If you look towards the bottom of the
 22 page, there is a bit in bold which says "Note". Do you
 23 have that? It says:
 24 "1. ITL pricing strategy to be adhered to on all
 25 brands."

1 Then if you turn the page, it says:
 2 "3. The bonus levels shown above will only be paid
 3 if existing levels of pricing and percentage of branches
 4 within each pricing tier are maintained."
 5 In paragraph 3.12 of your witness statement, you say
 6 as follows, it's the last sentence, you say:
 7 "I would confirm that the purpose and effect of the
 8 agreement was that the level of margin support would be
 9 reduced if the retailer increased its prices (and that
 10 no reduction in margin support would follow if prices
 11 were decreased)."
 12 On what basis do you give that confirmation?
 13 **A.** I think it was from my knowledge of the account at the
 14 time we were having negotiations about the relationship
 15 and the business.
 16 **Q.** You see, in 3.10, you say:
 17 "The purpose of trading agreements varied with each
 18 individual NAM and retailer."
 19 But you weren't the NAM and you weren't the
 20 retailer?
 21 **A.** No, I was the national account controller. The national
 22 account manager reported to me, as all the national
 23 account managers did.
 24 **Q.** Yes.
 25 **A.** So I was involved in various meetings with various

1 customers, one of which was First Quench, when we were
 2 trying to sort and negotiate the trading agreements.
 3 **Q.** Did somebody tell you something that led you to the
 4 conclusion that the purpose and effect of the First
 5 Quench agreement was that support would be reduced if
 6 there was an increase in price but it wouldn't be
 7 reduced if the prices were decreased.
 8 **A.** Well, the history with First Quench was that it was
 9 a business that was a result of a combination of two big
 10 retail businesses: Victoria Wine and Thresher.
 11 Victoria Wine was owned by, I think, Allied Breweries,
 12 and Thresher was owned by Whitbread. Those two
 13 businesses had strategies for cigarette pricing that
 14 were completely opposed to one another. Victoria Wine
 15 wanted to be the cheapest on the high street, and
 16 Thresher were quite happy to be the most expensive on
 17 the high street. When the businesses were combined, it
 18 ended up really under the umbrella of Thresher, and
 19 became First Quench with a lot of the management from
 20 Thresher taking over the management of First Quench, and
 21 so they were starting to introduce into all the branches
 22 the very expensive pricing policy that Thresher had had
 23 in place, and the consequence of that was that we felt
 24 that we were probably not getting value for the money we
 25 were investing and we wanted to be certain that our

1 pricing was competitive in the marketplace to enable our
 2 brands to grow.
 3 **Q.** The point I am getting at is if you look at the point 3
 4 at the top of the second page of the First Quench
 5 agreement, it's the phrase "bonus levels ... will only
 6 be paid if existing levels of pricing ... are
 7 maintained". Now, did somebody tell you that the
 8 agreement didn't mean what it said?
 9 **MR HOWARD:** I think the witness should be invited to look at
 10 the whole agreement, if we are going to have a debate
 11 about it.
 12 **THE CHAIRMAN:** The point that's being put to you, Mr Batty,
 13 is that the sentence in paragraph 3.12 as to your
 14 understanding as to the purpose and effect of the
 15 agreement, I think it's being put to you that it's not
 16 consistent with the actual wording, and asking,
 17 therefore, where do you get your understanding as to the
 18 purpose and effect. Which is the part in the agreement,
 19 perhaps it would help if you would identify that, the
 20 part in the agreement which you are putting to the
 21 witness as being inconsistent with his confirmation in
 22 paragraph 3.12.
 23 **MR LASOK:** It's the wording of 3.
 24 **MR HOWARD:** If you look at the next paragraph in the
 25 witness's statement, he then refers to the next part of

1 the agreement, "accordingly". So that's the point, one
 2 can't just take sentences out of context.
 3 **MR LASOK:** Now, point 3 talks about existing levels of
 4 pricing being maintained. I am going to put to you that
 5 the ordinary meaning of the word "maintained" is kept in
 6 place. Would you agree with that?
 7 **A.** Well, I think so, bearing in mind the section on pricing
 8 which shows the tiers and the pricing below recommended
 9 retail levels.
 10 **Q.** If I said to you, or rather if you had a deal with your
 11 employer, and your employer agreed with you that your
 12 bonus levels would be paid, your bonuses would be paid
 13 if your level of performance was maintained, you would
 14 assume that that meant that there would be no
 15 deterioration in the level of performance?
 16 **A.** As long as the performance was defined well, yes.
 17 **Q.** So it wouldn't go down?
 18 **A.** Mm.
 19 **Q.** Also if you look at 3, again, the full phrase refers to
 20 existing levels of pricing and percentage of branches
 21 being maintained. That reinforces the idea of
 22 maintaining the position?
 23 **A.** Mm.
 24 **Q.** On the preceding page, the reference to ITL pricing
 25 strategy to be adhered to on all brands. Now, do you

1 agree that ITL's pricing strategy includes adherence to
 2 ITL's parity and differential requirements?
 3 **A.** The pricing strategy to reflect the RRP differentials,
 4 yes.
 5 **Q.** Right. Do you also agree that the payment of a bonus
 6 was at times directed at achieving a particular
 7 differential between an ITL brand and a Gallaher brand?
 8 **A.** As a maximum price, so as long as the differential was
 9 in place and was at least at the level that was stated
 10 on the schedule.
 11 **Q.** Yes. I think possibly if we go to annex 20 ... my
 12 learned junior has told me that I don't need to turn to
 13 annex 20 on this point. I apologise for that.
 14 Can I move on to a slightly different topic and look
 15 at annex 17. If you have annex 17, could you go to --
 16 THE CHAIRMAN: 17?
 17 **MR LASOK:** 17. If you look at tab 4, {D17/4} you have the
 18 ITL agreement with Morrison covering the period
 19 August 1999 to July 2001. Were you familiar with
 20 agreements of this nature?
 21 **A.** Yes, I was.
 22 **Q.** If you could turn to the fifth page, you have the ITL
 23 strategy pricing sheet, and it has various parities and
 24 differentials. Run your eye quickly over it.
 25 (Pause)

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1 These are expressed, for the most part, as parities
 2 and fixed differentials. If you go to tab 67, {D17/67}
 3 you have a letter dated 12 September 2002. Do you have
 4 that?
 5 **A.** Yeah.
 6 **Q.** This attached a draft copy of a new trading agreement.
 7 If you go to the last two pages, under the heading
 8 "Pricing", if you go to the very bottom, it says:
 9 "As at September 2, 2002, the price list
 10 differentials to be reflected in Morrison's shelf prices
 11 were as follows."
 12 Then it sets out and we see parities, and then we
 13 see what appear to be fixed differentials because they
 14 are things like minus 2, minus 5 and so forth. Do you
 15 have that?
 16 **A.** Mm. Can I just say that I don't think the differentials
 17 are fixed.
 18 **Q.** Well, I was going to ask you about that, because if you
 19 move to 72, and go to page 3, tab 72 appears to be
 20 another draft. Also, if you look at the third page in
 21 this tab, you have the price list differentials which
 22 should be reflected in Morrison's shelf prices. They
 23 are also expressed as parities and fixed amounts.
 24 Then when you go to 78, you have the agreement that
 25 was eventually finalised as between ITL and Morrisons.

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1 If you go to the third page, you have the price list
 2 differentials which should be reflected in Morrison's
 3 shelf price, and they are now not more expensive than
 4 and at least 2p and so forth less expensive than. That
 5 was the agreement that was actually agreed.
 6 **A.** Yeah.
 7 **Q.** The previous ones, apart from tab 4, which is also
 8 a signed agreement, the other ones in between were
 9 drafts.
 10 Did the change from the drafts to the final version
 11 that we see on the page that we are now looking at
 12 reflect legal advice that ITL had been given?
 13 **A.** I can remember a time when we did question the wording
 14 on our agreements, because, as in any large company, as
 15 you appreciate, when we are entering into agreements
 16 with either suppliers or customers, we would get those
 17 things checked, and I do remember them being checked at
 18 some point, and the wording adopted that we have in this
 19 final Morrisons example.
 20 **Q.** Yes. Now perhaps --
 21 **A.** Which, although we didn't say it in the previous ones,
 22 we were saying I think exactly the same as that, and
 23 intended the same as what was in the "no more expensive
 24 and at least". We never operated to fixed
 25 differentials.

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1 **Q.** Despite the fact that the drafts and the first agreement
 2 in tab 4 were expressed in that way?
 3 **A.** Well, I think they might have been expressed in that
 4 way, but they certainly weren't intended in that way.
 5 We were quite happy if a retailer decided to price
 6 products with a bigger gap than the one that was
 7 expressed here. So if Embassy No 1 was 3p cheaper than
 8 B&H, we were quite we were happy with that situation.
 9 **Q.** This is something that you will also turn to later on in
 10 your witness statement, and -- I think you can put that
 11 bundle away -- if you go to paragraphs 3.27 to 3.28.
 12 Could you just read those two paragraphs to yourself,
 13 please.
 14 **A.** 3.27 and 3.28?
 15 **Q.** Yes.
 16 (Pause)
 17 Now, to begin with, your comment in --
 18 **A.** Sorry, I am only part way through 3.28.
 19 **Q.** I am sorry.
 20 (Pause)
 21 **A.** Yes.
 22 **Q.** Now, the comment that you make in 3.27 about ITL not
 23 being concerned if the individual store was charging
 24 a price cheaper for ITL's products than that specified
 25 in the Alldays schedule, is that a general comment or is

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1 it just specific to Alldays?
 2 **A.** Well, it's a general comment.
 3 **Q.** So also, in the middle of 3.28, when you say in the
 4 middle:
 5 "In this regard ITL was unconcerned where the
 6 retailer was selling ITL's products at shelf prices that
 7 were lower than the respective RRP's when compared to
 8 competing brands."
 9 And the last two lines, you say:
 10 "We would not point out occasions where the ITL
 11 product was cheaper on the shelves than expected as
 12 a low price was considered to be in our interests."
 13 Those are all general observations?
 14 **A.** Yes.
 15 **Q.** Now, that's not correct, is it?
 16 **A.** It is in my own mind, but please --
 17 **Q.** Could we now have a look at annex 20. {D20/9}
 18 **THE CHAIRMAN:** Which tab is it that you need?
 19 **MR LASOK:** If you go to tab 9, in the middle under the
 20 heading "Somerfield", the writer of the letter, who was
 21 Mr Hall, refers to a reduction in the selling prices for
 22 Cafe Creme and Small Classics, and says that the
 23 strategy is normally to match a Gallaher brand which was
 24 unchanged to £2.62. Isn't that an instance where ITL
 25 would ask the retailer to price by reference to the

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1 parity?
 2 **A.** No, I think all that the national account manager is
 3 doing in this instance is pointing out and making sure
 4 that the retailer is aware of his own pricing, because
 5 we are just reporting back pricing that we are finding
 6 out in the marketplace, I believe, in this instance, and
 7 certainly what we wouldn't want to happen is in -- when
 8 was this, it was November 2000 -- January 2001, for the
 9 retailer to come back to us and say "Well, I have been
 10 pricing these products at this price and we now demand
 11 a bonus to make up that difference".
 12 **Q.** But you actually say in the second sentence of that
 13 paragraph "our strategy", that's the ITL strategy.
 14 **A.** Yes, I think it is just pointing out that's our
 15 strategy.
 16 **Q.** That's right, so you wanted them to price in accordance
 17 with that strategy?
 18 **A.** No, we are pointing out that it wasn't in line with our
 19 strategy, and was he aware of that, for the reasons I've
 20 just explained, I think, which is that we were
 21 protecting ourselves from being hit by a bonus by this
 22 retailer that we weren't expecting to pay.
 23 **Q.** If you go to {D20/18} tab 18 in the same annex, you have
 24 the trade development programme for 2001, and if you
 25 look at the third page, you have the strategy pricing

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1 requirement. Do you have that?
 2 **A.** Yeah.
 3 **Q.** If you look at the bottom, you have the last two lines:
 4 "Drum no more expensive than Amber Leaf."
 5 **A.** Yeah.
 6 **Q.** So I think from the answers that you have given to
 7 an earlier question from me, it would be consistent with
 8 that agreement for, in this instance, Somerfield to
 9 price Drum on the shelves at below Amber Leaf?
 10 **A.** It could do, yes.
 11 **Q.** If you go back to the first page of tab 18 --
 12 **A.** This is the letter dated 14 May?
 13 **Q.** Yes. Just immediately before the heading in bold
 14 "Period from 1 January to 31 July 2001", you have
 15 a paragraph which I'll read:
 16 "When no additional price reductions are being
 17 funded by another manufacturer, selling prices should be
 18 in line with the strategic pricing requirements and
 19 payments will be based on store adherence to this."
 20 Isn't that an indication that the payment of the
 21 bonuses was at times directed at achieving
 22 differentials, and it depended on compliance with the
 23 strategic pricing requirements?
 24 **A.** Not at all, if we were getting a more advantageous price
 25 on shelf.

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1 **Q.** So if Drum went below Amber Leaf, you would be perfectly
 2 happy and would take no steps to alter the position?
 3 **A.** Mm.
 4 **Q.** Could you turn to tab 19, please. {D20/19} Can you read
 5 tab 19? Not out loud but just to yourself.
 6 Now, you were copied in on this memorandum?
 7 **A.** Yeah.
 8 **Q.** And it talks about the preparation of a new price file
 9 ensuring that the price of Drum would match Amber Leaf
 10 because Amber Leaf was moving up in price. That's
 11 inconsistent with the answers you have given to me
 12 a moment ago?
 13 **A.** Well, I think in this instance, obviously it is
 14 August 2001, but my interpretation of what was going on
 15 here, particularly as I and my operations manager were
 16 copied in, was that this was a promotion, whether it was
 17 specific to Kwik Save and Somerfield or whether it was
 18 a retail-wide promotion, where we had reduced the price
 19 of our product, either as a promotion on our own or to
 20 ensure our products weren't disadvantaged against the
 21 competing product. And this is the commercial shorthand
 22 which is saying that that promotion is coming to an end,
 23 and these are the new bonuses applying to it, to the
 24 suggested prices, because that's what I think the SP
 25 means, suggested price, in that note.

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1 Q. If the promotion was coming to the end, are we talking
 2 about an Amber Leaf promotion or a Drum promotion?
 3 A. Well, that I can't tell from this correspondence, it
 4 could be either, that we responded to something that
 5 Amber Leaf had done or we have done something that
 6 Amber Leaf responded to.
 7 Q. The true position, therefore, is that whether this
 8 relates to a promotion is pure speculation on your part?
 9 A. Yes, I think it is pure speculation, but with the
 10 evidence that I've got, without digging deeper into this
 11 particular instance, but to me the way that we tended to
 12 operate as a national account team, this was just the
 13 general type of everyday activity that was taking place.
 14 There were promotions going on with different retailers
 15 at different times across a raft of our products, and
 16 this was probably one of many.
 17 Q. Could you turn to tab 23, please, {D20/23} and could you
 18 read that. This is not something that you were copied
 19 in on, but it also relates to the Drum and Amber Leaf
 20 pricing issue.
 21 (Pause)

22 A. Yeah.
 23 Q. Does that shed any light?
 24 A. Well, not really. I think the only people that might
 25 remember the precise details of what was happening at

1 this time were Graham Hall and Steve Clarke.
 2 Q. Because here, in this particular email, there is no
 3 reference at all to promotions or bonuses, and in the
 4 penultimate paragraph Mr Hall says:
 5 "We would like to have Drum at the same price as
 6 Amber Leaf, whatever that is."
 7 A. But I guess Graham Hall didn't want to be hit
 8 unwittingly with a bonus to support a Drum price, and
 9 I think that the last line of that memo, I mean,
 10 probably sums it up, where he is saying that he remains
 11 confused, and he was trying to deal with this issue on
 12 a day-to-day basis.
 13 Q. Well, I put it to you that this is a situation in which
 14 there is no promotion or anything like that involved,
 15 this is a clear indication that ITL wanted parity
 16 between Drum and Amber Leaf, and they didn't mind
 17 whether one of them went up in order to achieve parity
 18 or the other one went down to achieve parity, they
 19 wanted parity?
 20 A. I can't pass any comment on that, other than that that
 21 was not the way we operated --
 22 Q. That was not the way you operated.
 23 A. -- without good cause.
 24 Q. Let's go to tab 24, which was the next one. {D20/24}
 25 This is an email, and you were copied in on it. Do

1 you see? I think you can read, for present purposes,
 2 just down to the heading "Planograms, Kwik Save" and not
 3 past it.
 4 (Pause)
 5 Now, I would suggest to you that this is completely
 6 inconsistent with the evidence that you have given in
 7 your witness statement and orally today that ITL was
 8 unconcerned where a retailer was selling ITL products at
 9 shelf prices lower than the relevant specified
 10 differential?
 11 A. Well, I would disagree. Without knowing the precise
 12 infinite details behind this, there is obviously some
 13 further factor in here, because there is mention of Drum
 14 being, having a 10p differential against
 15 Golden Virginia, which is another Imperial brand, and
 16 I do remember that part of our own brand strategy was to
 17 have that differential in place, and it looks to me as
 18 though, in response to an Amber Leaf promotion, we have
 19 reduced the price of Drum. We are trying to get the
 20 Drum price back to the strategic brand position we
 21 require against another of our own brands,
 22 Golden Virginia.

23 I think if I can just make the point, further on in
 24 that correspondence, the two or three paragraphs
 25 underneath the Amber Leaf and Drum, as you can see there

1 is quite a bit of confusion over what pricing should be,
 2 and that was certainly one of the problems that we were
 3 having with Somerfield during this time, was how well
 4 they were implementing the promotional pricing that we
 5 were trying to get in place in the market.
 6 Q. I am just going to read you a sentence from the middle
 7 of this page, and it runs as follows:
 8 "Once again it would be appreciated if the price of
 9 Drum could be increased to achieve parity pricing with
 10 Amber Leaf."
 11 I put it to you that ITL policy at this time is
 12 exemplified here, you wanted in this instance parity
 13 between Drum and Amber Leaf, and you wanted that even
 14 though Drum was being priced in accordance with the
 15 trading agreement, or at least the written terms of the
 16 trading agreement, below Amber Leaf. Do you agree with
 17 that?
 18 A. No, for the reasons I've said, that that was not our
 19 policy to insist on specific pricing like that, and --
 20 Q. So you disciplined Mr Law, did you, hauled him into the
 21 office?
 22 A. I honestly can't remember, I don't think so, but --
 23 Q. Surely if you saw one of your employees sending out
 24 a communication like this, which you say is wholly
 25 inconsistent with ITL policy at the time, you would have

1 done something about it?

2 **A.** Unless there was something involved with this that I am

3 not aware of in reading this correspondence here.

4 I don't see the full story here, and that's what I find

5 difficult in trying to reach a conclusion and

6 an interpretation on what is going on. All I can say is

7 that we didn't act in a way that counsel is suggesting,

8 where we instructed retailers, for no apparent reason

9 other than this strategy situation, to put prices up.

10 It was usually connected with a short-term tactical

11 promotion and bonus that we were paying a retailer.

12 **Q.** Could you turn to the next tab, tab 25. (D20/25} There

13 are effectively three emails here, but if you look at

14 the second one, which is in small print, it starts off

15 "original message" and then it says underneath "from

16 Nick Law, sent 6 November 2001, 14.02." Do you have

17 that one?

18 **A.** Yeah.

19 **Q.** That was an email to Mr Hall, and you were copied in on

20 that email. Could you possibly read that email, again

21 you don't have to go past the heading "Planograms" just

22 below the second holepunch.

23 (Pause)

24 **A.** Yes.

25 **Q.** This is an instance in which ITL gets reassurance that

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1 Amber Leaf and Drum are going to be brought into line.

2 In this instance the reassurance derives from the fact

3 that Somerfield has reduced the Gallaher price. That's

4 what it says, isn't it?

5 **A.** Yes, Amber Leaf has been reduced down to the Drum price.

6 **Q.** And that's how that particular problem was resolved?

7 **A.** Looks like it, because there is further mention of the

8 other products that were in previous correspondence.

9 **Q.** Yes, and I put it to you again that this is simply the

10 culmination of an episode in which Imperial were seeking

11 to get parity for Drum with Amber Leaf, irrespective of

12 the absolute price level?

13 **A.** Well, I think it was achieved, but in a way that we

14 probably weren't expecting, in that the competitor

15 reduced their price down to match ours.

16 **THE CHAIRMAN:** Well, it seems that that was what happened

17 for the 25 gram, but for the 50 gram, the end of that

18 first bullet point says:

19 "Steve wishes to increase Drum to match Amber Leaf

20 at 8.29."

21 At tab 24 is the Amber Leaf price for the 50 grams,

22 whereas the Drum at 50 grams was £8.09.

23 **A.** But I think, madam, that that actually puts the three

24 packings in the right sort of pricing perspective.

25 **THE CHAIRMAN:** Yes, but --

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1 **A.** There is an equilibrium there --

2 **THE CHAIRMAN:** -- it seems that the problem was resolved by

3 Amber Leaf 25 grams coming down to the Drum price, and

4 the Drum 50 grams going up to meet the Amber Leaf price.

5 **A.** That's what it looks like, yes.

6 **DR SCOTT:** What seems to be going on, and this reflects the

7 previous witness, is that you have periods of turbulence

8 that occur, followed by attempts to get things back to

9 your pricing strategy, and because there is more than

10 one player, a certain amount of dance goes on, and then

11 eventually you seem to get back to something that looks

12 like your pricing strategy.

13 Does that characterise the situation --

14 **A.** I think it does.

15 **DR SCOTT:** -- correctly?

16 **A.** The turbulence I think is the competitive nature of what

17 we were doing. The retailers were competing with one

18 another, we were certainly competing with Gallaher, with

19 Rothmans, with BAT, at the same time, and retailers, you

20 know, take this example for instance, Somerfield were

21 I think going through their own turmoil at the same

22 time. And dare I say it, I remember the buyer at

23 Somerfield at this time, [REDACTED]

24 [REDACTED]

25 [REDACTED] I think adding to the confusion here is

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1 the introduction of Nick Law, who was a young trainee

2 that joined us, who was working sort of in conjunction

3 with Mr Hall, Graham Hall, and so you get a fairly

4 complex situation developing. But I reiterate, we

5 weren't, you know, wedded to the adherence to the

6 strategy differences in the way that I think counsel is

7 suggesting.

8 **MR LASOK:** But what we see here in this resolution is what

9 you expected to see through the operation of the trading

10 agreements?

11 **A.** If they then reflected the differentials, probably so.

12 But these were prices that the retailer was making their

13 own minds up that they were going to price those

14 products at in their retail outlets.

15 **Q.** Yes, I don't think anybody disputes the fact that the

16 retailers were entitled to fix absolute prices. The

17 issue is about the pricing relativities.

18 Let's go to another one, annex 29, so you can put

19 away this annex.

20 **DR SCOTT:** Mr Lasok, can I just ask a question to put things

21 in perspective?

22 Mr Batty, you were involved throughout this period?

23 **A.** Yes, I was. I succeeded Mr Goodall.

24 **DR SCOTT:** Yes, and we have had a very helpful schedule

25 prepared of the chronology of Budget announcements and

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1 manufacturers' price increases. The impression that we
 2 get from that was that there were these steps up,
 3 usually two, sometimes more, per year. So that the
 4 underlying price trend was going up as tax and inflation
 5 went up and that the reductions that took place were
 6 promotional reductions and reactions to promotional
 7 reductions. Does that properly characterise your
 8 understanding?
 9 **A.** It does, and I mean, Imperial Tobacco as a company
 10 tended to be reactive to what the competition were
 11 doing. Bearing in mind where we had started out, sort
 12 of in the early 1990s, with 33, 34 per cent of the
 13 market, and Gallaher's much further ahead than us, this
 14 activity of tracking everything that they did and making
 15 sure our brands were always competitive was the strategy
 16 that we followed and we had to think very carefully
 17 about when to do things and when not to do things.
 18 **DR SCOTT:** That's helpful, thank you.
 19 **THE CHAIRMAN:** I think one of the other witnesses comments
 20 that when there was a Budget increase, an MPI would
 21 follow fairly shortly thereafter to reinstate the
 22 retailer's margins which had been reduced by the passing
 23 on of the Budget increase. Even though the margin may
 24 in absolute terms have remained the same, the
 25 arithmetical result of adding on the Budget increase was

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1 that the margin was reduced as a percentage, and that
 2 was what the second MPI, if I can call it like that, was
 3 aimed at reinstating.
 4 Is that your recollection of how that worked?
 5 **A.** Yes, that was I think part of the rationale for having
 6 the price increase when we did, after a Budget, because
 7 you quite rightly say that although the cash margin
 8 stayed the same with the tax increase, the percentage
 9 margin fell, and unfortunately retailers were wedded to
 10 percentage margins, not to the cash that pays the bill.
 11 So that was what we were trying, as part of
 12 a manufacturers' increase, to address, as well as
 13 a strategic requirement for us to make profit for the
 14 shareholders.
 15 **MR LASOK:** Could we turn to annex 29, please. Do you happen
 16 to have that one? {D29/19}.
 17 **A.** Yeah.
 18 **Q.** And to tab 19. This is a letter dated 12 July 2000.
 19 Could you read the first page of the letter down to but
 20 not including the heading at the bottom "Advertising &
 21 Units", please.
 22 (Pause)
 23 I don't think you need read the rest of the letter,
 24 but if you would prefer to do so, please go ahead.
 25 **A.** I am just making sure I understand the context of the

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1 letter.
 2 **Q.** So this letter looks as though Mr Culham, who is the
 3 national account manager for T&S Stores, is pointing out
 4 to T&S differential errors in the branches, and he is
 5 asking T&S to arrange the correction of those errors.
 6 They involve such things as, if you look at the third
 7 item down in the list of errors, you have a reference to
 8 Classic Twin --
 9 **A.** Yeah.
 10 **Q.** -- which was at 5.44, and he wants T&S to change the
 11 price to 5.54, equal to Hamlet. This too, I put it to
 12 you, is an example of ITL's actual behaviour at the
 13 time?
 14 **A.** Well, I think this letter refers to the amalgamation of
 15 a retailer called Day & Nite, that were a small
 16 convenience chain that T&S acquired sometime in 2000,
 17 and quite often in these instances, where a bigger
 18 retailer took over a smaller retailer, we would be asked
 19 to give what was the best of whatever terms were
 20 available to the retailer that was making the
 21 acquisition. I think this is part of that process,
 22 where the Imperial national account manager, Ken Culham,
 23 was trying to get the Day & Nite business into line with
 24 the price of our products in the T&S retail outlets.
 25 The item in question, the Classic Twin at 5.44 and

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1 changing to 5.54, Mr Culham would also have probably
 2 a pretty good understanding of the margin that T&S were
 3 wanting to make on any particular line, and I think he
 4 would have alarm bells ringing to see Classic Twin at
 5 10p below the Hamlet 10, particularly when you note,
 6 I think in the second main paragraph of this letter, the
 7 second sentence, it says:
 8 "There are currently no special short-term tactical
 9 bonuses on Day & Nite sales volumes."
 10 Now, whether this coincided with a time when we had
 11 been promoting the Classic Twin pack, I don't know, but
 12 I am tying those two things together, and to me, the
 13 national account manager is, if you like, looking after
 14 his own future with this customer by pointing out what
 15 could possibly be a damaging error in terms of margin
 16 and profit on that particular product line. Again, not
 17 wanting to be hit at some stage in the future for some
 18 compensation for having a low price.
 19 **Q.** Well, the letter refers to differential errors, and if
 20 we look at the trading agreement with T&S, which is at
 21 tab 11, {D29/11} the price requirements are on the sixth
 22 page. I don't know what pagination you have, but in my
 23 copy there is a sort of stamped page 32 in the bottom
 24 right.
 25 **A.** Yes. With much of the information redacted.

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1 Q. Oh, really?
 2 A. Earlier in the -- not on that page but in the other part
 3 of the document.
 4 Q. You have the price requirements here.
 5 A. Yes.
 6 Q. And we can see that Regal, for example, Regal Kingsize,
 7 is for 20s packing at least 5p less than
 8 Benson & Hedges?
 9 A. Yeah.
 10 Q. 100s packing at least 25p less than the price of
 11 Benson & Hedges.
 12 If we go to the middle of the page we have Lambert &
 13 Butler and the 100s, which are the ones referred to in
 14 the letter, the 100s packings are no more than 50p above
 15 the price of Sovereign.
 16 Then just below the second holepunch we have Classic
 17 all packings at least no more than the price of the same
 18 Hamlet packing.
 19 If you go back to the differential errors, it's
 20 quite clear, I put it to you, that Mr Culham is
 21 identifying failures by T&S to comply with the pricing
 22 requirements in the agreement, and in particular where
 23 he refers in his letter to Classic Twin and says that it
 24 must go up to equal Hamlet 10s, he is indicating that
 25 the understanding between ITL and T&S was that the

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1 contract required T&S to keep, for example, Classic and
 2 Hamlet at parity?
 3 A. I don't think -- I think I go back to my original
 4 response, that this was a balancing process in this
 5 instance with the Day & Nite stores and is not in any
 6 way typical of the behaviour in the marketplace. We
 7 were not telling retailers that they must stick to these
 8 differentials, and that's ...
 9 **THE CHAIRMAN:** But you have twice given us a reason why
 10 there might be a notification, if I can put it
 11 neutrally, by ITL to a retailer that their price was
 12 lower than would be envisaged by the differential, that
 13 you were worried that the retailer might come back to
 14 you and say "Oh, well, we want you to fund that
 15 difference because", what, because they would say, "You
 16 are monitoring these prices, why didn't you point out to
 17 us that our price for ITL was too low? You should have
 18 told us that, and because you didn't, you have to fund
 19 that mistake"? Is that what you were worried about?
 20 A. Yes, quite possibly that would be an outcome.
 21 **THE CHAIRMAN:** Was that particular to Day & Nite sales, or
 22 was that something you were worried about with all the
 23 retailers?
 24 A. No, that was something that a lot of retailers did, was
 25 that after the end of a financial year, they would have

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1 an external auditor brought in to actually audit
 2 promotional activity, promotional spend, pricing,
 3 whether or not payments had been received, and I think
 4 somewhere else in my witness statement, I think I do
 5 pass comment about one instance where we had to explain
 6 back to a retailer that we had actually paid the bonus
 7 in a different way, and they had missed it. So
 8 retailers did police the revenue that they were getting
 9 from these types of agreements and would come back and
 10 hit us with all sorts of things.
 11 So I think your comment is particularly relevant to
 12 the situation.
 13 **THE CHAIRMAN:** If someone had come back to you, say you had
 14 not pointed out this, suppose Mr Culham had noticed or
 15 been told that Classic Twin was at 5.44, and Hamlet was
 16 at 5.54 and had done nothing about it, then you would
 17 have a concern that Day & Nite would come back and say
 18 "Well, we want you to fund the 10p difference" --
 19 A. And I think in fact in my witness statement there is
 20 an example of Alldays doing that on Castella cigars,
 21 where several months after a bonus was reduced by us,
 22 and the buyer had forgotten to do it, they came back and
 23 claimed that bonus from us. And in that instance we did
 24 pay it.
 25 **THE CHAIRMAN:** Why wouldn't you just say "Well, the schedule

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1 with differentials is only a maximum, as far as we are
 2 concerned we were happy for you to be pricing
 3 Classic Twin at 5.44"?
 4 A. Well, I think that one of the sort of contexts that you
 5 have to attach to all of this correspondence is the
 6 relationship that we, as a supplier, had with the
 7 retailer. I mean, to say the least, those relationships
 8 were not quiet and cosy and retailers doing things that
 9 we asked them to. Far from it. And we were always very
 10 careful to try to keep some equilibrium and balance in
 11 the relationship, recognising that in any negotiation at
 12 times you need to make concessions, and whether they are
 13 concessions in terms of financial or concessions in
 14 terms of physical assistance, those sorts of things. So
 15 sort of the outcome of certain of these things would
 16 probably depend on the relationship that existed between
 17 the national account manager and the account at the
 18 time.
 19 **DR SCOTT:** Just to understand these two documents together,
 20 in tab 11, which is the business agreement, we have
 21 a requirement on page 29 that "ITL products are treated
 22 no worse than equally in terms of selling prices
 23 compared with other manufacturers' similar products.
 24 The full requirement is shown on the attached listing to
 25 which we have referred."

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1 If you then go to the letter in 19, and we have
 2 talked about the differential errors which are going to
 3 be corrected, and then above that it says:
 4 "When available will you please forward a copy of
 5 the full price list to Lorraine at the office."
 6 Are we to understand that that then gives the office
 7 a chance of checking (a) that the differentials are now
 8 in line, and (b) that it looks as though they are
 9 abiding by the price requirements reflected in the
 10 agreement at tab 11?
 11 **A.** It would show what price they were -- the retailer was
 12 telling their stores to sell at.
 13 **DR SCOTT:** Yes. No, I do understand that the stores
 14 might -- I understand.
 15 **A.** That might not always be the same when you get out to
 16 store. We would then see whether or not they had chosen
 17 to set their prices at the differential levels that we
 18 were seeking.
 19 **DR SCOTT:** Yes. Thank you.
 20 **MR LASOK:** One thing that puzzles me slightly, Mr Batty,
 21 about your answers is that in this particular letter
 22 there is no MPI, there is no bonus issue, so on the face
 23 of it there is actually no basis on which T&S would be
 24 able to come back to you to make a claim if you had
 25 allowed it to carry on pricing at the lower price

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1 instead of the higher one that you preferred.
 2 **A.** Well, I think under normal circumstances you may be
 3 right, but I think the circumstances here are that T&S
 4 have acquired another retail business, and are in the
 5 throes of actually sorting out how that business is
 6 integrated and operates within the T&S business, and we
 7 are helping them trying to sort that out, because
 8 obviously T&S would have a strategy that they would want
 9 to apply across all their outlets, whatever they traded
 10 as. I mean, they might be different in different
 11 categories, because they had Supercigs which was a deep
 12 price cutter, and they had the convenience stores,
 13 One Stop, and I think Day & Nite might have gone into
 14 the one stop operation, which was a sort of a mid-price
 15 convenience store operator.
 16 **Q.** That doesn't explain the reference we have here to
 17 achieving parity with Hamlet?
 18 **A.** Well, I think it would, for the reasons I've explained,
 19 that obviously in the terms of business that was
 20 operating between Imperial and Day & Nite at that time,
 21 Day & Nite weren't receiving any price support for
 22 Classic Twin, and Ken Culham, the national account
 23 manager, was a bit concerned that this price for
 24 Classic Twin was probably a way from the margin that T&S
 25 would be looking to achieve on Classic Twin in their own

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1 stores.
 2 **Q.** But he doesn't express it in that way, does he?
 3 **A.** No, he doesn't, but I am tying in, why would he put that
 4 statement in there, "There are currently no special
 5 short term tactical bonuses on Day & Nite sales
 6 volumes", into that letter if that was not relevant?
 7 **Q.** Well, it's relevant because it indicates that there is
 8 no bonusing going on.
 9 **A.** Exactly.
 10 **Q.** What you have is a normal price, and what you want to do
 11 is a normal price with a normal margin, and what you
 12 want to do is increase that normal price so that it's at
 13 parity with Hamlet; that's so, isn't it?
 14 **A.** Well, it is in the case of T&S, if this was an historic
 15 T&S outlet, but it's not an historic T&S outlet, and
 16 I think, as I explained, the national account manager is
 17 trying to help the retailer integrate this particular
 18 business into his.
 19 **MR LASOK:** I would like to move on now to another part of
 20 your witness statement, but as it's 3.15, it may be the
 21 time at which we have the customary mid-afternoon break.
 22 **THE CHAIRMAN:** Yes, we will have a break for ten minutes.
 23 Mr Batty, you are in the course of giving your
 24 evidence, so you mustn't speak to anybody about the case
 25 whilst we break.

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1 **A.** Understood.
 2 **THE CHAIRMAN:** Thank you.
 3 (3.15 pm)
 4 (A short break)
 5 (3.25 pm)
 6 **MR LASOK:** I don't know, madam, sometimes even in air
 7 conditioned surroundings like this some people find it
 8 a bit uncomfortable to be wearing a jacket, I am not in
 9 that position myself but if there were people who felt
 10 uncomfortable, would it be permissible for them to
 11 remove a jacket? Not anything else.
 12 **THE CHAIRMAN:** Yes. Let's go one step at a time.
 13 **MR LASOK:** It's just, Mr Batty, if you felt more
 14 comfortable.
 15 **A.** I am fine, thank you.
 16 **Q.** If you have your witness statement, could you turn to --
 17 I'll just explain that I fully understand that in your
 18 witness statement, when you comment on certain documents
 19 it's difficult for you to do so because you don't know
 20 the context, we have already had that experience with
 21 some of the documents I put to you before the break,
 22 where even though you were copied in, you say that you
 23 didn't know the full context. So I fully accept that
 24 that's the position, and therefore what I propose to do
 25 is only go through stuff where you are speaking at

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1 a more general level from what appears to be your
2 knowledge.
3 Now, that's why I want to jump to paragraph 4.1.
4 You say here that:
5 "The central tenet of ITL's pricing strategy was to
6 increase its market share by ensuring that its products
7 were offered to consumers at prices that were attractive
8 both in absolute terms (ie below RRP) and when compared
9 to those of competing brands."
10 The point I am going to put to you is this: do you
11 agree that actually ITL told retailers something
12 different, because you told retailers that the pricing
13 strategy involved maintaining parities and
14 differentials?
15 **A.** Maintaining and exceeding, so making the gap wider if it
16 wasn't a problem for us.
17 **Q.** For example, if you go to annex 20, tab 31, {D20/31} you
18 have here a letter from ITL dated 5 March 2002, have
19 you?
20 **A.** Yes.
21 **Q.** Thank you. It's to Somerfield headed "The Trade
22 Development Programme 2002". I will just read a bit,
23 the letter starts off:
24 "I have pleasure in confirming our proposal for
25 developing our mutual business during 2002. The key

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1 factors to the development of our business are ...
2 maintaining our strategic pricing requirements which are
3 designed to maintain price list differentials."
4 That's the kind of message that you were -- when
5 I say "you", ITL -- sending out to the retailers, isn't
6 it?
7 **A.** Well, it was, along with the other messages that are
8 contained there, which I think we have highlighted as
9 confidential. So I think, you know, that sentence or
10 that section on its own in isolation, the middle of
11 those three, tends to perhaps put overemphasis on the
12 pricing strategy when there were two other main factors
13 involved in developing our business with our customers.
14 **Q.** I fully accept that, I am just focusing on the point
15 that's relevant to the present proceedings, which is the
16 pricing. So, for example, on the next page, in the
17 middle, we have the first item under the heading "2002
18 trade development programme. Somerfield Stores.
19 Strategy Pricing" and there we have a payment that is to
20 be made:
21 "... when the level of adherence to ITL's strategy
22 pricing requirements meets the criteria."
23 But there is nothing here in this document that
24 tells the retailer that the central tenet of ITL's
25 pricing strategy is to increase market share by ensuring

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1 that its products are offered to consumers at prices
2 that are attractive both in absolute terms and when
3 compared to those of competing brands, you are focusing
4 on the maintenance of price list differentials; that's
5 correct, isn't it?
6 **A.** In that it's not mentioned in here, yes.
7 **Q.** Yes. So I think that we can put that file aside.
8 **A.** Can I just make the point that, I mean, that in
9 isolation I think doesn't tell the whole picture,
10 bearing in mind that there is an ongoing dialogue,
11 communication between us and the customers, and my guess
12 would be -- and I've not seen the witness statements
13 from any of the retailers -- that there would be quite
14 a lot of comment about the competitive nature of what we
15 were doing, or what they were doing, what we were doing,
16 and that there were lots of activities taking place on
17 price and around price, and I just wanted to make that
18 point as part of our activities in the marketplace that
19 it wasn't solely about price, there were other factors
20 involved.
21 **Q.** I would like to pursue the pricing aspect. Could you
22 turn to paragraph 4.25, please, in your witness
23 statement. You can put that file away, thank you very
24 much. If you have 4.25, could you read it to yourself,
25 please.

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1 (Pause)
2 **A.** Yeah.
3 **Q.** I just wanted to look at some examples of the use by ITL
4 of vigorous low pricing strategies. Could you turn to
5 annex 14, please. You have tab 49, perhaps? {D14/49}
6 **A.** Yes.
7 **Q.** Now, this is an email string and, as usual, it starts,
8 as it were, from the bottom upwards. The earliest email
9 starts in the middle of the page, and was sent on
10 Thursday, February 28th 2002. It was sent to you, and
11 immediately above that email there is another email from
12 Graham Hall later the same day, which was copied in to
13 you, and refers to a conversation that he had had with
14 a person to whom he refers as Roger. Now, could you
15 just read the page, please. Again, in silence and at
16 your own speed.
17 (Pause)
18 Now, am I right in thinking that the second email,
19 the one that was sent by Mr Hall on 28 February 2002 at
20 14.28, is to all the UK NAMs?
21 **A.** Yes.
22 **Q.** And it's copied in to you, and the Roger that Mr Hall is
23 referring to, is that yourself?
24 **A.** Yes, it is, I believe, yeah.
25 **Q.** So you have been asked to advise on the situation that

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1 was reported to ITL by Asda, and your advice is, and
 2 I'll quote again as follows:
 3 "... he has confirmed that we should follow
 4 Gallaher's lead on this by moving Richmond Superkings
 5 20s up to £3.47 one week after Dorchester Superkings
 6 move up. The strategy thereafter (where Sterling is
 7 stocked) is that Richmond should be 5p [above] cf
 8 Sterling and at parity with Dorchester.
 9 "Roger requests that you take appropriate action
 10 with your accounts please."
 11 Is this one of your examples of vigorous low pricing
 12 strategies?
 13 **A.** I think it's probably as a consequence of the vigorous
 14 low pricing, intense price led competition in the market
 15 that I refer to here, because this is, I believe, the
 16 consequence of the activity that created this new sector
 17 in the market, the ultra low price sector, which, if my
 18 memory is correct, Gallahers were the first company to
 19 enter the ultra low price sector, and we were quite late
 20 by comparison in entering it as Imperial's chief
 21 executive was concerned with the impact on profitability
 22 in the company by getting into this particular sector.
 23 But when we did enter it, we entered it with a brand
 24 called Richmond in a Kingsize version, and we then
 25 attacked I think it was Mayfair initially with Richmond,

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1 and I can't remember the exact sequence of events but
 2 Dorchester came along and got embroiled, and eventually
 3 Sterling came along, and in between Imperial launched
 4 Richmond Superkings, and I think, if my memory proves me
 5 correct, that at one point Richmond Kingsize were
 6 retailing at £3.29 for 20, and that obviously was
 7 costing Imperial Tobacco a lot of money to maintain
 8 a brand at that particular price at that particular
 9 time.

10 Over the subsequent year or so, because this was
 11 March 2002, there were various things happening where
 12 one brand would be promoted, whether it was ours or
 13 whether Gallahers chose to put some money behind one of
 14 their ultra low price brands, and so there was quite
 15 a big price war going on in that area, and this was
 16 a move to move us out of one set of pricing which might
 17 have had some questionable profitability attached to it,
 18 into a more profitable position, but after a fairly long
 19 and intense period of price competition between these
 20 brands.

21 **Q.** So are you saying that this was the point at which ITL
 22 backed off from the continuation of a price war?

23 **A.** Well, again, I think that the other factor to include in
 24 here is looking at the date, in March, it was quite
 25 possible that there was a Budget, Chancellor's Budget

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1 just round the corner, I can't be absolutely certain of
 2 that, but one of the things that we might be cognisant
 3 of at that point is there could well be a Budget
 4 increase on the product, and if we were thinking of
 5 increasing the shelf price of a product, then we might
 6 find ourselves with a bit of a double whammy with
 7 a Budget increase and a tax increase at the same time.
 8 **Q.** I am particularly interested in the passage in Mr Hall's
 9 email where he's effectively, as I read it, reporting
 10 your strategy, and the strategy, I'll read it again:
 11 "The strategy thereafter (where Sterling is stocked)
 12 is that Richmond should be 5p above Sterling and at
 13 parity with Dorchester."

14 That's the strategy.

15 **A.** Yeah.

16 **Q.** That was your strategy?

17 **A.** Yeah.

18 **Q.** And the instruction was that appropriate action was to
 19 be taken by the NAMs with their accounts, to implement
 20 that strategy?

21 **A.** Yeah.

22 **Q.** I'll put it to you that that is not a vigorous low
 23 pricing strategy, because parity or being priced 5p
 24 above a rival brand is not a low pricing strategy?

25 **A.** Well, I think taking this item in isolation is

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1 an incorrect interpretation of the position, because you
 2 have to look at the price of Richmond against the other
 3 brands in the marketplace that it wasn't necessarily
 4 competing against. Maybe we thought at this particular
 5 time Richmond had got to where it had got to, and we
 6 needed to do something with the price to make some
 7 profit on it. Once we made some more profit, we could
 8 have another promotion.

9 **THE CHAIRMAN:** When you say "got to where it had got to"
 10 what do you mean? In terms of --

11 **A.** Market share and the sales it was stealing from
 12 competing brands. I mean, Sterling, to give you a bit
 13 of background on that, Sterling was a brand that I think
 14 Tesco had launched -- sorry, Gallahers had launched just
 15 in Tesco initially, and had been like a sort of pseudo
 16 own label product, so was priced even lower than our
 17 ultra low priced brand, and Dorchester was a brand that
 18 Gallahers had purchased from RJ Reynolds and tried to
 19 use as a price fighter, and had lost out on the battle.
 20 I mean, Richmond was hugely successful by comparison to
 21 Dorchester.

22 **DR SCOTT:** You had, according to the list of manufacturers'
 23 price increases, led the market back in September 2001
 24 by putting up the price of Richmond and Gallaher
 25 followed you, I think a week later.

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1 A. Right.
 2 DR SCOTT: You were indeed contemplating a Budget in April,
 3 so we get a 17 April Budget announcement followed the
 4 following day by adjustments by both companies, in which
 5 in fact both Richmond and Dorchester go up by the same
 6 amount. So that's the context that you have already led
 7 the way in taking these prices up at the MPI level.
 8 A. Right. I think you will find that there will probably
 9 be, if we look in the history books, another period of
 10 price competition following on that Budget, and it may
 11 even have been that we did some price holding during
 12 that Budget, which was quite a frequent tactic that we
 13 used.
 14 THE CHAIRMAN: Could you explain again why, if you were
 15 envisaging that there would be a price rise shortly
 16 after because of a Budget, why you would want to have
 17 a price rise shortly before that? I would have thought
 18 that you would prefer to hide any price rise in the
 19 Budget and blame it on the Chancellor rather than take
 20 the blame yourselves.
 21 A. We would have liked to have done that, I think, but the
 22 retailers wouldn't, because the retailers were at the
 23 sharp end, and they used to catch the wrath of the
 24 consumer about prices going up, and certainly one of the
 25 things I think that was said to me in my senior role by

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1 several retailers was that they didn't want to be seen
 2 to be putting -- say there was a Budget increase of 10p,
 3 and we wanted a 4p manufacturers' increase, for those
 4 two things to happen at the same time, because the
 5 consumer would go into the retail outlet having just
 6 heard there is a 10p Budget increase and find that the
 7 price had gone up by 14p, so the retailer would then be
 8 accused of profiteering. So that's why we phased it in
 9 the way that we probably did.
 10 THE CHAIRMAN: Would it have struck you as surprising at the
 11 time that Asda would call up Mr Hall to tell him that
 12 Gallaher were increasing the prices of two of their
 13 brands?
 14 A. In a way, yes. I mean, generally speaking we only found
 15 out about things after they had happened, when they were
 16 in the true public domain. But, you know, in my
 17 instruction, I think it's made clear, which I ask
 18 Graham Hall to do in my absence for some reason, was
 19 that they were to take the appropriate action when they
 20 saw things happening.
 21 So if that was going to be the case, then that is
 22 what we would do.
 23 DR SCOTT: Just one other small question to clarify: TAs?
 24 We know what a NAM is.
 25 A. A trading assistant --

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1 DR SCOTT: Thank you.
 2 A. -- who worked in the national account office in Bristol
 3 and were responsible for a lot of the administrative
 4 work, and contact with customers on administrative
 5 items.
 6 DR SCOTT: So they would be the people who would have
 7 a large role in making the matrices for the individual
 8 retailer?
 9 A. Yes.
 10 DR SCOTT: Okay.
 11 MR LASOK: Before I move to the next document on pricing
 12 that I wanted to look at, I wanted to follow up this
 13 business about Asda informing ITL about price changes.
 14 Now, I think you can put away -- we are in the right
 15 file, unfortunately. We are in annex 14. Could you go
 16 back to tab 10, please. {D14/10} If you look at the
 17 email there, you are being informed -- because this is
 18 an email to you -- about [redacted] in Asda. I am
 19 sorry, this is confidential. For some reason, what
 20 I have just said is confidential.
 21 MR HOWARD: I can't believe it is.
 22 MR LASOK: All right, whatever. Somebody from Asda advised
 23 that his Dorchester price would be moving from 3.29 to
 24 3.34. I hope that's not confidential. So you were
 25 informed that at that stage Asda was passing information

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1 on of that nature?
 2 A. Yes, it did happen occasionally. One of the roles of my
 3 team was market intelligence. You know, information was
 4 valuable to us, to try to work out what the competition
 5 were doing, because we had no way of finding out other
 6 than observation in the field. I used to say to my guys
 7 "Look, you know, if you don't ask, you don't get". So
 8 occasionally a question would be asked and we would get
 9 an answer back. So fine, we would deal with it on that
 10 basis. But I do not want anybody to think there was
 11 an arrangement of exchanging information of this sort.
 12 This was us asking a question and getting an answer.
 13 Q. If you look at the preceding tab, which is 9, this is
 14 a letter dated 5 October, I think it must be 2000, and
 15 refers to a meeting that took place on 3 October between
 16 ITL and Asda. If you look at the second page, under the
 17 heading "Richmond Pricing", you see that the author of
 18 the letter, Mr Hall, refers to the fact that there was
 19 an agreement between Asda and ITL that the Richmond
 20 price would move as a result of a Dorchester move and
 21 that's the kind of thing that you would expect to see,
 22 I would suggest. To use your own phrase, if you don't
 23 ask, you don't get?
 24 A. Yeah.
 25 Q. It's well worthwhile drawing your attention to the bit

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1 at the top of the page under the heading "Lambert &
2 Butler and JPS Pricing". That again is a move upwards
3 by ITL, and I would suggest that that is not evidence of
4 vigorous low pricing strategy, is it?
5 **A.** In that instance, you are correct, but that's just one
6 instance of many where there would be lots of examples
7 of vigorous and intense price competition in the
8 marketplace.
9 **Q.** If you move to tab 32, {D14/32} again it's the same
10 annex, and read that one, it's not an email exchange to
11 which you were a party, but we see Asda again informing
12 ITL, here I would suggest to you this indicates that
13 it's something that was not in the public domain?
14 **A.** Certainly that's what it looks like with those dates.
15 **Q.** If we go to 40, {D14/40} and again I fully accept that
16 you are not a person who received or was apparently
17 copied into one of these emails, it doesn't say that you
18 were, but if you could just read those two emails.
19 (Pause)
20 It's just the way things went in the relationship
21 between Asda and ITL, wasn't it?
22 **A.** Well, it would appear from these pieces of
23 correspondence that we found out information about what
24 was happening in the marketplace, yes.
25 **Q.** You can put away 14, and I would like you to take up

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1 annex 28, please. If you have annex 28, I would be
2 grateful if you could go to tab 65, please. {D28/65}
3 Tab 65 ought to be a letter dated 5 August 2002,
4 addressed to Mr Trevor Thomas of Safeway. Is that the
5 one that you have?
6 **A.** Yeah.
7 **Q.** Okay. Would you be kind enough to read the letter
8 quietly to yourself and at your own pace, please.
9 (Pause)
10 At that time, in 2002, ITL sent out a number of
11 letters expressed in that way to a number of retailers.
12 Is that a letter that shows the use of vigorous low
13 pricing strategies?
14 **A.** It's a letter detailing the changes of a manufacturers'
15 price increase, which was on 2 September.
16 **Q.** It's more than that, though, isn't it?
17 **A.** It shows the effects of the price increase on
18 2 September.
19 **Q.** And the last paragraph on the first page reads:
20 "At the MPI we wish to move the market up."
21 The writer goes on to say:
22 "We would encourage you to follow on Sterling and
23 Dorchester, and as a guideline across the trade
24 anticipate shelf prices as follows."
25 They then set out anticipated prices for Gallaher

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1 brands, and the writer goes on to say, after the
2 reference to tilt stores:
3 "You may also price higher than shown above, but the
4 differentials should be the same, ie Sterling is 5p less
5 and Richmond and Dorchester at parity."
6 It's more than just what you said it was?
7 **A.** I said and the effects of that manufacturers' price
8 increase across the range of products, so ... I think as
9 well, certainly in this instance with Safeway, who were
10 at this stage in fairly serious trouble, we had a buyer
11 here who was very inefficient, and in some ways the
12 national account manager was having to work very hard to
13 achieve what we wanted to achieve, which was our brands
14 at competitive prices. But I think generally speaking,
15 there are instances of correspondence in this vast array
16 of documents that you can pull out which say it wasn't
17 intense price competition, but by the same token you can
18 see there is lots of documents detailing tactical
19 bonuses and price reductions. So ...
20 **THE CHAIRMAN:** At paragraph 9 of the letter, those plus 7p,
21 plus 6p, what is that referring to? It says "individual
22 brand price changes". Is that an increase in the
23 wholesale price or the recommended retail price?
24 **A.** The recommended retail price, which has a consequence of
25 increasing the wholesale price by that amount, including

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1 tax.
2 **DR SCOTT:** Yes, I mean, if one looks at the schedule of
3 MPIs, it ties in with the schedule of MPIs, so this is
4 writing to them about the change scheduled for
5 2 September, ITL having, with the exception of
6 Philip Morris brands, not immediately followed the
7 Gallaher price increase on 25 June that year.
8 Now, presumably what this letter implies is that at
9 least Safeways had not implemented price increases
10 introduced by Gallaher, because the letter is suggesting
11 "time to go up"?
12 **A.** Yeah, I mean, I think this was one of the occasions
13 where again, trying to get inside the old grey matter
14 from nearly ten years ago, there was a Gallaher price
15 increase I think round about June/July time.
16 **DR SCOTT:** 25 June.
17 **A.** Right, and when Gallaher realised that we were not
18 announcing an MPI, and we made it very clear, I think,
19 to the retail trade that we weren't, because there is
20 correspondence again to demonstrate that, Gallaher then
21 rescinded their MPI with various retailers and took
22 prices back down, and tried to compete with the low
23 level of prices that we had set for that period of time.
24 So we invested hypothetically anyway a considerable
25 amount of money during that time but we gained market

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1 share and decided okay, we will now put prices up.
 2 **DR SCOTT:** And you are envisaging in this letter that now
 3 everything will go up in this sector.
 4 **A.** That's what we would hope, but because we didn't know
 5 what Gallaher's attitude or BAT's attitude would be to
 6 it, we had to sit and wait and see, as Gallaher sat and
 7 had to wait and see if we were going with an MPI earlier
 8 in the year, which we didn't.
 9 **MR LASOK:** But there was an expectation, wasn't there, that
 10 the Gallaher prices would go up to suit, that's why --
 11 **A.** I think there was a hope, you know, from a commercial
 12 point of view, that that's what would happen.
 13 **Q.** I put it to you it was an expectation?
 14 **A.** It was a hope.
 15 **Q.** Why did the writer of the letter anticipate shelf prices
 16 which he then set out?
 17 **A.** Maybe in this instance because it was a national account
 18 manager dealing with probably [REDACTED]
 19 [REDACTED] at that particular point.
 20 **Q.** I put it to you this is a letter which shows the
 21 operation of the parity and differential strategy that
 22 ITL had, that the price increases were encouraged as
 23 long as differentials and parities were maintained, and
 24 there was the expectation that the Gallaher prices would
 25 change to suit?

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1 **A.** I think that we expected prices to change on shelves at
 2 any time when the retailer's net buying price, net cost
 3 price, increased and this was an example where
 4 a retailer's and a whole raft of retailers' net cost
 5 prices were going to increase, mainly because of the
 6 MPI, but also perhaps because some tactical bonuses may
 7 be withdrawn, so there was going to be a huge change in
 8 the marketplace, and that was their approach, right the
 9 way through my time running the national account
 10 department, that we wouldn't expect any retailer, when
 11 his net cost price went up, to still keep selling at the
 12 previous price. That just wasn't an expectation at all.
 13 **Q.** But this is a letter in which you are encouraging the
 14 retailer to make even greater price increases, as long
 15 as the differentials and the parities are respected?
 16 **A.** In this instance that's -- yes, and as long as we
 17 remained competitive, because that's what we were trying
 18 to achieve all the time, that we were competitive
 19 against our --
 20 **Q.** What do you mean by competitive?
 21 **A.** Part of the research that was done with users of our
 22 products over the years was that consumers could very
 23 rarely tell you exactly what price a product was, but
 24 they could tell you how a price fitted into the whole
 25 scheme of things. So that they knew that brands like

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1 Regal and Embassy No 1 will be a penny or two cheaper
 2 than B&H, that Superkings and Berkeley were usually
 3 roughly around about the same sort of price, and then
 4 they would put Lambert & Butler with, at one time
 5 Mayfair, but then ... so that was the sort of mindset
 6 that consumers had.
 7 **DR SCOTT:** So consumers were, what you are suggesting, more
 8 sensitive to parities and differentials than they were
 9 to the absolute level?
 10 **A.** Yes.
 11 **MR LASOK:** Mr Batty, that can't be right in the case of
 12 Richmond and Dorchester, because you have just explained
 13 only a few moments ago that they were newcomers to the
 14 market, as you have pointed out, Richmond was at parity
 15 with Mayfair initially, and then it moved to parity with
 16 Dorchester. So this was happening right at the very
 17 beginning as a result of decisions made by the
 18 manufacturers. This is not a reflection of the
 19 viewpoint of the consumer.
 20 **A.** Well, Richmond I think was launched in about 1999, so
 21 that's two or three years before this particular piece
 22 of correspondence.
 23 **Q.** You repositioned Richmond, when was it, it was in the
 24 autumn of 2000?
 25 **A.** Possibly.

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1 **Q.** And you repositioned it then on a parity with
 2 Dorchester, you made that decision?
 3 **A.** Yeah.
 4 **Q.** That's right, it wasn't the consumer who made it?
 5 **A.** No, but the consumer was already in a position where
 6 they realised that Richmond was -- they didn't call it
 7 ultra low, more often than not they called it cheap, but
 8 that's not a terminology our marketing people would have
 9 liked to be seen. But that's what the consumer saw, and
 10 they would see that in that group of cheap brands at the
 11 bottom end of the market, but slightly better than the
 12 own label products.
 13 **THE CHAIRMAN:** Was there anything about the actual Richmond
 14 cigarette that changed, that you changed the tobacco in
 15 it?
 16 **A.** No.
 17 **THE CHAIRMAN:** It was just the price.
 18 **A.** It was the price and the continuation of a pricing level
 19 that kept it sort of in the consumer's interest. That
 20 coupled with the pack designs. We did make one or two
 21 sort of marginal changes to pack designs.
 22 **THE CHAIRMAN:** But the actual product didn't change?
 23 **A.** No, the actual product was not changed, as far as
 24 I know. I mean, basically [REDACTED]
 25 [REDACTED]: ultra low, low, mid-price and premium. So

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1 there was slight variations in the make-up of the blend
 2 of tobacco. But that was, as far as I know, the
 3 Richmond blend was the Richmond blend from day one.
 4 **MR LASOK:** Right, we can close 28 and could you take up
 5 annex 16, please. {D16/10} Could you go to tab 10,
 6 please. Just a short bit here. The only bit I am
 7 interested in is the paragraph immediately before the
 8 numbered paragraph 5. It's the one that says -- I hope
 9 this is not confidential -- it says:
 10 "I also note that Amber Leaf will move up to 1.99
 11 from the date of the Gallaher MPI. Drum will match
 12 Amber Leaf and I will set out the new bonus in the retro
 13 payment."
 14 Is that too an example of vigorous low pricing
 15 strategies at work?
 16 **A.** I don't know because I don't know what the recommended
 17 price of Amber Leaf was at that particular time.
 18 **Q.** The policy was parity with Drum. Sorry, parity between
 19 Drum and Amber Leaf.
 20 **A.** Yes, I understand that. But to me 1.99 sounds like
 21 a good price point, and it would be attractive to
 22 consumers.
 23 **Q.** You say:
 24 "Drum will match Amber Leaf."
 25 It's not you; ITL says.

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1 **A.** I mean, that was our declared strategy, to have --
 2 **Q.** To match?
 3 **A.** -- Drum at the same price or less than Amber Leaf.
 4 **Q.** No, to match?
 5 **A.** Same price or less, no more expensive than.
 6 **Q.** If it was the same price or less, why is it "Drum will
 7 match Amber Leaf and I will set out the new bonus in the
 8 retro payment"?
 9 **A.** I think in this case this is just the terminology that
 10 the national account manager, George Byas, used as part
 11 of his, if you like, commercial shorthand slang, a quick
 12 way to get to the point in here. If it had been written
 13 by a lawyer, it would have been very different, I am
 14 sure. These are salesmen that are writing these, and
 15 I just don't think that the emphasis that you are adding
 16 to match is the emphasis that he would have put on, he
 17 wouldn't have put any emphasis on that, the emphasis for
 18 him was more to do with the 1.99, I think.
 19 **Q.** Are you saying that the word "match" is a technical term
 20 in the trade?
 21 **A.** No.
 22 **Q.** It has its ordinary and natural meaning, doesn't it?
 23 **A.** Yes.
 24 **Q.** So what's the longhand version of this?
 25 **A.** Can't be certain but my guess would be that it's that

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1 there will be a reduction in bonus -- it says there,
 2 doesn't it "I will set out the new bonus in the retro
 3 payment", so he is reducing the bonus behind it and the
 4 price is going up to 1.99, which is a great shelf price.
 5 **Q.** I would like to focus on the first phrase:
 6 "Drum will match Amber Leaf."
 7 I think you have said that's commercial shorthand?
 8 **A.** I didn't say commercial shorthand, I said shorthand.
 9 **Q.** Okay. What's the longhand version?
 10 **A.** To be the same price as or less, if you are looking at
 11 the sort of strategic price requirements that feature in
 12 these things.
 13 **Q.** But it already was less?
 14 **A.** Yes, but I think that from a sort of product management
 15 point of view, if I was out there doing this job and
 16 I had an opportunity to sell a product at 1.99 and
 17 reduce my bonus, ie the cost of me selling it, I would
 18 do that. It's just convenient that that product is
 19 there at that price and he has put "match". It's just
 20 a word he has chosen out of the blue, I think, to
 21 express what he wants from this position. I wouldn't
 22 read anything significant or sinister in the use of the
 23 word "match".
 24 **Q.** Why didn't he say "Drum will poison Amber Leaf", that's
 25 a word that he plucked out of the blue?

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1 **A.** I don't know, I can't answer.
 2 **Q.** Why did he choose "match"? It's ordinary English, isn't
 3 it?
 4 **A.** Yes, it is, that's it, it's ordinary English. And
 5 going --
 6 **Q.** The recipient of this letter --
 7 **A.** Sorry?
 8 **Q.** The recipient of this letter, on what basis are we
 9 supposed to believe that the recipient of this letter
 10 would have interpreted it in the longhand way that you
 11 have suggested?
 12 **A.** I don't know, I can't even begin to guess how
 13 Michael Williams would have interpreted that, what he
 14 would have thought when he read that.
 15 **Q.** Maybe he would have thought that "match" meant "match"?
 16 **A.** Maybe.
 17 **Q.** Pretty likely, isn't it?
 18 **A.** Maybe.
 19 **Q.** Particularly when he is being told that Drum is going to
 20 match Amber Leaf?
 21 **A.** I think the point is that Michael Williams at Thresher,
 22 if he chose to sell at a price other than 1.99, if he
 23 sold it at less than 1.99 he would probably get the
 24 retro bonus that George Byas had calculated in here, if
 25 he sold it for £2 or above he would not get the retro

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1 bonus. It's as simple and straightforward as that.
 2 **Q.** Why "Drum will match"?
 3 **A.** I think I tried to explain as best I can an answer to
 4 this question.
 5 **Q.** Okay, fine.
 6 **DR SCOTT:** Can we once again put this in context, that here
 7 we have a situation in which ITL have had an MPI on
 8 29 January, and in that MPI on 29 January hand rolling
 9 tobacco had been increased, with the exception of
 10 Gold Leaf concept which remained unchanged, and then
 11 there is going to be, after this letter, a Gallaher one,
 12 which is going to follow a fortnight later, in which
 13 their hand rolling tobacco, right the way across, is
 14 going to go up by amounts which bear a remarkable
 15 similarity to the ITL price increase. So that's the
 16 context in which this is happening, that identical MPIs
 17 are taking place, and what this suggests is again the
 18 pattern that after this little bit of turbulence, parity
 19 will rule again.
 20 Does that characterise the --
 21 **A.** I think so, yes, without seeing the precise details of
 22 the MPI with the figures and the precise timings, yes.
 23 **THE CHAIRMAN:** I think the other point apart from the use of
 24 the word "match" which you debated is that this is
 25 notifying them of a move up by Amber Leaf, and your

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1 evidence, as I understood it, was that in the event of
 2 Amber Leaf moving up, you wouldn't expect Drum to be
 3 moved up by the retailer, nor is that an expectation
 4 created by the trading agreements you say because they
 5 are maxima and so an increase in Amber Leaf, if Drum
 6 remains the same, that's perfectly consistent with the
 7 agreement.
 8 **A.** Yes.
 9 **THE CHAIRMAN:** So why was there any need to say anything
 10 about the Amber Leaf moving up here?
 11 **A.** I think it's probably because we were going to save some
 12 money by reducing the bonus.
 13 **THE CHAIRMAN:** I see, so you reduce the bonus and, as
 14 I think you have said earlier, you would expect ...
 15 **A.** So the net cost price of that product would go up.
 16 **THE CHAIRMAN:** It would go up and then you would expect the
 17 retail price would go up?
 18 **A.** Yes.
 19 **MR LASOK:** You can put away that bundle now, and move to
 20 annex 17. Could you go to tab 16, please. {D17/16}
 21 Again, this should be an Imperial letter dated
 22 15 November 2000. Would you be kind enough just to read
 23 the letter to yourself, please.
 24 (Pause)
 25 **A.** Yes.

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1 **Q.** Is this also another example of the use of vigorous low
 2 pricing strategies?
 3 **A.** Well, I think I can refer you to a previous answer
 4 I gave here, because I actually did talk about this
 5 particular price position on Richmond at 3.29 when it
 6 was reduced in price, I think, at the time when we
 7 launched Richmond Superkings, and this is probably --
 8 well, certainly several months on from the launch of
 9 Richmond Superkings, and, as you see in the confidential
 10 boxes, there were considerable additional bonuses being
 11 paid to achieve the 3.29, and this was an opportunity we
 12 saw to move the price up, reduce our bonus, and still
 13 remain competitive.
 14 **Q.** I would like to focus in particular on the second
 15 paragraph of the letter, the one that begins "you are
 16 probably aware", because there is a reference in the
 17 second line to a presentation on the Richmond
 18 repositioning, and the writer of the letter says in the
 19 next line:
 20 "Our strategy is parity with Dorchester."
 21 He goes on to say:
 22 "We are moving Richmond."
 23 The moving bit follows on from the reference to the
 24 strategy being parity with Dorchester. The reason for
 25 the move expressed in this letter is to maintain parity

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1 with Dorchester. Would you agree?
 2 **A.** Yes, because our stated objective was to have this
 3 product on the shelf at the same price as Dorchester,
 4 and if the retailer moved to these prices, these are the
 5 margins, cash and percentage, he would make by doing
 6 that.
 7 **Q.** Thank you very much. Now, I would like to go back to
 8 your witness statement, and this time to -- I was
 9 looking at paragraph 4.25, but if you go back to the
 10 bottom of the previous page, paragraph 4.23, in the last
 11 sentence of that paragraph, I'll perhaps just read it
 12 out, you say:
 13 "In particular on the occasion of a price rise
 14 (whether as a result of an MPI or increase in Government
 15 duty), ITL must ensure that the implications of that
 16 price rise at the RRP's are clearly communicated to the
 17 retailer, within the context of any promotional cost
 18 pricing that ITL may itself be offering."
 19 You then say in 4.24:
 20 "Where such communications ..."
 21 Now, are these communications you are referring to
 22 the ones in that sentence in 4.23 that I've just read?
 23 **A.** This letter --
 24 **Q.** No, no, I am terribly sorry, I am not referring back to
 25 the document in the bundle.

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1 A. Right.
 2 Q. In 4.24 when you use the phrase "such communications",
 3 are you referring to the communications mentioned in the
 4 sentence at the end of 4.23 that I've just read?
 5 A. Yes, I believe so.
 6 Q. So you say that where those communications:
 7 "... refer to the retailer's own selling price (and
 8 even indications from ITL as to the implications of
 9 a Budget or MPI for that selling price), this does not
 10 mean that ITL is agreeing with the retailer what the
 11 retailer's selling price should be, rather ITL is taking
 12 steps as a responsible manufacturer and generally at the
 13 request of the retailer to ensure that the retailer has
 14 correctly understood the implications of a change to the
 15 published RRP's when applied to the retailer's own
 16 pricing strategy."
 17 Now, are you saying that communications of this
 18 nature never involved ITL agreeing with the retailer
 19 what the retailer's selling price should be, and that
 20 when we see references of this nature, ITL is referring
 21 only to implications for the retailer's pricing
 22 strategy?
 23 A. If at the time of an MPI we were notifying the trade
 24 three or four weeks in advance of a manufacturers' price
 25 increase, obviously the Budget situation was a bit more

1 instantaneous, but for those retailers that we operated
 2 a price file with, we would have to make, certainly in
 3 the case of the Budget, certain assumptions that if
 4 product increased by X pence at the recommended retail
 5 level, then that amount could be added to what we were
 6 aware was the retailer's chosen pricing for each
 7 individual product, because we had that information on
 8 the price file that they had confirmed to us that that
 9 was their current pricing.
 10 Q. Can I go back to 4.23, because in the sentence I read
 11 out you are dealing with occasions where there is
 12 a price rise, and ITL must ensure the implications of
 13 that price rise for the RRP's clearly communicated to the
 14 retailer within the context of any promotional cost
 15 pricing. You then say in 4.24 that such communications,
 16 where they refer to the retailer's own selling price,
 17 don't mean that ITL is agreeing with the retailer what
 18 the retailer's selling price should be, it's just you
 19 giving the retailer assistance. And you say:
 20 "... generally at the request of the retailer to
 21 ensure that the retailer has correctly understood the
 22 implications of a change to the RRP's when applied to the
 23 retailer's own pricing strategy."
 24 Now, look, in 17/16, {D17/16} which is the one that
 25 you have there, this is a price rise letter, because it

1 informs the retailer of a price rise. Now, this is
 2 a price rise that you are making in response to a rise
 3 in Dorchester, and here ITL is actually telling the
 4 retailer where the price is going to move to. So would
 5 you agree that ITL did in fact engage in communications
 6 of that nature with the retailer in which ITL did
 7 specify or agree with the price that the retailer was to
 8 have on the shelf?
 9 A. I think if we were looking at 4.23 and 4.24, these
 10 specifically refer to changes to recommended retail
 11 prices in published price lists of Budgets and MPIs
 12 which involved the change of tax and duty, which was the
 13 implication for the retailer in their revised cost
 14 prices. The situation in tab 16 is the withdrawal of
 15 a sort of tactical bonus behind these products. So
 16 assuming again that the tactical bonus was being reduced
 17 by X pence per packet of cigarettes, then one can assume
 18 that if the retailer wanted to continue making the same
 19 sort of margin they were making before, then they would
 20 have to put up their price by that amount, if they chose
 21 to do so. If they didn't choose to do so, then they
 22 understood the consequences of it.
 23 Q. Probably you don't remember it, but we looked a little
 24 while ago at a document in annex 28. Can we have a look
 25 at that one again, please. It's tab 65. {D28/65} If

1 you want to read it again, please do.
 2 (Pause)
 3 A. Yes.
 4 Q. This is an MPI document, isn't it, it's one of the ones
 5 that you are referring to in paragraph 4.23 of your
 6 witness statement? Do you want to reconsider what you
 7 have said in paragraph 4.24 of your witness statement,
 8 in the light of that document?
 9 A. I don't think so.
 10 Q. So when this document says on the second page:
 11 "You may also price higher than shown above but the
 12 differentials should be the same, ie Sterling is minus
 13 5p and Richmond and Dorchester are at parity."
 14 You say that is ITL merely taking steps as
 15 a responsible manufacturer to ensure that the retailer
 16 has correctly understood the implications of a change to
 17 the published RRP's when applied to the retailer's own
 18 pricing strategy?
 19 A. But I think that -- isn't this a reference to the tilt
 20 stores and being 3p more expensive? When you may also
 21 price higher than shown above but the differentials
 22 should remain the same. So the choice is yours,
 23 Mr Retailer, as to what price you are going to sell at.
 24 Q. As long as the differentials are the same?
 25 A. Yeah.

1 Q. That's right, isn't it?
 2 A. I think so.
 3 Q. So do you want to modify what you said in paragraph 4.24
 4 of your witness statement?
 5 A. No, I don't think so.
 6 Q. Why not?
 7 A. Because I can't quite understand the correlation that
 8 you are making between the two.
 9 Q. Well, you are not ensuring that the retailer has
 10 correctly understood the implications of the change to
 11 the published RRP's, you are encouraging the retailer to
 12 price even higher, as long as the parity and the
 13 differentials are respected?
 14 A. But I think there is some assumptions here that the
 15 retailer is selling below RRP. This is what Safeway
 16 did, sold most of the product below the recommended
 17 retail price.
 18 Q. Forgive me, that's an evasion, isn't it?
 19 A. An evasion of what?
 20 Q. Of what I am putting to you.
 21 A. I don't think -- sorry. Sorry, I don't understand.
 22 DR SCOTT: I think the point being put to you is this:
 23 whatever the level of pricing in the tilt price lists
 24 was, your concern was with the maintenance of parities
 25 and differentials rather than with the absolute levels.

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1 A. I think it was a combination of the two things, put like
 2 that. I mean, we were concerned, and there is plenty of
 3 correspondence, I think, around the Safeway situation,
 4 to determine that if they sold at above recommended
 5 retail prices in the tilt stores, then we withdrew the
 6 bonuses related to that --
 7 DR SCOTT: The bonuses related to that pricing below RRP's.
 8 A. Yes.
 9 DR SCOTT: But you would retain the bonus related to
 10 differentials were they to maintain the differences.
 11 A. Yes.
 12 THE CHAIRMAN: I think there is also the point that the
 13 wording, looking at the wording in paragraph 4.24, one
 14 might expect this letter to say something like "Oh, we
 15 are moving this up, assuming you want to keep your
 16 margin at the same level, you would increase the prices
 17 by 4p for KS and 6p for SKS", whereas what in fact it
 18 says is "Please increase Richmond brands by 4p for KS
 19 and 6p for Superkings", which seems to be something
 20 different from --
 21 A. That's the amount that they have gone up in the price
 22 lists, that's the increase in recommended retail price.
 23 I am not sure what those two prices quoted there for
 24 Sterling and for Richmond relate to relevant to the RRP's
 25 at that time., which I think has a bearing on the whole

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1 situation. I think that, I mean, ultimately we would
 2 suggest prices to the retailer but ultimately the
 3 retailer had to make the decision what they wanted to
 4 do, based on their own particular pricing strategy.
 5 They certainly didn't do things that we told them to;
 6 far from it.
 7 DR SCOTT: But you were, in this letter, anticipating that
 8 whatever the retailer decided to do in absolute terms,
 9 whether at the non-tilt or at the tilt tiers, you would
 10 pay them to maintain parity and differentials?
 11 A. As long as our brands weren't more expensive than their
 12 paired counterparts, yes.
 13 MR LASOK: And not below either?
 14 A. They could be below.
 15 Q. Not on the basis of that letter?
 16 A. Well, the retailer could make the choice, couldn't they,
 17 if they decided to sell below those prices.
 18 Q. No, we don't want to talk about absolute prices, we are
 19 talking about the relativities. The letter instructs
 20 the retailer to respect a parity and a 5p differential
 21 between Richmond and Sterling. That's what it says.
 22 A. Yes. But it's not how a national account manager would
 23 use it with the retailer.
 24 Q. And how would the retailer understand ordinary English.
 25 A. Yes, I would hope so, but I don't think that there is --

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1 I mean, I get the feeling that there is a suggestion
 2 that this was fixing the price in some way, and far from
 3 it. You know, the retailer was free all the time to
 4 price where they wanted to, and at worst, if Richmond
 5 and Dorchester were the same price, we would be
 6 relatively happy. If Richmond happened to be cheaper,
 7 then we would be a degree or two happier.
 8 Q. But you don't say that in the letter?
 9 A. No, but I think that was a general understanding that
 10 was in the marketplace, bearing in mind there is a lot
 11 more communication goes on between a national account
 12 manager and a buyer than is apparent from the written
 13 word here, and I think one of the things to point out is
 14 that most of the correspondence that's contained here is
 15 produced by Imperial Tobacco national account managers,
 16 because if we didn't confirm it to the retailers, there
 17 was no way they would confirm it to us, and we had to
 18 have something which actually stated the position where
 19 we were, where we believed the position was, to ensure
 20 that there was no confusion over related matters in the
 21 future.
 22 Q. I put it to you that we have been looking at a whole
 23 series of documents in which ITL uses language like
 24 "matching", "parity", "maintaining or respecting
 25 differentials", we have not seen anywhere in these

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1 documents any suggestion that the understanding between
 2 ITL and the retailers was that the retailer could price
 3 below, and these were just maxima?
 4 **A.** Well, I think if you go back to the strategic pricing
 5 requirements, which is probably not the best title in
 6 the world for that particular document, but you will see
 7 that the majority of them talk about "at least" or "no
 8 more expensive than", and those sorts of pieces of
 9 phraseology, which quite clearly convey to the retailer
 10 reading that that they have flexibility to price at
 11 whatever level they want --
 12 **Q.** Even when the retailer is being bombarded with
 13 communications that don't use that kind of language at
 14 all?
 15 **A.** Well, it's there in the documentation that a retailer
 16 would have, because I think quite honestly a lot of the
 17 reason we are here today is to do with those strategic
 18 pricing requirements and the differentials, isn't it,
 19 and they were attached to the trading agreements and
 20 a retailer would understand, I hope, from that that they
 21 had the flexibility, and from my experience retailers
 22 looked at it and said, "Hmm, okay" and then made their
 23 own minds up.
 24 **Q.** I am simply putting it to you that's not the way it
 25 worked, what actually happened was that ITL communicated

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1 to the retailers using the kind of language that we have
 2 seen in these documents, and imparted to the retailers
 3 the clear view that, from ITL's perspective, the
 4 retailer was to respect parities and differentials, and
 5 Imperial did not communicate in such a way as to
 6 indicate to the retailers that there was scope for the
 7 retailer to price at any level that distorted or failed
 8 to respect the parities and differentials?
 9 **A.** Well, I mean, it was my understanding that retailers
 10 were quite clearly capable and able and did make their
 11 own minds up about what price they were going to apply
 12 to our products on their shelves in their retail
 13 outlets, and to even suggest that, you know, there was
 14 this -- Imperial Tobacco were a puppeteer pulling the
 15 strings of retailers and retailers were doing just as we
 16 asked couldn't be further from the truth. I mean, life
 17 as a national account manager dealing with the retailers
 18 was not a particularly easy life. There were hard
 19 negotiations, hard bargaining, it was more akin to
 20 tug-of-war than playing with a puppet. You know, there
 21 was a bit of give and take, and there was tension from
 22 both sides. We knew what the retailer was wanting to
 23 do, they knew what we were wanting to do, we didn't know
 24 all the time what our competitor was doing, what they
 25 were up to, you could see things in the marketplace, but

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1 we had no idea of what their longer term strategy was
 2 and what their view was against the things that we were
 3 doing. But ultimately between us and the retailer, you
 4 negotiated an outcome.
 5 **DR SCOTT:** But if I am a retailer, Mr Batty, and you make it
 6 very clear to me what your strategic pricing
 7 requirements are, and you come to me with a trading
 8 agreement which annexes those strategic pricing
 9 requirements and you offer me a bonus in terms of
 10 accepting adherence to those strategic pricing
 11 requirements, what do you think I am to understand by
 12 your approach?
 13 **A.** Well, in a very cold clinical way I can understand that
 14 comment, but the reality was there were two people
 15 involved in a dialogue, and there was a much greater and
 16 broader understanding of both sides' positions, and it
 17 was quite clear, I think, that in a lot of instances, if
 18 you like, the letter of the law with the strategic
 19 pricing differentials were broken but we didn't impose
 20 penalties for that. We were encouraging the retailers
 21 to sell our products at competitive prices and to win
 22 market share, and during the period of this whole
 23 investigation we won a lot of market share. Now,
 24 I don't believe we would have won market share by being
 25 uncompetitive.

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1 **DR SCOTT:** If we stick with the background to this in terms
 2 of the difference between demand for tobacco overall,
 3 which we understand from the evidence to be relatively
 4 inelastic, the suggestion is that you introduced the
 5 concept of parities and differentials because you
 6 recognised the significance of those differentials --
 7 and you talked about this earlier on -- in terms of
 8 consumers actually making that decision between brands,
 9 and what we heard was that what mattered, there was that
 10 differential, because the consumers weren't terribly
 11 good at remembering the absolute prices when you
 12 questioned them in the market research, so that it's
 13 fairly logical and I think we see this in your witness
 14 statement in 2.24, 2.40, and 3.28, that parities and
 15 differentials were a good idea from the point of view of
 16 winning market share, for that very reason of consumer
 17 behaviour.
 18 So that it's quite logical for you to come to
 19 a retailer with the approach with which you came to
 20 a retailer, not suggesting any control over absolute
 21 pricing, because that really didn't matter. The
 22 difficulty when we come to the documentation is it
 23 actually quite a lot of references we have seen to very
 24 specific pricing.
 25 Now, what you seem to be saying to us is this:

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1 bearing in mind the parities and differentials that you
2 had in mind, bearing in mind the RRP's which were public,
3 you took the retailer's price list, tailored ones for
4 each retailer, which you were helping with as a matter
5 of administrative assistance, and you made the
6 adjustments to that when there was a Budgetary change or
7 an MPI, which would maintain, as I understand it, both
8 the differentials between RRP's and retailers' prices
9 that had existed before the change and also the parities
10 and differentials that existed between the prices for
11 Imperial and Gallaher products and the others. Do
12 I have that right?

13 **A.** Yes, if they were there in the sort of base period of
14 that price file, then it would be replicated, but we
15 didn't alter -- for instance, I mean, if Embassy No 1
16 should have been a penny cheaper than B&H, for instance,
17 and we found a retailer's price file where it wasn't,
18 there was an MPI, we wouldn't just change it to reflect
19 the differential, we would change it in line with the
20 retailer's stated price, but point out to them that's
21 not where we preferred to be.

22 **DR SCOTT:** Yes, and we have seen examples of letters like
23 that, so that in the case of Day & Nite you pointed out
24 there are some things here which aren't quite right and
25 then you expect the price list to come back with that

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1 corrected.

2 **A.** Hopefully, yeah. Yes.

3 **DR SCOTT:** Thank you.

4 **MR LASOK:** Madam, I think the problem is one of time,
5 because it will not be possible, regrettably, for me to
6 finish the cross-examination of Mr Batty today. Had
7 that been possible, one might have made the bold
8 suggestion of sitting even later than we currently are,
9 but I don't think it's realistic. I had a brief
10 conversation with Mr Howard about this, and obviously we
11 would prefer to -- I was going to say get rid of
12 Mr Batty, but that's putting it impolitely.

13 We would like to ensure that he can get away as soon
14 as possible, and therefore I think that the provisional
15 view that we had come to would be we should continue
16 with Mr Batty on Tuesday and finish him off, using that
17 in a non-aggressive and perfectly friendly and polite
18 sense. It's not commercial or legal shorthand.

19 **THE CHAIRMAN:** Yes. Clearly that makes sense.
20 Unfortunately that means, Mr Batty, that you have to
21 remain in purdah over the weekend, which may in fact be
22 something of a relief to you, and could we start
23 a little bit earlier on Tuesday, say at 10.15?

24 **MR LASOK:** We are in the Tribunal's hands on that, but from
25 our perspective, 10.15 is fine.

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1 **THE CHAIRMAN:** Yes, I think we are in difficulty starting
2 any earlier than that, but shall we say 10.15 on
3 Tuesday. So we will reconvene then.

4 **MR HOWARD:** Could we enquire from Mr Lasok how much longer
5 he will anticipate being, because we need to, I suspect,
6 think about the Shell position.

7 **MR LASOK:** I sympathise with that. I'll take stock over the
8 weekend, and see whether I can shorten things. As
9 the Tribunal will be aware, Mr Batty actually gives
10 evidence about virtually everything that there is to
11 know or that anybody might wish to know about the whole
12 case, and if we cut corners too much we will be
13 criticised for it, but equally what we want to do is to
14 do the essential points as quickly as possible.

15 **MR HOWARD:** I wasn't suggesting cutting corners, not by any
16 means, just really testing whether if we, for instance,
17 aren't going to start Shell until 2 o'clock, for
18 instance, on Tuesday, we ought to tell the Shell people.

19 **MR LASOK:** It's difficult to tell. I would not be prepared
20 to say that I would be finished before 1 o'clock.

21 **DR SCOTT:** Apologies for this, I have a meeting scheduled in
22 relation to a charity from 9 to 10. I will endeavour to
23 get here as speedily as I can, and apologies if I don't
24 make it by 10.15, but I will try hard to achieve that.

25 **THE CHAIRMAN:** Are you envisaging calling Mr Goodall then,

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1 or you might --

2 **MR LASOK:** Yes, but I think that due to the difficulties
3 with Shell, there was a suggestion that after we deal
4 with Mr Batty we deal with Shell, and then Mr Goodall.

5 **MR HOWARD:** I think we ought to find out from Shell what
6 their position is, and it may be that we could push them
7 off for a day, and that would solve things. Let us
8 enquire over the weekend and on Monday.

9 **THE CHAIRMAN:** Thank you very much. We will meet again at
10 as close as possible to 10.15 on Tuesday morning.
11 (4.50 pm)

12 (The court adjourned until 10.15 am on
13 Tuesday, 4 October 2011)

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