IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

20 October 2011

Before:

VIVIEN ROSE
(Chairman)
DR ADAM SCOTT OBE TD
DAVID SUMMERS OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) IMPERIAL TOBACCO GROUP PLC
(2) IMPERIAL TOBACCO LIMITED

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

CO-OPERATIVE GROUP LIMITED

Appellant

– v –

OFFICE OF FAIR TRADING

Respondent

WM MORRISON SUPERMARKET PLC

Appellant

– v –

OFFICE OF FAIR TRADING

Respondent

(1) SAFEWAY STORES LIMITED
(2) SAFEWAY LIMITED

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

(1) ASDA STORES LIMITED
(2) ASDA GROUP LIMITED
(3) WAL-MART STORES (UK) LIMITED
(4) BROADSTREET GREAT WILSON EUROPE LIMITED

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

(1) SHELL UK LIMITED
(2) SHELL UK OIL PRODUCTS LIMITED
(3) SHELL HOLDINGS (UK) LIMITED

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING (DAY 17)

Note: Excisions in this transcript marked "[…][C]" relate to passages excluded.

APPEARANCES

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

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

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

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

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

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

Thursday, 20 October 2011

(10.00 am)

THE CHAIRMAN: Good morning, ladies and gentlemen. We asked, a day or so ago, for a revised timetable to cover the remaining factual evidence, and I understand that that is well in hand.

MR HOWARD: Yes.

THE CHAIRMAN: We have another two weeks and a day or so of factual evidence, and we really are going to have to be somewhat stricter with everybody's timings in order to make sure that we do get finished in time for the experts to start in the second week of November.

MR HOWARD: Yes. We have prepared a revised timetable. We have not yet circulated it. It will be circulated later today. It's designed to ensure that the evidence is finished on that timetable.

THE CHAIRMAN: Thank you.

Now, Mr Howard, are you kicking off with Safeway?

MR HOWARD: As I think I indicated last night --

THE CHAIRMAN: Oh, you want to call Mr Culham?

MR HOWARD: -- we want to call Mr Culham, yes.

Looking on the other side of the court, I think, I wasn't sure whether anybody was anticipating, it's obviously up to the OFT whether they were going to amplify their response to the issues raised last night,

or how one wants to deal with that. It's up to them whether they --

THE CHAIRMAN: I think Mr Lasok said last night that he would reconsider whether, having read over what was said last night, he wanted to amplify it. As he is not leaping to his feet, I thought that meant he was happy with what occurred last night and we would get on with Mr Culham.

MR LASOK: Well, I had noticed that I haven't answered all the specific questions that the Tribunal have put. I am quite happy to answer those questions now, if the Tribunal wishes.

THE CHAIRMAN: Well, let's have Mr Culham's evidence, as he has come here, and perhaps we can deal with that point later on.

MR HOWARD: As I understand it, Mr Culham is still under oath, so the position is he doesn't need to be re-sworn or reintroduced.

THE CHAIRMAN: Yes.

MR KENNETH CULHAM (recalled)

MR HOWARD: So, Mr Culham, you are here to give further evidence. You have given evidence before, so you will now be asked questions by counsel for the OFT.

THE CHAIRMAN: Yes, please sit down, and as Mr Howard said, you are still under oath.

A. Okay.

THE CHAIRMAN: Yes, Mr Williams.

Cross-examination by MR WILLIAMS

MR WILLIAMS: Good morning, Mr Culham.

A. Good morning.

Q. You explained in your witness statement that you only worked on the Safeway account from June 2003?

A. That's correct. George Byas, who had the account before me, retired I think in June 2003, and I looked after the account after that.

Q. I think you understand that only covers a period of two or three months of the period which we are specifically interested in in this case, which is the period until some time in August 2003?

A. I believe that's the case. I did work with George from 1995 until he retired in -- not directly with him, but in the same team as him, so some of the things he -- like Richmond tactical support and things that were going on, which I've seen the correspondence from George, Mr Byas, was similar to what I was doing with other accounts at the time.

Q. When you say you have seen the correspondence, do you mean you saw it at the time you were running the account in which we are interested in, that is June to August 2003, or do you mean you have had seen it since as part

of these proceedings?

A. As part of the handover from George, what we did do is spend a day or two going through important aspects of an account. I wouldn't say I saw every single document, but the key things like the business plans, and things like that, I would have seen from the time when George was leaving.

THE CHAIRMAN: You will have to slow down a little bit for the transcript writers to follow what you say.

MR WILLIAMS: What you have just been saying ties into some comments that you make in your witness statement, I think. Do you want to just read to yourself paragraphs 157 and 174.

(Pause)

It's at tab 35 of that file. You start Safeway on page 35. That's where paragraph 157 is.

(Pause)

A. Which paragraphs?

Q. 157 and 174, because I think they set the scene in terms of what you are saying.

(Pause)

A. And 174?

Q. Yes.

(Pause)

A. I've read the paragraphs.

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

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

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

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

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

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

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

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

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

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

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

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

Do you want to just go back to tab 9. We are not going to spend all morning on documents that Mr Culham didn't deal with, but I think it's helpful to get the terminology straight, that's all.

It says:

"In response to your price reduction on Mayfair [so that's a Gallaher brand] and the subsequent equal move of Richmond, I am confirming that the following price reductions will be implemented to achieve the appropriate strategic pricing differentials."

So this isn't a situation where, as Mr Culham was saying, a tactical bonus might move the differentials out of line, this is the opposite, this is a tactical bonus to put the differentials in line.

Do you agree with that?

A. Well, I can't remember, it was a move --

Q. No, you didn't deal with it.

A. I didn't deal with it, I don't know -- reading this document, it is suggesting that Mayfair was reduced to 3.39, and we were seeking to reduce Lambert & Butler to 3.59. If the differential at that time was 20p, then yes, it would be restoring -- but I don't know what the differential was at that time. That's what I am trying to say.

Q. No, no, no, I am really just asking you about the

terminology, that's all, and the strategy.

Coming back to tab 77, {D28/77/308}, which is a letter you wrote, so now we are not dealing with a tactical bonus scenario here, are we, I don't think, we are dealing with an MPI and the conditions of a pre-buy. Do you agree with that?

A. Yes, that's correct, yeah.

Q. It says that the condition of the pre-buy is that your retail selling prices continue to reflect the differentials in recommended selling prices between ITL and other manufacturers.

So just breaking that down, it must be the case that Safeway was previously, as far as you understand it anyway, reflecting those differentials in selling prices?

A. Across many products, yes, but there were some out of line as well. So when I've used the word "continue", perhaps I have been overoptimistic but most of them would have been in line, but some of them were out of line.

THE CHAIRMAN: Yes, just answer the question, please.

MR WILLIAMS: So I am not putting an absolute proposition to you, but what this is saying is that basically Safeway's prices were, as far as you understood it, in line with the differentials in recommended selling prices?

A. Many of their prices were, but some were not.

Q. So I think that presupposes that they were again familiar with the concept of pricing in line with recommended selling prices; do you agree with me? This is not --

A. Sorry, we didn't recommended the selling price. Sorry, you said there -- can you repeat the question?

Q. I don't think the question was very clear, I am sorry.

The way you have written this letter, it presupposes that this idea, this approach to pricing in line with pricing differentials, that's something they understand, that's a concept which is familiar to them?

A. Oh, but they didn't always follow it, it's our objective --

THE CHAIRMAN: You are not being asked whether they always followed it, Mr Culham, you are being asked: were they familiar with the concept of pricing to reflect differentials in the RRPs.

A. I would hope so.

MR WILLIAMS: When you say you hope so, presumably that's the reason you wrote the letter in this way. We talked a few minutes ago about writing letters which they could understand in terms which were comprehensible to them, and what you are saying is that they have to continue to reflected those differentials, that is what you are

saying to them?

A. That's what I am requesting, yes.

Q. So Safeway understood ITL's strategy of requiring retailers to price in accordance with differentials in recommended selling prices between ITL and other manufacturers?

A. They knew what our objective was and we were happy for them to sell at prices well below that, but Safeway, I do stress, didn't actually follow the differential --

THE CHAIRMAN: That's not what you are being asked, Mr Culham.

MR WILLIAMS: I am asking you whether you agree that this letter shows that it's entirely clear that it was part of the relationship between ITL that they were supposed to price in accordance with differentials in recommended selling prices between ITL and other manufacturers.

A. That was our aspiration, yes.

Q. That's not what I asked you. I asked you whether you agreed this letter shows that it was part of the relationship between you, part of the terms on which you did business?

A. It was not part of the terms on which we did business, because it wasn't even included in the trading agreement.

THE CHAIRMAN: Well, do you accept at least that you were setting it as a condition for this pre-buy --

A. Oh, it was in there but the correspondence post it clearly shows they never actually followed it.

THE CHAIRMAN: You are not talking about whether they followed it, Mr Culham, those are two separate things, so do please try and focus on the questions you are being asked, which is: do you accept that you made it clear to Safeway that you hoped or you wanted them to do that, and that they knew that you wanted to do that, and that was at the least one of the conditions that were set for this pre-buy arrangement?

A. They were clear it was our aspiration, that that's what we wanted to achieve.

THE CHAIRMAN: Yes.

MR WILLIAMS: And this isn't a complete snapshot, because it talks about continuing to reflect the differentials. Do you agree with that?

A. The correspondence does mention "continue" and I wrote the correspondence. However, just prior to this and post this, they are not actually reflecting differentials.

DR SCOTT: Mr Culham, you keep saying "aspiration". What I actually read in the letter is three words "on condition that". Can you explain to me what the words "on condition that", at the bottom of page 308, mean in

the context of an agreement where you are offering them pre-buy on condition that, followed by (a), (b), (c), (d)?

A. They were the four objectives that Imperial Tobacco would like to have achieved within the Safeway account.

So they were presented to Safeway, but ...

DR SCOTT: Are you suggesting that the words "on condition that", to a normal recipient of a letter, means something other than "on condition that"?

A. Well, hopefully it would mean that's our requirement, that's our request, on condition, but what I stress is Safeway didn't actually --

DR SCOTT: No, no. Stick with your letter.

A. Right.

DR SCOTT: You write this letter --

A. Yes, I did, yes.

DR SCOTT: You include the words "on condition that", and in a normal contractual situation you are making an offer which is conditional, and you are very clear what those conditions are, and those conditions include at (b) "will continue to reflect the differentials".

Are you suggesting to us that you didn't mean that? Leave aside for a moment what Safeway did with it afterwards, that's a different question. But the letter seems fairly clear on the --

A. The letter is very clear, and that's what I, as the account manager, was trying to achieve. It was my request, my condition, however you want to phrase it.

DR SCOTT: Well, you phrased it as a condition.

A. It was, yes, I've written the letter, yes.

DR SCOTT: Thank you.

MR WILLIAMS: I think this was something that was explored when you were giving evidence about Shell, but there is a significant benefit to Safeway here, isn't there, because you are offering them a pre-buy, so it's a good opportunity for them to enhance their margin?

A. If (a) they wish to pre-buy and (b) they change their shelf pricing when they want to.

Q. So all I am saying is there is a real incentive for Safeway to do what you want them to do, that is comply with the condition?

A. If they complied with the condition, there is an incentive, yes, if they chose to put their prices up. But I do stress, Safeway didn't comply, but they still had the stock.

THE CHAIRMAN: Do you mean they didn't go forward with this pre-buy?

A. No, they pre-bought the stock.

THE CHAIRMAN: They did pre-buy the stock.

A. But the differential objectives of Imperial were not

reflected in the Safeway account. That's what I am trying to say here. I asked for it but they didn't do --

THE CHAIRMAN: Yes, I know what you are trying to say.

MR WILLIAMS: Can we turn on, then, to tab 79, two documents forward. {D28/79/242}. This is another letter from you to Trevor Thomas. It's probably useful for you to read the whole letter. I am going to ask you questions about the letter starting at "petrol filling stations" for the moment.

(Pause)

A. I've read it, yeah.

Q. So the context of this letter is that there has been an MPI, many brands suffered from a double MPI, and you are identifying or commenting on certain errors that you have identified in the shelf prices, and would that be through visits of ITL personnel to stores?

A. I would assume so. This is -- we have identified errors against what Safeway have told us was their pricing policy.

Q. I just wanted to ask you some questions first of all at the petrol filling stations section. So you have identified as we say errors in the PFS, and Stephen -- is that Stephen Carroll?

A. Stephen Carroll was a trading assistant who worked for me in Bristol, yes.

Q. He is going to send through details of those. Underneath, there is a section dealing with 100s multipacks, and you have been told that the position is going to be as follows, and there is a sort of calculation for how they have gotten to the price of 100s multipacks.

Underneath that, there are a number of examples of particular brands. Do you see that?

A. Yes, that's highlighting some brands that weren't in line with the pricing policy that Trevor had told me they were adopting in petrol filling stations.

Q. Okay. We will come back to that in a minute. You see the last three there are brand pairs, aren't they? When I say brand pairs, there is one ITL brand and one Gallaher brand. Richmond and Dorchester Kingsize and then Superkings, and then Superkings and Berkeley?

A. Yes, they are, yes.

Q. Those are brand pairs that were linked under ITL's differential pricing strategy, weren't they?

A. They were products which had the same RRP, so Imperial Tobacco's strategy was to have our brand no more expensive than the competing Gallaher brand, but Trevor had told me, as it says here, their pricing policy in petrol filling stations, RRP times five less 5p. So they would naturally end up at the same price, as that

was Safeway's policy.

Q. Sorry, I didn't quite follow what you just said. Did you say that they wouldn't end up at the same price?

THE CHAIRMAN: Yes, they would end up at the same price. So what you are saying is that was Safeway's policy told to him, not ITL's policy.

A. Which is what it says there. I have actually put "you informed me".

MR WILLIAMS: Well, "you informed me that the correct price position is now as follows", it doesn't actually say on what basis this is the correct pricing position, does it?

A. Well, it does, it says "Recommended retail price times five less 5p". That was Trevor telling me what their policy was.

Q. That's how they have calculated the prices. But it's also right to say, isn't it, that Richmond and Dorchester, Richmond Superkings and Dorchester Superkings, and Superkings and Berkeley, those brands were all at parity under ITL's pricing strategy as well?

A. No, our objective was to have our brands no more expensive, I agree, but --

THE CHAIRMAN: Are those linked brands as far as the ITL strategy is concerned?

A. They are, but Safeway have used the RRP to get to their

pricing policy, which is what this is highlighting.

MR WILLIAMS: Yes, and you would have been happy with those prices on Richmond and Dorchester and Superkings and Berkeley, wouldn't you, because they reflected ITL's pricing strategy?

A. As a maxima, if ours had been cheaper than that, we would have been very happy, but no worse than parity, that would achieve.

Q. Can we then move on to the section of the letter that's headed "Stores". It says:

"Most of the errors have now been corrected, thank you. I've highlighted the few that still need adjustment following our discussion."

Then we see three headings, "Brand", "Suggested Price" and "Comments".

Underneath the three headings, I just wanted to look at a number of the examples we see there. B&H Silver, that's a Gallaher brand, isn't it?

A. Yes, produced by Gallaher, yes.

Q. It says:

"Same as L&B Kingsize?"

A. Question mark.

Q. We will come to the question mark in due course. The correction of an error means putting B&H Silver at the same price as L&B, from your point of view?

A. Our objective was for L&B to be no more than B&H Silver, correct.

Q. It says "same as", actually, doesn't it?

A. Yes, but we have had a discussion nine -- eight years ago. I don't remember what the discussion was, but Trevor would have told me what his intention was, so I was confirming whatever our discussion was.

Q. You aren't actually, because you say, "Most of the errors have now been corrected, I've highlighted the few that still need adjustment", so these are things they haven't done rather than things they have done?

A. Correct, we had a meeting and these were prices that were discussed at the meeting, and that's my suggestion, only a suggestion to Safeway, following the discussion we had at the meeting. I don't remember exactly what the discussion was.

Q. The suggestion is that they should be at the same price.

A. Yes, or no more than, no more than would have been good for us, yes.

Q. But you have suggested the same price?

A. In this letter, yes.

Q. Moving down, Drum, you are saying, should be at the same price as Amber Leaf?

A. Yes, but I would also like to put, in the summary, the prices that are highlighting are actually for them to reduce the prices down in the stores --

THE CHAIRMAN: You are not being asked about that, Mr Culham. Please just answer the question.

MR WILLIAMS: Yes. What you were suggesting is that Drum should be at the same price as Amber Leaf.

A. Because --

Q. And --

A. Obviously I can't remember the exact prices from that far back in time. I would assume Drum was more expensive than Amber Leaf prior to this letter.

Q. We will come on to that point. I am really just reading to you what the letter says. It says Drum should be at the same price with Amber Leaf?

A. With a question mark to ask the question.

Q. Can we just turn over the page, because the summary says:

"Hopefully you will be able to correct these urgently."

And there is your point about customers being overcharged compared to "your our price policy and your competitors on most of the products highlighted". I am not sure whether it's "your and our" or "your or our"?

A. I think it's a typo -- reading it back, it doesn't make sense. I think it is "your own price policy" what I should have put but I have mistyped there.

Q. But I suppose they are also being overcharged compared to your price policy as well is the logic of that?

A. I can read it that way now, yes, but that wasn't what was intended.

Q. But it is also true, isn't it? Whether or not that is what you meant it is also true that you weren't happy with these prices because they weren't consistent with your price policy?

A. We were seeking to get the prices reduced, yes.

Q. Underneath that you say:

"Please confirm when these will be implemented. I will advise you if other 'errors' appear over the ... few days."

Although you have used the words "suggested price" and you have dotted a few question marks around, the message is pretty clear, isn't it, you are expecting Safeway to move to the prices that you have put in this letter?

A. We are asking them to reduce the prices down but as always Safeway weren't the most efficient of companies and some may have come down, some may not have come down.

Q. It's more than a suggestion. You want them to do it?

A. I would have liked them to reduce the prices of our brands to consumers, yes.

Q. Just carrying on down the list, if you just go back to the previous page, the last one on that page is Golden Virginia 4p below Old Holborn. Now, can you just help me with this: it's right to say, isn't it, that at one stage Golden Virginia and Old Holborn were generally -- your strategy was based on parity and then things move to minus 4 at a particular point in time. Maybe you don't remember that?

A. Golden Virginia and Old Holborn traditionally were, had the same recommended retail price, but at different points in time, sometimes Old Holborn was dearer than Golden Virginia, and sometimes Golden Virginia was dearer than Old Holborn, but I don't remember exactly. From reading this document, I am assuming that Golden Virginia recommended retail price was 4p below Old Holborn.

THE CHAIRMAN: And why do you assume that?

A. By the fact that my objective is to get 4p below Old Holborn.

MR WILLIAMS: Just going back to your comment about continuity in the way that the account was run, I would just like to look at some parts of this letter in the light of an earlier letter sent to Mr Thomas, which is at tab 55, {D28/55/110} if you could turn to that. I just want to take this in stages. Do you want to just

read the first paragraph to yourself.

(Pause)

So parity with Dorchester is the objective in all stores and PFS, and that's the objective for Richmond; you would agree with that?

A. George is asking them to bring Richmond Superkings down to achieve, in this case he says parity, but the policy was no more than, but he does say parity, yes.

Q. He says parity is the objective?

A. I said I am agreeing, that's what he said, yes.

Q. It's probably useful for you, while we look at this letter, to keep a finger in tab 79, which is where we were just a minute ago, and do you remember we looked at Richmond and Dorchester in the multipacks, so parity is the objective, and we see Richmond and Dorchester are at parity; you would agree with that?

A. The recommended retail prices were both the same, and Safeway had told us their pricing policy was RRP times five less 5p.

Q. Just keep a finger in tab 79 and turn back, then, to 55. Can you read the third and fourth paragraphs, please.

(Pause)

A. Okay.

Q. So in this, in the letter at tab 55, parity is the policy between Drum and Amber Leaf; you would agree with

that?
A. The RRPs were the same and we were trying to achieve a price of Drum no more than Amber Leaf, yes.
Q. Well, it doesn't say that, does it, it says "parity is the policy"?
A. George has used the word "parity" and, as you can see, quite a lot of George's letters are quite brief in the words he uses, yes.
Q. I don't find it especially brief, it's in prose, isn't it, this is a longhand letter? Anyway, a bit further down, "Golden Virginia, we are paying for parity", in relation to Golden Virginia and Old Holborn. This is at the time when Old Holborn and Golden Virginia were at parity, as we just discussed a few minutes ago.
So back to tab 79, 4p below. I think really the point I am making to you is that the way that the letter at tab 55 is expressed is really the same as the way that the letter at tab 79 is expressed, which is that you are talking about specific fixed differentials rather than maximum differentials?
A. No, I would disagree. I don't believe they are. The use of the word "parity", as George has used it in his letter at tab 55 isn't perhaps the best way to express the word, but it's not the same. We were looking at what Safeway, in my letter in tab 79, Safeway had told

me what their policy was, if we used the PFS one as an example because it's actually in the letter, their policy was the RRP times something less 5p, Trevor would have told me what their pricing policy was in the stores, and all I was giving back to him was examples where his pricing policy in stores didn't match up with what his pricing --
THE CHAIRMAN: Well, suppose he told you that his pricing policy was that Richmond would be 2p more expensive than Dorchester. Now, would you then have written to him pointing out all the instances in the shops where in fact you found Richmond and Dorchester were priced the same?
A. No, because we would have been getting a benefit, and generally speaking, we would highlight where our brands --
THE CHAIRMAN: No, if he had told you that their policy was that Richmond should be 2p more expensive than Dorchester, ie not your policy but disadvantaging you as against Dorchester, but they had decided that was going to be their policy, would you then have written to him alerting him to instances where in fact Richmond and Dorchester were being priced the same in the petrol stations?
A. As a general rule, no, but I am sure there are

exceptions where it's happened. If that ... because where Imperial was getting a benefit better than our objective, we generally wouldn't highlight that to retailers. I am sure there are examples where --
THE CHAIRMAN: No, no, let me just ask one more time.
A. Sorry.
THE CHAIRMAN: You wanted Richmond to be the same price as Dorchester or less?
A. Correct.
THE CHAIRMAN: Suppose Mr Thomas had said "Well, regardless of that, we are going to make Richmond more expensive than Dorchester in our shops, that's just what we have decided to do". Now, would you, if you had nonetheless found that actually some shops were selling Richmond at the same price as Dorchester, have pointed out that error to Safeway to say "You told us you wanted Richmond to be more expensive, therefore you should correct these prices by increasing them because I know you want Richmond to be more expensive"?
A. As a general rule I probably wouldn't highlight it, but I probably have done on one or two occasions.
MR WILLIAMS: Well, I think document 79 is on your own evidence an example of you doing that, isn't it?
A. Is it?
Q. I thought that's what you were saying document 79 was?

A. Sorry, saying what?
Q. I thought you were saying that document 79 was an example of you writing to Safeway and pointing out that your brands were being priced relatively uncompetitively?
A. More expensive than the Safeway policy. That's what it's pointing out.
Q. Just thinking about document --
A. Sorry, the Chairman was asking me if our brands were priced better than we expected --
Q. No, the Chairman wasn't asking you that. The Chairman was asking you if Richmond was being disadvantaged, would you write --
MR HOWARD: I think this is unfair, quite frankly. The question which Madam Chairman put was on the basis that the policy was to disadvantage Richmond by putting it at a higher price, and then you find that actually in stores you are not being disadvantaged. The question, as I understand it, to the witness was: what would you do then? He answered "probably nothing, because", and one can understand that. The other document at 79 is, as he has said on a number of occasions, where Richmond is being disadvantaged because their policy is not being followed.
THE CHAIRMAN: Yes, the reason I asked my question was

because Mr Culham is saying that the purpose of this was to correct errors in the policy that Safeway were pursuing, not the policy that ITL were pursuing.

MR HOWARD: Yes, and I think what he has explained to you, which personally I find seems a perfectly natural explanation, is that he is interested in seeing that they have followed their policy where that actually accords with Imperial's interests. If they don't follow their policy in a way which is to Imperial's advantage, then he is saying "Well, I am not going to tell them that, although occasionally I might".

THE CHAIRMAN: Well, that was what I was trying to find out.

MR HOWARD: Yes, and I think that's what he answered.

MR WILLIAMS: Would you agree that the document at tab 55 is not about Safeway's policy? When it says, "Parity is the objective, parity is the policy, and we are paying for parity", that's about ITL's policy?

A. We were obviously doing tactical promotions on Drum, Drum Milde and Golden Virginia to achieve a position in Safeway pricing -- sorry, a position in the Safeway stores, yes.

Q. Can we just take it in stages, Mr Culham, please. Do you agree that the letter at tab 55 is not about Safeway's policy, it's about Imperial's policy?

A. The start point for anything is Safeway have their

policy, we have then in this case -- are offering tactical bonuses to achieve our objective, yes.

Q. So when we talk about parity being the objective and "parity is the policy" and "we are paying for parity", that's ITL's policy?

A. Imperial Tobacco's policy in the case of this was for Drum to be parity or below versus Amber Leaf, yes.

Q. Well, it doesn't say "parity or below", but that's a different point --

THE CHAIRMAN: Well, I think you have asked these questions on this document.

MR WILLIAMS: I agree.

What we then see at tab 79 {D28/79/186} is Drum should be the same as Amber Leaf, Golden Virginia, and then there is a 4p below Old Holborn and we have talked about that. So isn't this letter also about Imperial's policy, not Safeway's policy?

A. No, because at this point we were doing no tactical promotions. As I said, we had a discussion at the meeting, which is where I took over the account. I don't remember the exact conversations that took place at the meeting. Trevor had clearly outlined their policy at the petrol stations, which, as you can see, I have repeated because it's a simple one. I don't know what he said their exact policy at stores would have

been. He could have said "Our policy is to sell X below RRP or Y", I don't know what he said. But this is following the discussions that I had with him, we have noticed things which don't seem to be in line with what he thinks we should be doing.

DR SCOTT: Can I just understand one thing, and that is this: you say that this letter is written in the context of them not being tactical promotion?

A. I believe that's the case, yes.

DR SCOTT: Presumably that doesn't suspend the overall ITL pricing strategy, you are still looking --

A. My objective, Imperial, would still be achieve our pricing differential or better across the accounts, yes.

DR SCOTT: Thank you.

MR WILLIAMS: One thing we have not discussed in relation to the letter at tab 79 is your comment on B&H Silver. No doubt you would say that that is you commenting on the fact that you believe that B&H Silver is not being priced in accordance with Safeway's own policy?

A. Yes, I would, yes.

Q. Can I suggest to you an alternative interpretation, which is that you are concerned about the price of a Gallaher brand, because you are concerned in this section of the letter about departures from ITL's strategy, that is pricing differentials?

A. My objective is to achieve Imperial Tobacco's pricing objectives, I agree. These brands were highlighted as not being in line with what Safeway -- if Safeway had told me, for example, they were going to do 10p off Lambert & Butler and 20p off Benson & Hedges Silver, that would have been their decision. I don't know what the discussion was, that's what I'm trying to say.

THE CHAIRMAN: Yes, but would this be fair: you would draw their attention to instances where their policy, as you understood it, coincided with ITL's policy but that actually the prices were not reflecting either their policy or ITL's policy?

A. Correct.

MR WILLIAMS: Could we turn over to tab 81, please, and just read that to yourself. {D28/81/190}.

(Pause)

We can deal pretty quickly with the line which says "Richmond should be not more than Dorchester Kingsize multipacks", that is you expressing concern that Dorchester, Richmond and Dorchester aren't being priced in accordance with ITL's strategic pricing differentials, isn't it? Parity is the objective we saw in tab 55.

A. It's highlighting that Richmond multipacks were more than Dorchester, therefore I was seeking for him to

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

A. If the OFT had investigated Imperial, obviously it wouldn't come to my level first, but at some point I would have been informed. But I don't know, when did the investigation start? I don't know.
MR WILLIAMS: It started in March 2003.
A. Okay, so I probably would have been aware, yes.
Q. Can I suggest to you that the reason this letter is in different terms from the rest of the correspondence in the Safeway file is precisely because you were aware when you wrote it that the matter was now under investigation by the OFT?
MR HOWARD: Just as a matter of record, in fact, it was in August 2003 that the section 26 notices were sent, 15 August.
THE CHAIRMAN: 15 August before they were sent to anybody?
MR HOWARD: Sent to Imperial. So this letter, this email, seems to pre-date that by about a week. The fact that the OFT might have commenced its own enquiries internally, I don't know when they did that, but Imperial were informed in August.
A. So obviously I was not aware when I wrote this letter, this email then.

Can I add to that, because I know I am questioning other accounts as well. In other trading agreements we had with other accounts. Since I think 2000 I had been

using the words "no more than" in other trading agreements, but there wasn't one of those with Safeway.
MR WILLIAMS: I think while we are in this letter it's only fair that I take you back to one other letter. Could you just turn back to --
THE CHAIRMAN: Can I just ask, where it says "Both 18.75!", is that your handwriting?
A. No, that's Trevor's. Sorry, I assume it's Trevor's, because it's his little squiggle at the top of the email.
MR WILLIAMS: It's right that I just show you another letter while we are here. Could you turn back to tab 15, please. {D28/15/26}. This is another fax to Trevor Thomas which you won't have seen at the time. I was interested in, just to draw your attention, "BP/Safeway Pricing". It says:

"Following the rise, it would appear the following ITL brands have been disadvantaged against the competitive brands."

It then has, do you see the column "Target Differential"?
A. Yes.
Q. On the second page:

"The target differential for Hamlet 5s and Classic 5s is parity."

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

that there was a trading agreement in place at some point in the relationship with Safeway. I can't remember whether you said that you saw it at the time?

A. No. When I took over the account from George it was explained to me how our ongoing investment was with the account, and that was based on investments that were agreed in 1995, based on four elements that were important to Imperial, ie --

THE CHAIRMAN: You went through those.

A. I won't repeat them again, but no differentials were mentioned in that trading agreement.

MR WILLIAMS: I was just asking you, I can't remember whether you said, when we talked about this previously, that you saw it at the time you were running the account, you saw the trading agreement that you thought was rolling on at that point.

A. There wasn't actually -- it was an investment package that was related to four elements, so yes --

THE CHAIRMAN: Was there a document in which it was contained which you saw at the time?

A. I didn't, I just knew how the investments were made up within the Safeway account to cover those four elements, there wasn't actually a physical trading document, no.

MR WILLIAMS: Are you aware that, at least in 2001, before you took over the account, there had been discussions

between ITL and Safeway about a new trading agreement?

A. Yes, we were very concerned because over the years the level of our investment had stayed the same but Safeway were delivering less for it, so we were looking at how we could renegotiate a different trading agreement, but that never came to anything.

Q. You know that, do you?

A. Yes, because the investments I was paying were still based on the same basis they had been since 1995, with the same four elements.

Q. Given that you have said that, I am going to have to show you a document before your time, just to ask you some questions about it. Could you turn to tab 33, please. You are familiar with these sorts of documents, aren't you? {D28/33/360}.

A. Yes.

Q. You wrote them I think for other accounts and probably for Safeway in due course.

If you turn to the second page, do you see by the second holepunch it says "In October 2000 ..."?

A. Sorry, second page?

Q. Yes, this has 361, bottom right. Yes?

A. Sorry, yes, apologies.

Q. Then down by the second holepunch it says:

"In October 2000 ..."

Then this just gives us a bit of context, a new trading agreement is shortly to be discussed, and you have already given some evidence about that.

A. There wasn't a new trading agreement, it carried on the same.

Q. Yes. Could you just look on the next page at the section headed "Ongoing Bonus Payments".

(Pause)

Now, as I read this passage, it's making two points: first of all, ITL has been paying ongoing bonuses to Safeway for certain things, and those things are listed in the last line.

A. Can I correct you on that? We hadn't been paying on those listed in the last line, we had been paying under the four elements I mentioned earlier on. This was our strategy, our objectives to go forward.

Q. What it says is that the investment needs to be reconfirmed against specific measurable objectives, because the concern that's expressed in the first line, it says that the investment is in danger of being treated as a prerequisite, and what it goes on to say is:

"The investment needs to be reconfirmed against specific measurable objectives. This will cover pricing differential, merchandising, availability and

distribution."

Of those, do you agree that at least merchandising, availability and distribution were all covered by the trading agreement at the time?

A. There were four elements in the trading agreement at the time, and those were three of them. The other one was selling below RRP, not pricing differentials.

Q. What it says is that the investment needs to be reconfirmed against specific measurable objectives. The word "measurable" seems to reflect the concern in the first line that the bonus is being treated as a prerequisite. So this is saying that bonuses were being paid for compliance with pricing differentials, isn't it?

A. No, it isn't, it's our objective, we were -- the four original elements that were in the trading agreement, Safeway had put up their prices relative to RRPs, so the investment we paid for selling below RRP had been eroded. We had taken -- at some point we had stopped paying them any bonuses on the PFS, because they had gone to RRP. The original agreement included new product listing which at some point Safeway then said they want more money for product listing. That's what you're saying when it eroded. The four elements we thought we were paying for had been eroded, and this was

George saying that going forward, perhaps we should have these four elements in it, but it never did happen.

Q. We have seen a lot of documents now, and they are not all the documents on the file, which show that ITL expected Safeway to price in accordance with its pricing strategy. What I am suggesting to you is that Safeway wasn't doing that out of the goodness of its heart, it was being incentivised to do that and this passage is consistent with that.

A. I totally disagree. There was no incentive for Safeway to follow our differentials. Where we had tactical bonuses to achieve and specific requirements in reaction to, say, a Gallaher promotion or something like that, but on the ongoing business relationship with Safeway there was no incentive for them to deliver differentials. We would try and encourage them. We would talk and ask, that there was no investment for them against differentials.

THE CHAIRMAN: Except when there were those pre-buy agreements?

A. Yes.

MR WILLIAMS: Just while we are here, could you turn over to tab 34, {D28/34/75} please, and just read that to yourself. Because this is a document which dates from about the same time as the one we have just been looking

at.

(Pause)

This is another document which talks about errors in the pricing, and then it says:

"The differential between L&B and JPS should be 16p and 9p respectively."

Those are with reference to Mayfair and Sovereign. Do you agree that this is a reference to ITL's pricing strategy that shelf prices should reflect particular pricing differentials?

A. I am assuming this is a reflection of our pricing differential at that time, yes.

Q. So what the letter says is that "the differential should be", and that's regarded as an error in Safeway's pricing, and then it goes on to say:

"Could you please increase the prices. This increase will then make their prices in stores at", and I don't see any reference in this fax to a tactical bonus or anything of that sort?

A. There isn't, and going through the correspondence I think this situation carried on for many months afterwards, ie Safeway didn't do what George was asking them to.

Q. But you were asking them to do it, what, out of the kindness of their hearts?

A. We were asking them to do it (a) because it was an objective of us to hopefully achieve our differentials or better, and (b) it may have been against Safeway's policy at that time. I don't know what -- I didn't write the letter, so I can't comment, but there was no incentive from us if Safeway hadn't chosen to do this.

Q. It's very hard to understand a letter like this, isn't it, if there is no incentive, on Safeway?

A. It could be these prices were not what Safeway wanted them to be. As I say, I don't know in what context the letter was written. From Imperial Tobacco's perspective we would have liked to have achieved at least those differentials. George has outlined that to Trevor. I don't know what the Safeway policy at the time was. They could have been -- I don't know what their policy was, so I can't comment.

Q. But you are experienced in dealing with retailers about these matters, aren't you?

A. I have many years of experience, yes.

Q. I think you have direct experience of a number of accounts under which Imperial paid retailers bonuses, ongoing bonuses, when it wanted them to comply with its pricing strategy, and then from time to time also paid them tactical bonuses to make particular price moves?

Obviously you know that --

A. There are trading agreements that I've entered into with other accounts, yes.

Q. And they provide for the retailer to receive a bonus for application of your pricing strategy?

A. At no worse than the RRP difference, yes. Whether it's a bonus or, in the case of Shell, we discussed last week it was a -- two weeks ago -- fixed amount brand, yes. But there wasn't for Safeway.

Q. You offered those bonuses because, when you were asking a retailer to apply a particular pricing strategy, you thought you needed to offer them an incentive to do that?

A. It was part of our investment to make them consider it. I wouldn't say -- I couldn't say how many retailers actually actively made their business decisions on the money we offered them. Some it may influence, some would ignore it, some would take notice, some wouldn't.

Q. Would you agree that Safeway was no more likely to apply a particular pricing strategy for you than any other retailer if you weren't offered it an incentive to do that?

A. Can I repeat, we weren't offering Safeway any incentive for that differentials. There was nothing at for Safeway in it.

THE CHAIRMAN: Why were you treating them differently, then from First Quench and the others?
A. I don't know, because as I said the agreement went back to 19995 --
THE CHAIRMAN: When you were in charge of the account, didn't it strike you as odd that they didn't have this pricing differentials aspect to their trading agreement?
A. Yes, and that's why the letter we referred to earlier on when I brought about the MPI, when I was asking them to reflect the differentials, I actually brought it to the table.
MR WILLIAMS: Just to round off on this, what I am suggesting to you is that we don't have a copy of the trading agreement, we don't know exactly how the relationship with Safeway worked --
A. Well, I think if --
Q. Sorry, I do need to ask you the question before you can answer it, Mr Culham.
We don't have a copy of the trading agreement, but looking at the correspondence that we see, looking at the documents that we do have, it's clear that ITL expected Safeway to apply its pricing differential strategy and, on some basis or other, it's hard to believe that Safeway wasn't incentivised to do that, wasn't remunerated for doing that?

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

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

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

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doing.
Q. But you are encouraging him to go up: you are saying "please increase the price".
A. We are making, outlining for him that we are reducing the bonus, therefore if he wants to maintain the same margin for him, he has to go up by 2p, yes.
Q. Then moving down, you can skip over the bit about PFS, I was not going to ask you about that. Sorry, you can skip over the first three lines about PFS in the second point. Then it says:
"In the PFS please correct the price of Superkings down to 4.18."
I wasn't going to ask you about that either. I was going to ask you about the bit starting:
"Also Dorchester Kingsize Superkings are 3.58, 3.67. Richmond Kingsize Superkings are at 3.63, 3.65. These brands should be at 3.63, 3.66."
So 3.63, 3.66, are those the tilt and non-tilt prices?
A. I would assume so.
Q. Would you understand those prices to be the tilt and non-tilt prices?
A. Yes.
THE CHAIRMAN: I would have thought they were the Kingsize and Superkings prices.

A. Yes, you are right. Thank you.
MR WILLIAMS: Sorry, you are quite right. I have a different document in mind, I am sorry.
So what you have in mind, I think, is that Dorchester Kingsize should move from 3.58 to 3.63. I say you, I mean ITL obviously, I beg your pardon. Yes? So Kingsize moved from 3.58 we see in the middle of the second line there, to 3.63. Yes?
A. I am assuming, looking at the date of this letter, it's probably just after a Budget increase. There is usually a Budget in March, so ...
THE CHAIRMAN: Can you agree that that's what the letter seems to be saying?
A. Yes.
MR WILLIAMS: And Dorchester Superkings move from 3.67 to 3.66?
A. I think that's what the letter is saying, yes.
Q. And Richmond Kingsize stay at 3.63, and Superkings move up a penny to 3.66.
A. Based on what the Safeway policy was in petrol filling stations at that time.
Q. I think I am suggesting to you that this is not about Safeway's pricing policy, it seems to be about brands being priced at parity, because the first point we have seen is about Richmond matching Dorchester, and this really looks like it's about the same thing, Dorchester and Richmond matching each other.

A. Well, it's whatever Safeway had told us was their policy in the petrol filling stations, yes, so it was RRP and this seems to be RRP plus 5p or 6p, which is what Safeway have told us is their policy.
Q. I think you said earlier on that you wouldn't write to Safeway in relation to errors in its application of its own pricing policy, unless the errors were also incompatible with your pricing strategy. Is that right?
A. I think what I said was I generally wouldn't but I think there were one or two occasions when it may have happened. I think that's what I said.
DR SCOTT: Just one small point of clarification, the budget this year didn't occur until 17 April, so this is not --
A. Apologies, I don't know the dates of the Budgets.
MR WILLIAMS: What you actually do, on Superkings, when this letter is written -- and I shouldn't keep saying "you", because obviously it isn't you, I am sorry. What the letter does is that on Superkings, Richmond has a 2p advantage over Dorchester, but the letter suggests that that 2p advantage should be cancelled out in, by doing two things, moving Richmond up a penny and Dorchester down a penny.
A. The letter suggests that, but I don't know what tactical

support was going on at that time. The letter you took me to a few minutes ago showed we were reducing tactical bonuses, I don't know what was going on at the time in terms of bonusing, tactical bonusing.
Q. But the tactical bonus, if there was a tactical bonus, would have been in order to make sure that the prices were at the level you wanted to see, wouldn't they?
A. We would set an objective of our brands. In the case of Richmond and Dorchester, our brands no more expensive than Dorchester.
Q. In theory, if the differentials are maximum differentials, if they moved the price to a level which was more advantageous to you in circumstances where a tactical bonus was being paid, then in theory that's something that ITL would be pleased about?
A. If we are receiving a shelf price better than, for Richmond, better than Dorchester, generally speaking we would be pleased about that, yes.
Q. Yet what we see here is that, rather than rub your hands in celebration and keep quiet, what ITL does is write and say that Richmond Superkings should be moved to a price point where it's 2p less competitive with Dorchester Superkings?
A. And that goes back to what I said earlier on. We generally would not bring this to retailer attention,

but petrol filling stations were selling at RRP and in this occasion George has highlighted where a brand is not at RRP.

Q. Isn't the reality that this letter is bringing this to Safeway's attention because Superkings are not being priced in accordance with ITL's pricing strategy, which is what you would expect, given the evidence you gave earlier on?

A. Our pricing objectives would remain that Richmond would be no more than Dorchester. That's our objective. If Safeway had said to us "our policy in petrol filling stations is sell at RRP", that's perhaps what George has highlighted here. I don't know what George has highlighted. (a) I wasn't involved in the account then, but (b), Safeway were charging more in their petrol filling stations and we were looking to get our Superkings brand reduced, Superkings down from 4.20 to 4.18, so I am assuming that's in relation to an RRP position.

Q. You would assume that's because you want that brand priced in accordance with ITL's pricing strategy?

A. And with whatever Safeway's policy was.

Q. One more question about this part of the letter. This is one of many, many documents on the Safeway file where what ITL does is suggest to Safeway they move in the

price of a Gallaher brand. And we saw one of those in your letter at tab 79 earlier on, B&H Silver. Isn't it right to say that the reason why ITL was pointing out errors in the price of Gallaher brands is because those brands weren't being priced in accordance with ITL's pricing strategy?

A. If our brands were being disadvantaged we would highlight it. But there is another document in here from, I think, Trevor's boss pointing out that it's their pricing policy. One of the tabs in here somewhere talks about he is stating to us Safeway set their own pricing policy.

Q. But you didn't just highlight it, you suggested that the Gallaher price should be moved?

A. It was highlighted in my case with a question mark after it as a suggested price. I couldn't encourage them to do it. It's their choice.

Q. Would you agree that you believed that ITL's pricing strategy had implications for the price not only of ITL's brands but the price of Gallaher's brands?

A. I can't comment on Gallaher's brands.

Q. But Mr Byas has commented on a Gallaher brand and you commented on B&H Silver in the letter at tab 79.

A. As a point of reference where, if it's not -- if our objective is not being met and we believe it's not in

line with the retailer's objective, we would certainly highlight it.

Q. Can we --

A. Because as I said, in this, it's saying, is it to do with the systems problems, so we are highlighting things that don't appear -- we go into the calls, we see some pricing, it seems to be different to what the buyer is telling us, we have highlighted it.

Q. Can we just then move over the page back to 55, which you have already read, but please cast your eye over it again if you want to.

(Pause)

This is another letter where, in the fourth point, and I was going to focus on that at the moment, you recommend that ITL's preferred differentials are realigned by moving both Golden Virginia and Old Holborn up to the common price of 2.28. The reason for doing that is to make sure that, firstly, Old Holborn and Golden Virginia are priced at the same price point; do you agree with that?

A. Reading this, we obviously were doing tactical bonuses on Golden Virginia so we are stopping tactical bonuses on Golden Virginia and obviously I don't know whether Gallaher's were paying tactical bonuses on Old Holborn or not, but if they were, if we stopped it and then they

eventually stopped it, that would be a benefit for us.

Q. Yes, but I was just talking about what's happening to the prices and what outcomes ITL wanted to see, and I think the first point that I was putting to you is that you wanted to see Golden Virginia and Old Holborn at parity at 2.28; do you agree?

A. We would like to see Golden Virginia no more than Old Holborn and the price is suggested of 2.28, yes.

Q. And you also want Golden Virginia to be 10p more than Drum --

MR HOWARD: When you say "you", do you mean Mr Byas?

MR WILLIAMS: Sorry, I keep doing this, but I have explained I don't mean "you".

THE CHAIRMAN: The writer of the letter.

MR WILLIAMS: The writer of the letter.

Yes, ITL also wants to see Golden Virginia 10p above Drum and Amber Leaf?

A. We had been, but then we were stopping that position.

Q. Is that right?

A. Yes, that's why were stopping --

Q. Golden Virginia is currently --

A. We were stopping the tactical bonus, so we had a tactical bonus and we were stopping it.

Q. Yes, "We are paying for parity at 10p, 20p, 40p more expensive than Drum/Amber Leaf", so you were going to

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

Golden Virginia and Old Holborn up to the common price, so you expect to see both your brand and the Gallaher brand move to a common price?
A. George is recommending that for Safeway to make a decision.
Q. I think what he is recommending is that they move into line with other grocers at the particular price point, but he does expect to see parity at 2.28 or parity at some particular price at least?
A. He has suggested it, but I don't know what did happen on the pricing, but he suggested it to Safeway, whether they did it or not I don't know.
Q. Underneath that he says:

"The current bonus on GV will cease from this date of implementation. Can you please advise Gallaher of this move."

Can you explain why he might have said that?
A. We were ceasing our tactical promotions, so therefore GV would have gone up on -- the shelf price would have gone up, we assume, and Gallaher would have either been told by Safeway GV has gone up, or they would have seen it in stores that GV had gone up themselves.
Q. Why would you suggest that he advise Gallaher of the move? Sorry, why would Imperial suggest that Mr Thomas advise Gallaher of the move?

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

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

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

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

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

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

(Pause)

Now, I am not going to ask you questions about this document, but I will tell you what I think it shows, because I think that's relevant to the questions I am going to ask you in a moment.

I think it shows that ITL expects that when it puts its prices up, the price list differentials between, in this case, Richmond on the one hand and on the other hand Sterling and Dorchester, that those differentials will be maintained by the prices of the Gallaher brands being increased as well. That's what ITL expects to see.

Now, you don't have to comment on that, but you can comment on it if you want.

A. I think the background to this was Gallaher had had an MPI several months, two or three months earlier than Imperial. We announced an MPI for September. And I believe between the Gallaher MPI, Gallaher had been doing tactical bonuses on their brands. So that's what's behind this, I think.

Q. I said I wasn't going to ask you questions about the letter. Could you move to tab 79 again {D68/79/146} and we will look at that bit of the letter that we didn't look at before, the very short first two lines about Cafe Creme.

(Pause)

There are only two lines there. So this is dealing with your Cafe Creme brand. Would you agree that, under ITL's pricing strategy, Cafe Creme was linked to Hamlet Miniatures? Do you remember that?

A. I believe -- well, Cafe Creme wasn't actually an Imperial Tobacco brand, we distributed it on behalf of Henri Wintermans but we were the distributor of it. so Henri --

THE CHAIRMAN: You need to slow down. Perhaps you would give that answer again.

MR WILLIAMS: Sorry if you are taking your lead from me; we are as bad as each other, perhaps.

A. Apologies.

Imperial Tobacco distributed Cafe Creme brands for, I think, 20 or 30 years but they were manufactured in Holland by Henri Wintermans. They set the pricing policy and they set the retail price of it, but we acted as their agent in the UK, and the RRPs for Cafe Creme were set by Henri Wintermans which were the same as Hamlet Miniatures.

Q. I will give you briefly a bit of context. Do you want to turn back to tab 61, {D28/61/126}, corresponding with Safeway about this. Very quickly, on the second page, this is a slightly confusing letter because it's

written in the context of the June to September period when everything was out of kilter, but on the second page it says:

"Cafe Creme brands should be 6p against Hamlet Miniatures but are currently the same price. Either you have not applied the MPI or Gallaher are holding down Hamlet Miniatures."

I think we can work out from that that absent the MPI they would have been at parity, so that would have been the normal position, and it goes on to say:

"On the multipack there should also be parity."

So that's the sort of normal relationship between them?

A. Both RRPs were the same normally.

Q. Yes, I just wanted to put that in the context of that letter if that was helpful.

Going back to tab 79, you say:

"Thank you for ensuring that the prices of Cafe Creme were not increased."

So they have been held down with some form of bonus, is that right?

A. I think the Imperial Tobacco MPI was in, was it June?

Q. I think you are right, I think it was.

A. Imperial Tobacco had an MPI on 23 June, but Henri Wintermans decided to have their MPI on 1 August,

so they delayed it six weeks later for -- the MPI on that product was later.

Q. Then it says:

"Don't forget to change these prices by 7p with effect from 1 August 2003."

So that is reminding them they should put their prices up on that date?

A. It's actually reminding him that the MPI for Cafe Creme was on 1 August 2003 and his costs would go up on that day, and if he wants to maintain his margin, he has to put his prices up by 7p.

Q. Well, it doesn't say again if you want to maintain your margin, put the price up by 7p, it says "don't forget".

A. I didn't write all that, but that's what it meant.

Q. If we go over the page, you can see at the top it says:

"Cafe Creme Filter should be 2.96."

Do you see that?

A. I do, yes.

Q. 20p above Cafe Creme. From that I think we can work out that Cafe Creme Filter is at 2.76, because that's 20p below 2.96?

A. Cafe Creme would be 2.76.

Q. Sorry, that's what I meant to say, Cafe Creme would be at 2.76.

A. Reading this, yes.

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

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

terms which were absolutely explicit, that it expected Safeway to price in accordance with its pricing strategy.
A. I disagree. I think it's just the change of my style of writing letters compared to George's style. The court or the Tribunal saw various letters I wrote to Shell a couple of weeks ago, and will see more in the coming weeks. We are not told what to write in letters, we all construct the letters and they were typed invariably by ourselves as well and we used different styles. But the policy from the company was the same, it is just my style is different to George's.
MR WILLIAMS: Thank you very much.
THE CHAIRMAN: Mr Saini.

Cross-examination by MR SAINI

MR SAINI: I have just a few questions, Mr Culham. I am counsel for Morrisons and Safeway.
Can I ask you just a general question? I am obviously restricting myself to the period from which you became in charge of the Safeway account.
We see in the file that we have been looking at, that's annex 28, both when you were dealing with it and Mr Byas, quite a substantial number of what I call error letters being sent to Mr Thomas.
Was there something exceptional about the way

Mr Thomas behaved that required so many letters?
A. I think diplomatically I can only refer to what George wrote in his business plan, he was [redacted], but secondly Safeway's own pricing policy across all their stores for all products was actually, I think, being changed and the buyers didn't actually know sometimes what was going on, because they were -- they introduced the tilt pricing, premium pricing, systems errors, things seemed to be going on far more in this account outside the buyer's control, or he told us they were outside his control.

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Q. Can I ask you, please, to go to tab 77, in file 28, {D28/77/181}, which is a document you have been asked some questions about. This is your letter to Mr Thomas of 16 June 2003. Do you have that?
A. I do, yes.
Q. You will recall it's the one about the MPI of 23 June 2003.
If you would please go to the second page and to subparagraph (b) at the top, which was the focus of certain of Mr Williams' questions.
Could you explain to me what the concern was on the part of ITL which made you include this paragraph there? What was your worry?

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

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

MR SAINI: Thank you very much.
THE CHAIRMAN: Yes, Mr Howard.

Re-examination by MR HOWARD

MR HOWARD: Yes, just a few questions, Mr Culham.
I want to try and go through it in the order that Mr Williams went through things. So go, please, to tab 9. Asking you about this letter, although you were asked about a lot of letters that you weren't party to, but since you have been asked what was happening in them, we should look at it.
You were shown tab 9, but I think your attention wasn't drawn to the last paragraph. Could you just read that to yourself. {D28/9/18}.
(Pause)
So in terms of bonuses and so on and tactical bonuses, can you explain what's going on in this letter?
A. We have offered Safeway a tactical bonus to reduce the price of Lambert & Butler and John Player Special across their estate, and offered to fully fund it from their normal chosen shelf price.
Q. Right. Interestingly, we can see that, I think the questions were put to you on the basis -- you have been asked a number of questions to the effect that there were differentials and the differentials were, I think, of a fixed amount. Now, if we look at the letter for

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

"Hopefully you will be able to correct these urgently, as currently your customers are being overcharged compared to your [and you say that should read] own price policy and your competitors' on most of the products highlighted."

Who are you trying to benefit by this paragraph?

A. (a) consumers by having lower prices, (b) Safeway that hopefully would sell more if they were at lower prices, and (c) Imperial because it has reduced the price of our brands to make them more competitive so more people might buy our brands.

Q. Then go back to tab 15, which is another one of these letters that predates your involvement. You see at tab 15 {D28/15/26} that this is, we see, you were shown the bit under "BP/Safeway Pricing", as I understand it Safeway are running petrol stations in some sort of venture with BP; is that what it was?

A. Yes, they were BP petrol stations that then had a Safeway little mini store on them, a bit like Marks & Spencers do now with Simply Food. It was the forerunner of that.

Q. We see that there is a complaint in the letter about ITL brands being disadvantaged. What's the complaint in terms of disadvantaged and why would Imperial be concerned about that?

A. From the reports it seemed that the BP/Safeway pricing position was not treating -- sorry, was treating our brands worse than Gallaher brands, and we were seeking at least parity or better treatment. So we were being, in our mind, disadvantaged. So our brands were more expensive on the shelf than our competitors' similar products.

Q. Right. Then you mentioned on a number of times, but Mr Williams didn't go to it, tab 1 of the bundle. {D28/1/2}. I think we ought to turn to that. Can you, first by reference to that letter, which is on 1 December 1999, which I think you have explained to us that you would have seen contemporaneously when you took over the account, what does that letter -- just taking that -- tell us about the nature of the trading relationship with Safeway?

A. It wasn't easy, because they kept increasing pricing.

Q. What does it tell us as to what you were paying for in the trading relationship?

A. It was the four elements we were paying for them to sell below --

Q. Point out to us in the letter, how you get that out of the letter.

A. Okay. It's the fifth paragraph down.

Q. Take the third paragraph. What's that dealing with?

A. It's specifically for reduction below -- price reduction below RRP.

Q. Right. Then the fourth paragraph seems to be complaining about them selling the brand at full price, notwithstanding that they are getting this RRP bonus; is that right?

A. Correct.

Q. To what extent was that a problem, as far as you understood it, at Safeway, where they had said they would be below RRP but actually were pricing at RRP or above?

A. Sorry, I am not quite sure --

Q. To what extent, when you became involved, were you aware that there was a problem of Safeway getting a bonus to price below RRP, then proceeding to price at RRP or above?

A. Okay. The action we took when I had -- prior to me taking over the account and when I had the account was we deducted from the bonus payment an amount which was equal to the volume that was going through at RRP or above. So, for example, we only got paid on a certain percentage of their volume for the cut price element, so the stores that were selling at RRP, ie petrol filling stations, received no money for cut price. They only received money for availability, distribution, new

products. So there was only three elements paid to petrol filling stations.

Q. So we have seen this RRP element. Then the fifth paragraph refers to a bonus of so much per thousand, and containing additional payments for other factors such as availability, merchandising and listing of brands, and then there is a breakdown of the payment for merchandising, listing and availability as so much per thousand, and the remaining element is RRP.

So at this stage, does it appear that there is any other element in the trading arrangement, any other element of investment in the trading arrangements other than these four categories?

A. No, there wasn't, and at the time I was managing the account, later on in the file there is a price file and the same amount that's shown in this document is repeated in early 2003.

Q. Then if you go to tab 33 --

A. Sorry, apart from tactical bonuses.

Q. Yes, apart from tactical bonuses. If you then go to tab 33, you were shown tab 33, page 361. {D28/33/361}. Mr Williams showed you the paragraph that reads:

"In October 2000 Safeway moved to RRP."

But he didn't show you the preceding two paragraphs. Could you just read those to yourself.

(Pause)

Do those paragraphs reflect what we have just seen in the letter in December 1999 as to the nature of the trading arrangement?

A. Yes, in sentiment and actually the values as well.

Q. Yes. Let's get the position absolutely clear. As far as you were aware, was any other trading arrangement other than the tactical bonuses and the situation of the pre-buy, just leave that pre-buy on one side, other than that, are you aware of any other trading arrangement with Safeway that was entered into other than what we see on page 361?

A. The only exception is when, in 2001, we entered into negotiations over a unit contract(?), supplying the units for the store, which I don't think is relevant to what we are talking about. So that was another different arrangement but ongoing, this was the only investment apart from tactical bonuses.

Q. Mr Williams has suggested, oh, well, an incentive of some sort must have been paid, didn't tell us what it was, he just says there must be something, we don't know what it was, unfortunately. But let me ask you this: if this unidentified incentive of some unidentified sum had been paid, in other words if an incentive had been paid to Safeway, when you took over as national account

manager for Safeway, would you have known about it?

A. Yes, certainly.

Q. Would it be possible for sums of money to have been paid to Safeway to do things in relation to this account which you as national account manager would be ignorant of?

A. Certainly not. Each national account manager wrote a business plan for each account, and estimated the budget or the funding throughout the year, and every invoice that came in from a national account manager had to be agreed and signed off.

Q. Now a separate point, can we go to tab 54. {D28/54/109} This is a letter, you were asked some questions about the petrol filling station paragraph, but I am afraid again your attention wasn't completely drawn to all aspects of the letter, which I need to do.

Just before I do that, look at paragraph 2, where we see it says:

"I note that prices of cigarettes in the petrol filling stations have also been increased by 5p/6p for 20 in line with the stores in the superstores. They are now therefore premium priced by 5p/6p."

Stopping there for a moment, so at this stage what did you understand Safeway's pricing policy was at the petrol filling stations?

A. To sell at -- well, we thought their policy was to sell at RRP, but obviously this is highlighting they have actually gone to a premium price position.

Q. This Safeway policy where it's RRP plus, did you understand when they were doing that whether they applied that across the board, so all cigarettes, RRP plus 5p, or did they have a policy which differentiated between different cigarettes so that some cigarettes are RRP plus 5p and some are at some different level?

A. Well, I wasn't managing the account at this time --

Q. No, but insofar as you had knowledge of the way the account was done --

A. They would have done it across the board.

Q. Yes. Now, we see that the letter is in fact relating to systems problems, and pointing out or asking whether this is the reason for errors. I think you were asked questions which were about Mr Byas here making reference to the price of Dorchester Superkings coming down.

Can we look at what he actually says. What he points out is that Dorchester Kingsize/Superking size are at 3.58/3.67, Richmond Kingsize/Superking size are at 3.63/3.65. These brands, by which I think he must be meaning Dorchester and Richmond, applying the policy of premium price plus, should be 3.63/3.66.

Now, what we see is he is pointing out a discrepancy

in relation to the paired brands. What I wanted to ask you is: if you were pointing out a discrepancy, for instance in relation to the price of Richmond Kingsize against -- sorry, let me start again.

The Kingsize and the Superking size, to what extent are they looked at as a pair that go together?

A. The Kingsize was a cheaper brand than the Superking size, and the price difference between the two, Kingsize and Superkings, has changed considerably over the years. I think originally it was a penny, and then it is 2p, 3p. I don't know what it was at this time, but I am assuming it was 3p at this time.

Q. What you can see is he is pointing out that in respect of Richmond Kingsize, Imperial is being disadvantaged because Dorchester is 5p below it, and in the case of the Superking size, it has an advantage. Is there anything surprising to you in his pointing out the position on the Kingsize and Superking size as a package? Would it have made any sense to have simply told them, made a complaint about Kingsize or Superking size without pointing out what the position was overall in relation to these brands?

A. I think it would make sense to highlight that both were wrong or both were -- need to be considered or for Safeway to make a choice. Because if you are trying to get -- if you are trying to encourage retailers, you have to be honest, you can't withhold the true picture from them, and that's why I said earlier on about generally speaking we wouldn't identify if a product -- in a better position than we would like, but there are occasions when the greater good, you know, in terms of getting the Kingsize down is actually a bigger benefit.

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

A. Never, no.

Q. You were then asked a question about tab 65, {D28/65} about Mr Byas saying at the foot of the page:

"At the MPI, we wish to move the market up on Richmond brands and bring greater profitability to this end of the market, therefore on 2 September please increase Richmond brands by 4p and 6p. We would encourage you to follow on Sterling and Dorchester."

We see he says "encourage". Again, was there, as

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

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

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

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

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

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

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

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

MR HOWARD: Right. Thank you very much indeed.

Questioned by THE TRIBUNAL

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

A. I have to thumb through this volume.

DR SCOTT: That's quite all right.

(Pause)

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

THE CHAIRMAN: What does PDA stand for?

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

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

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

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

DR SCOTT: Yes, we can understand that.

Earlier on you told us that you did not want Trevor coming back and saying "you owe me for a lower cost price", and that seems to reflect that margin point. Is that right?

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

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

that was introduced at a time. So I think on page 235, at the top of that, we had offered a tactical bonus on Raffles.
THE CHAIRMAN: So when you talk about the fact that the letters that you send are pointing out errors so far as Safeway's pricing policy is concerned, how did you know what their pricing policy was?
A. They had told us, like in petrol filling stations it was to sell at RRP, in their supermarkets it was generally to be I think 2p or 3p more expensive than Tesco's, and in the superstores to be 6p above that.
THE CHAIRMAN: So they told you in conversation or at meetings?
A. Yes. That's also why you couldn't put the price on a price file because there's at least three different prices ongoing at any time. You have the tilt stores as well, so it could be seven different prices in Safeway.

Further re-examination by MR HOWARD

MR HOWARD: Just to be clear, the way the price file operated here, this is not a price file where you are setting out a calculation of the retail price and what the margin would be; that's right?
A. It's just effectively their cost price.
Q. It's their cost price and it's setting out essentially their discounts -- sorry, not the discounts, it's

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

Further opening submissions by MR SAINI

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

Confidential Gallaher

Confidential Gallaher

[redacted]

Then at (ii):

[redacted]

So the position is that there is no P&D clause in the sense one has seen, for example, in the Morrisons trading agreements, and some others, but we have a very similar opportunity to respond clause.

In short, after here ITL have started a promotion, Gallaher have to be given an opportunity to respond to that.

From the perspective of Gallaher, I would ask the Tribunal please to go to annex 3. We can put away annex 26. If you could go to tab 17 in that document, {D3/17/419} which I hope is a copy of a communication from Gallaher to the OFT, and if you could please go within that document to page 17, and to the middle of the page after the bold typeface referring to PFS, if I may quote, three paragraphs down:

"As explained at section (i) of the introduction, it is Gallaher's objective to ensure that its brands are

priced competitively as against key competitor brands. Safeway never had a 'parities and differentials' clause, nor was there ever any understanding between Safeway and Gallaher that Safeway would observe parities and differentials, however Safeway knew this to be Gallaher's objective and would not have wanted to price differently in any event."

I won't ask the Tribunal now to go to paragraphs 1.11 and 1.14 earlier in this document, but there Gallaher provide an explanation of why retailers generally would have wanted to price in a particular fashion irrespective of P&D clauses, which is very similar to some of the evidence the Tribunal has heard in this case.

So standing back from that, the position of Safeway as regards Gallaher is, yes we have a trading agreement with an opportunity to respond clause, no P&D clause, and that's common ground certainly between Gallaher and Safeway.

The remainder of the case is a case to be argued according to the documents, and I am not going to take the Tribunal to those documents now because that's a matter for closing submissions.

Thank you very much.

THE CHAIRMAN: Yes, thank you.

So that then completes the evidence and submissions as regards Safeway. So then, after the short adjournment, it's going to be you, is it, Mr Flynn?

MR FLYNN: Yes, Madam, it is. I think in agreement with Mr Howard, I was proposing to do a short mini opening on behalf of Asda. If Mr Howard has anything to add, no doubt he will. Mr Jolliff apparently has just arrived, so he is ready to come on this afternoon.

THE CHAIRMAN: Yes.

MR FLYNN: And we will see where we get to, because Mr Hall of course has to be dealt with tomorrow.

THE CHAIRMAN: Is that Mr Jolliff at the back of the court?

MR FLYNN: It is not, Madam. Not that I met him, but I know he would be escorted.

MR SAINI: Madam, I do not want to spoil the game plan, but we don't want to remain in court while Mr Flynn makes his opening -- without any disrespect to Mr Flynn -- or the evidence that is given in relation to his clients, but we would like to hear Mr Lasok's answers to the questions from yesterday.

THE CHAIRMAN: I was just coming to that, Mr Saini.

Mr Lasok, is there something that you would like to say as regards the exchanges that occurred at close of business yesterday afternoon, as now might be an opportune moment for you to do so.

Submissions re Tribunal direction by MR LASOK

MR LASOK: In the exchanges yesterday, the Tribunal put certain specific questions to the OFT, and there are direct answers to those questions that are best understood in the context of the case set out in the decision.

What I am going to do is to go to the first of the questions that was put and dispose of that one. That first question was the one that -- I am going to give the references to the transcript: Day 16, page 152, line 24, to 153, line 13.

This is a question about the focus of cross-examination. The cross-examination focused on grant and withdrawal of bonuses and the link changes in the retail prices arises because those communications commonly are expressed by the manufacturer in terms of moving the retail price to a specified price point, and the alteration of the bonus is a consequence of the move, and therefore the OFT's contention is that such communications are evidence of a P&D arrangement between the manufacturer and the retailer. The reason for that is that the specified price point to which the move is made has been identified by reference to the manufacturer's P&D strategy. In some instances, that appears on the face of the communication, in other instances it can be deduced by looking at other evidence.

I come now to the second specific question that was put, and this is at Day 16, page 153, line 14, to page 154, line 1. This relates to paragraph 40(d) of the OFT's skeleton. That paragraph refers to the situation where, under an ITL P&D agreement with a retailer, if the retail price of the Gallaher brand decreases then the retail price of ITL's brand must also decrease.

Now, the OFT's case as set out in the decision, and indeed in its defence and skeleton, has never been based on the premise that under such a P&D agreement -- that's to say an ITL P&D agreement -- the retail price of the ITL brand must or will decrease even if there is no decrease in the net wholesale provides of the ITL brand.

That's dealt with specifically in paragraphs 6.223 to 6.224 of the decision. The decision recognises that, in the case of a decrease in the price of a Gallaher brand, there might not be a decrease in the price of the linked ITL brand if ITL decided not to assist or encourage the retailer to move the price of the ITL brand down by reducing the net wholesale price in some way or another, such as by increasing a tactical bonus or whatever.

It's in relation to that, and before I turn to the next specific question that was raised by the Tribunal, then it's worthwhile going back to what the decision actually says. Because what you have in the decision is the following, and in part this has already been mentioned by me in opening, but since it does not appear to have been put by me in opening clearly, I am going to have to try and remedy that particular defect.

Paragraph 6.213 of the decision describes a P&D requirement. If you have 6.213, it's at page 131 of the decision, the first sentence describes a P&D requirement, and the second sentence describes what happens if a P&D requirement is implemented.

6.213, when it refers to implementation, is not limited to implementation by the retailer acting alone. The OFT does not consider that the manner of implementation is relevant. Accordingly, it simply doesn't matter if the manner of implementation involves action by the retailer alone or action by the retailer acting in combination with the manufacturer, such as where the manufacturer reminds the retailer to act, eggs on the retailer or provides an inducement.

In decision paragraphs 6.223 to 225, the OFT acknowledges the possibility that a P&D requirement may not be implemented in full or at all times. And that is

it presaged, if you like, by the fact that 6.213 in the second sentence says "if a parity or fixed differential requirement is implemented."

So the position in the decision is based on an analysis that focuses on the nature of a P&D requirement and then it acknowledges points put to the OFT by the appellants, and that arise from the evidence -- we see this in paragraph 6.223 -- where the OFT has to grapple with the scenario in which the P&D requirement may not be the subject of full implementation, that's to say implementation in every respect and/or at all times.

So the decision is actually based upon a scenario in which there may be partial implementation, and that is why, in 6.223 to 6.225, we find the language that is used there.

So we have, in 6.223, the OFT expressly recognising that the manufacturers' uncertainty regarding the retail price movement of a competing linked brand was not completely eliminated. It is for that reason that the OFT to say not assert that a P&D requirement in the context of the particular cases or agreements that we are looking at would have had all the features that are described in paragraph 40 of the OFT's skeleton argument. That in fact is made abundantly clear in

paragraphs 43 to 44 of the OFT's skeleton argument, because, for example, the full panoply of the features referred to in paragraph 40 of the skeleton argument apply where there are parallel and symmetrical agreements. That's what paragraph 44 says.

The case made out in the decision is, therefore, that a P&D requirement is anticompetitive by object, even if, in the particular factual circumstances in which it operates or applies, it does not possess each and every one of the features mentioned in paragraph 40 of the OFT's skeleton argument.

The question: just how many of the features in paragraph 40 must exist for a P&D requirement to be anticompetitive by object?, is essentially a matter for expert evidence and submission.

The OFT considers that the number of features referred to in paragraph 40 of the OFT's skeleton argument present in the arrangement goes to the extent of the harm to competition arising from the arrangement, but not to its anticompetitive object.

That is, I think, a completion of the submission that I've just made in response to the second question put by the Tribunal yesterday and it also enables me to move into the next question, which is the one at Day 16, page 158, lines 12 to 17.

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

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

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

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

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

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

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

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

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

If ITL increased the wholesale price of the ITL brands, and we are now looking at the matter the other way around, whether or not the retailer would be expected to increase the price of the linked Gallaher brand would depend upon the circumstances and why. Because if ITL was altering the P&D requirement, the retailer would not be expected to alter the Gallaher price under the arrangement between the retailer and ITL, because the instruction or the communication between ITL and the retailer would such that the retailer understood that the ITL price increase was not connected with the maintenance of the pre-existing price relativity between the two linked brands, but was a change.

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

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

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

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

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

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

(1.17 pm)

(The short adjournment)

(2.15 pm)

Further opening submissions by MR FLYNN

THE CHAIRMAN: Mr Flynn.

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

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

decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

range, and display.

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

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

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

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

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

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

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

Now, Mr Howard has already said, none of these companies is a charity, and everyday low pricing doesn't mean giving the goods away, it means offering the best price that is available, whilst still making a profit, whilst still making a margin, companies have duties to their shareholders and so you have to look at margin as well as price, and there is evidence on that which I shall not take you to, but both from our witnesses but also from Imperial. They had a pretty good idea what Asda's strategy is, you see that in Mr Hall's witness statement, you see Mr Batty also gives some evidence as to what they understood Asda's strategy to be. And of course it's pretty accurate, it's not accurate in every respect, but they had a good idea about that.

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

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

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

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

movements in the market?

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

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

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

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

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

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

No doubt we will be going through it, but we say there is plenty of evidence before you that Asda was not simply a patsy giving up its freedom, a powerless tool in the hands of the manufacturer.

One example that you raised yourself, Madam, in questioning was: was there ever any push-back from retailers about this rather complicated accounting system of bonusing and, you know, yes, there most certainly was, and it's in our evidence, Asda pushed for and eventually secured what they called "net net pricing" to make the pricing more transparent to reduce the manufacturers' influence and ability to negotiate towards the end of the period or whatever, simply to give it as much freedom as possible to price as it saw best, and that is in the evidence.

There are plenty of other examples of Asda using its power to put pressure on the manufacturers, and a good example of that is its own label, which you will see, it's referred to in passages in the witness statements which are marked "Confidential", I don't know to what extent they still are. But you will see that essentially the own label product was put there to be the cheapest in store and to exert downward pressure on the manufacturers for the cost prices of their ultra low cigarettes.

So without going through all the permutations in paragraph 40 or in Mr Lasok's revised theory, what

possible interest would Asda have in agreeing in advance these sort of parallel movements, up or down? As I say, evidence is given on those matters for each category, I think, each permutation of the OFT's case.

There are also plenty of instances of Asda using its knowledge that the manufacturers had these desires to secure better terms from them. What Professor Shaffer calls parlaying, playing it off, simply saying "this is what we are charging for Gallaher, Imperial, are you going to match it, are you going to beat it?" Plenty of examples of that.

A particular example was mentioned by Mr Lasok in opening, which is where Mr Lang made it absolutely plain that he was not going to be funding any discounts. Mr Lasok said -- I didn't fully follow this -- this showed that there was some underlying expectation and Mr Lang was looking for a sweetener. No, he wasn't looking for a sweetener, he was looking for absolute neutrality. He was not looking for any benefit for Asda on that. He was simply saying "If you want to compete with Gallaher at that level, well, you are simply going to have to fund it". He wasn't taking a benefit for Asda. We say that taking of the funding to achieve those is simply no indication of buying into the P&D strategies.

To take one particular example which Mr Lasok did put before the luncheon adjournment, there is absolutely no evidence that Asda felt under any constraint from making an own initiative reduction of, say, a Gallaher brand whilst leaving the Imperial brand at the existing level. On the contrary, there are examples where precisely that happened. An example is given by Mr Mason at paragraph 36 of his witness statement. Such a thing might be done to damage their competition, such as Tesco, it might be done to incentivise Imperial to offer better terms, but there was absolutely no sense of restriction and no sense that that was something that they couldn't do in pursuance of their own strategy; so parlaying we haven't(?).

Focusing specifically on Gallaher, you may remember that in his opening Mr Lasok dealt in a bit of detail with Asda and Imperial and then at the end said: no, I don't have the time, for reasons of time, but for Gallaher it's the same picture.

Well, in my submission, it really isn't the same picture at all. There isn't any P&D trading agreement. There are very, very few documents -- I ran through this in the initial opening and I shan't labour the point -- in annex 4, which is the statement of objection annex for Asda/Gallaher. There are, I think, 19 of them.

There are internal Gallaher documents, there are documents outside the infringement period, leaving about a scant dozen documents which of course cannot amount to much bombardment over the period of the infringement.

As Dr Scott pointed out, even bombardment is essentially unilateral. I mean, that's usually the position with bombing, actually; it's not necessarily desired by the recipient. But this is not bombardment or pestering. Most of those exchanges are completely irrelevant to the OFT's case. They are "here is our MPI, here are details of our MPI". So you have something like five documents a year, which really don't take the OFT anywhere, we say. Very little could, on any stretch, be said to have anything to do with the relative price of the competing brand, and none of them, we say, show any agreed linkages to that brand.

As regards Imperial, as I have already said, the first trading agreement that is on the file, although it's not cited in the decision and it wasn't in the SO annex as originally constituted, doesn't have any reference to P&Ds at all.

The other two, one of them is outside the period and the 2002 one signed in the middle of 2002 is, in my submission, one of the loosest and the vaguest of those that we have looked at during the course of these hearings.

It applies without distinction to a number of desiderata requirements that ITL would like to see fulfilled, and as I have already said, those are actually important, should not be taken as also-rans listing availability, stocking range, display, these things are of vital importance to the manufacturer. There is no apportionment as between the many, as between the pricing and the others.

The amount given by way of what I think we are calling ongoing bonus under that trading agreement is, in the Asda case, strikingly small compared with some of the others that you have seen. It is extremely small. There is no clawback provision for partial compliance, that sort of thing has been mentioned before. There is no opportunity to respond clause. As to that, I did make submission in my initial opening. Firstly to say that insofar as that is being used by Mr Lasok and the OFT as saying "There is a sort of structural element going to the linkages between the prices", that is absent in the Asda case. But of course, as I said, it doesn't preclude actual responses, and of course on occasion Asda would seek such a response in pursuance of its own strategy to get the prices down as much as possible. The fact that it makes use of the

manufacturers' pricing and differential desires in order to secure that funding is pro-competitive, as I think the OFT accepts, and certainly as Professor Shaffer did in the famous paragraph 51 of his advisory report. To coin a phrase: that paragraph is written in English, not in Arabic, Chinese or Greek.

We also say very clearly that the ongoing bonus is an incentive payment, the contract, if you want to look at it as a contract, although I think the evidence is that certainly in our case it wasn't looked at as a document of vital importance, it's not referred to in the daily correspondence, it is simply an additional -- and in our case relatively small -- ongoing discount off the prices, but no obligations are placed on Asda to secure that. It can comply or not, as it chooses. The evidence is that it inevitably -- it always was paid and there wasn't any discussion about it whatsoever.

Now, we have also said that the amounts in any differential schedule are expressed as maxima, not as fixed. I don't understand, but Mr Lasok can explore that with the witnesses, the case that's being put forward about the obvious commercial rationality of some of the aspects of this that the OFT puts forward. It will be seen that if Mr Batty thinks that it's good for Richmond if it's priced the same as Dorchester, what he

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

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

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

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

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

MR FLYNN: Mr Jolliff has been dutifully waiting outside.

MR JOHN DAVID JOLLIFF (sworn)

Examination-in-chief by MR FLYNN

THE CHAIRMAN: Do sit down, Mr Jolliff.

A. Thank you.

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

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

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

A. That's correct.

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

A. Correct.

Q. Is that your signature?

A. That is my signature, yes.

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

your evidence before this Tribunal?
A. That's correct, yes.
Q. And is it true?
A. It is true, yes.
Q. There is nothing in it that you wish to change at this point?
A. There is nothing in it that I wish to change at all.
MR FLYNN: In that case, Madam, that's Mr Jolliff's evidence and Mr Jolliff, Mr Lasok will have some questions for you on behalf of the OFT.

Cross-examination by MR LASOK

MR LASOK: Now, Mr Jolliff, am I right in thinking that Asda did not stock tobacco products because Asda was getting a good margin on them; the reason why you stocked them was because they were a must-have product and a footfall driver?
A. It was a must-have product and a footfall driver.
Q. I just want to deal with various miscellaneous matters first. I think in your witness statement you say that you were the buyer responsible for tobacco products from 1997 until the summer 2002?
A. That's right.
Q. Can you remember when in the summer?
A. Unfortunately not.
Q. I think the last document that I think that we have and

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

an agreement between you and him about a movement in the price of Richmond.
A. Right, well --
Q. Can I just say, if we go to your paragraph 64 of your witness statement, and look at the second line, you say:

"The suggestion is that I have told ITL when the Gallaher price change will happen."

Then the sentence after that you say:

"I do not know whether I actually did tell Graham Hall when we would be increasing the Gallaher price, or it is just posturing by ITL but it would be highly unusual, as I would not want to give ITL an excuse to push up prices."

Is the truth that you don't actually remember the circumstances surrounding this letter?
A. The only thing I can say in answer to that is that I don't make common practice of giving information to rival suppliers about other suppliers' brands.
Q. If you go to paragraph 67, you are now referring to the next document, which is number 10 in annex 14, {D14/10/29} and this is an internal ITL document which obviously you wouldn't have seen at the time?
A. No.
Q. You are commenting on that in paragraph 67, and in the middle of paragraph 67 of your witness statement, you

say:

"This seems unusual to me as I would not normally discuss with him what we were planning to do with our retail prices."

A. Yeah, that's right, that's what I just said.
Q. In the next sentence you have a "presumably".
A. Well --
Q. What I am asking you is: do you actually remember any of all this?
A. The only thing I can say is that I never, ever -- I mean, I have been buying for 30 odd years, I have never given a supplier another supplier's retail prices, because that is just not ethics.
Q. Could you turn to paragraph 101 of your witness statement, please. Now, if you have paragraph 101, this relates to a document 40, and I am quite happy if you finish reading your paragraph 101 and then we look at document 40, but if you want to look at it first before refreshing your memory, by reading your witness statement, it's up to you.

(Pause)

A. Right, what am I looking at now?
Q. Could you look at tab 40, please. You have two emails on that page, and we are looking at the moment at the first email in point of time, which is the one that

starts in the middle of the page. It's an email from Mr Hall to yourself, sent on October 1, 2001.

A. Yes.

Q. You see, in your paragraph 101, in the first line, you have an "apparently", and if you look at the fourth line, towards the end of the line you have an "I imagine". Then if you go four lines below that, you have again, towards the end of the line, a sentence that starts "it may be", so you may:

"It may be that I told ITL when we would be increasing Gallaher's Sterling, as I wanted the price for ITL's Richmond to increase across the market so that I could restore my margin. It may also be that the information I had apparently given ITL was not true."

Then in the last sentence you start off by saying:

"This would suggest either ..."

Just how much about all of this do you actually remember?

A. The only thing is that at the time when I made this statement on 11 June 2010, it refers back to something that happened in 2001, which is nine years previous. I could only think that I wouldn't have told ITL that Sterling was going to move, because that was a brand that I brought in from Gallaher's, and that brand was brought in sole as to Asda. So I wouldn't be telling

those particular retails to ITL although they are surmising that I did.

I mean, if they were looking at increasing the Richmond brand, because the marketplace was ready to take an increase, I would obviously look at it, provided it was for the benefit of Asda and our customers if we needed to move the retails.

But I think he is being a bit presumptuous saying that I've told him they were Sterling retail because I wouldn't do it.

Q. So what you are saying is that you now remember this incident?

A. No. I don't actually remember the incident. The only thing I can say is that trying to remember a way back to 2001 in 2010 I can only surmise that that was what happened.

Q. Well, this is what I am trying to get at because the reason why I've been taking you through this paragraph is because you are using phrases like "this seems unusual", "presumably", "apparently", "I imagine", "it may be", and this gives me the impression that you don't actually remember the circumstances surrounding these documents.

A. I can only work on the information that I have been given, and that is the reply that I gave.

Q. Well, now, when you use phrases like the ones I've mentioned, like "this seems", "presumably", "apparently", "I imagine", "it may be", when we see this appearing in your witness statement, are you really saying that you have no recollection of the matters covered by the document and you are just surmising?

A. The only thing I can say is that retailers moved up and moved down, to actually recollect this actual event on that specific day is difficult, but I am surmising what was going on was the fact that they wanted to move the Richmond brand, and they were trying to say that we, being Asda, were trying to move the -- were going to move the Sterling brand. Otherwise I wouldn't have even moved the Richmond brand, I wouldn't have even looked at the Richmond brand, and I wouldn't have even looked at the Sterling brand. So it's a bit of supposition on both sides, I think.

Q. Well, it doesn't appear to be supposition from Mr Hall, because he is sending you an email and he says:

"Many thanks for your phone call."

A. But I've just said that I never ever gave retail prices out, ie on Sterling brand, to another supplier. I mean, I have been buying 31 years, not just in tobacco, but throughout very big portfolios like beer and soft drinks.

Q. Could you turn to your paragraph 110, please. This refers to document 49, and again it's up to you whether you would like to look at 49 first before you read paragraph 110 of your witness statement.centre.

49 is a single page, it has two emails. The one at the bottom is the earlier of the two.

(Pause)

A. But this email here is an internal email, with no input from myself, apart from what Graham is saying, that he had called me this morning, which I am disputing.

Q. If you could turn to your paragraph 110, you start off by saying:

"This is an internal ITL email chain in which Graham Hall suggests I have told him the dates" and so forth.

A. That's correct.

Q. Then there is a reference to document 40 and further down the paragraph, and you say:

"I am not sure whether these price moves had not actually happened or had reduced again in the interim or whether I did actually give this information to ITL. I cannot remember making this telephone call and it is hard to believe that I ever made such a call."

A. I definitely didn't make the telephone call. I am presuming there that if we had got this email here and these documents had been sent out to myself, that the price increase would possibly have happened, if I had had the deal sheets and the marketplaces had moved which didn't disadvantage Asda's margin or disadvantage our consumers.

Q. You see, the point I am putting to you, and I'll put it to you again for the sake of clarity, is that you are using language yet again in paragraph 110 that suggests that you don't remember the event?

A. The actual date of the event, as I've already said, could be a bit difficult. But certainly price increases happened on and off throughout the trading period, which will have been into a situation where Asda either moved the prices of Richmond or didn't. I am not trying to lie, I am trying to say that at that particular time, definitely didn't tell them about Sterling, but the situation could have been that we moved Richmond, provided I got the deal sheets from Imperial Tobacco and that the market was ready to take the move. You don't just take price increases from suppliers willy-nilly, we actually look at the marketplace, for example my brief from Asda is to be equal to or better than the Big Five, as it was in those days, ie Tesco, Sainsbury's, et cetera, et cetera, and I wouldn't be moving retails unless I knew that they were going to be moving their

retails. And I used to go out every week price checking to make sure that Asda was competitive, and used to get many telephone calls from suppliers saying "Tesco's reckon you are too cheap".

THE CHAIRMAN: Just focusing back on this email, are you saying that you remember this incident or not, and are you saying that it's hard to believe that you made this call, or are you now saying you definitely didn't make the call?

A. As far as I am aware, I have never ever given any information out so I wouldn't have made that telephone call.

MR LASOK: I think I would like to be precise about this, because in many respects I was rather surprised when you raised the question of lying, because I've not, up until now, suggested that you were lying at all, I was trying to help you out, because I was putting to you that the impression I was getting was that you simply didn't remember, and I was moving on to a different point, which is that when we see in your witness statement language like "this seems", "presumably", "apparently", "I imagine" and so forth. Is it the case that you simply can't remember? Because if you can't remember and you are just surmising, there is no point in my asking you questions.

A. No. I cannot remember that exact thing. Prices used to go up and down, and I was probably -- well, was surmising that this was the case at that particular time.

Q. Wait a minute. So in 110, paragraph 110, do we have here surmise?

A. (Pause). I mean, yes, because I can't actually remember because of so many prices moving --

Q. Right, you can't remember. So do I take it, therefore, that in your witness statement, when we come across the same kind of language that you use here -- you know, "I am not sure", "I cannot remember", and other language like "this seems unusual" and "presumably" and "apparently" and "I imagine" -- when we are looking at language like that, you are telling us that you can't remember?

A. Yes.

Q. You are just surmising?

A. Yes.

Q. Right.

DR SCOTT: Mr Jolliff, I think we should say that if you can't remember, that's not a reflection on you, it's just a fact that you can't remember.

A. Yes. I understand. I mean, the fact of the -- I mean, I know I shouldn't be saying this, but it is very

difficult to remember something that went on in 2001, so to try to give you an answer, you give the answer to the best of your ability, and to the best of my ability that's what happened at that particular time.

THE CHAIRMAN: What's taken Mr Lasok by surprise is that you seem now, in the witness box, to be being rather more categorical that you were in your witness statement by saying, if it is what you are saying, "Graham Hall must have been incorrect in saying to Roger Batty in this email 'John Jolliff has advised me of the following prices'. That must be wrong because I would never have discussed prices with Graham Hall"?

A. I would never ever give competitor prices out to another supplier.

THE CHAIRMAN: Well, these are retail prices.

A. Yes.

THE CHAIRMAN: These are the prices at which they, Asda, was, it's said, going to sell these products on its shelves. This is not talking about the price that you, Asda, are going to be paying.

A. Yes, I understand that.

THE CHAIRMAN: So you are saying you wouldn't have discussed retail prices?

A. No. I wouldn't discuss Sterling retail prices with Imperial Tobacco, because Sterling is a Gallaher's brand, and not only that, Sterling was sold to Asda for six months and then it went onto Tesco, so we were both stocking it.

DR SCOTT: But would you expect them to discuss those prices with you, bearing in mind that they can see them in the store? I mean, imagine for a moment that I am the national account manager, I have been to an Asda store, I have observed something which I don't like, because my competitor's product looks to be being advantaged against mine, am I not likely to be on the phone to you to say "What about the price of Sterling?"?

A. Well, yes, I mean, they did phone up saying, you know, "How come this price is that when we have agreed that", but unfortunately from a supplier's point of view, the Asda retail is Asda's policy, and if I am selling below the recommended selling price, the reason for that is to give the customers a good offer and to be beneficial to Asda. But they would ring me up and say, you know, "how come this price is so low", but you would say "it's got nothing really to do with you, they are Asda's prices, not your prices".

DR SCOTT: But if I am the national account manager, I am not so much concerned with the absolute price, that's down to your margin.

A. Yeah.

DR SCOTT: I am concerned to ensure that my product is not disadvantaged against the rival's product.

A. I understand that. I understand that.

DR SCOTT: So you wouldn't be surprised if I am wanting to discuss with you the relative price of the two products?

A. Yeah, but if it was another brand, I wouldn't give them that answer. It's like when I was buying soft drinks, if Coca-Cola phoned up and said, you know, "What's the price of Pepsi", I am making this up, "How come the price of Pepsi is 89p, and we are 99p, and Pepsi is always 99p", I would say, "Well, it's got nothing to do with you, what do you think it is?" So he would probably say, "Well, I think it's probably a promotion". I would say, "Well, you are right".

DR SCOTT: And you would look for a promotion in return?

A. Of course, yes.

DR SCOTT: Thank you.

MR LASOK: Right, well, now up to this point, we have had four documents in which it is stated that you have communicated to ITL the shelf price of a Gallaher product. The very first one is a letter that's written to you, and I think the last one is an email to you, a couple of them are emails to you. The first and the third and the fourth involve you.

A. Yes.

Q. We don't have any response from you in which you say to Mr Hall "you have got it wrong"?

A. Well, no, because that's after the event. You know, the event has happened. I have either put my prices up or not. And it's got nothing really to do with Graham. It's either happened or it hasn't happened.

Q. Well, I am not looking at --

A. Because they would be out price checking to see what's been going on in the market anyway, because price really is all that we have got on all sides to fight on.

Q. Well, you see, if you look at tab 40, you have the email from Mr Hall to yourself on October 1, 2001, in which he thanks you for your phone call confirming that Sterling would move. We don't have a response from you saying "I don't understand what you are saying". Is there any explanation for that, that you can think of?

A. Because it's just a passing comment from Graham saying that Sterling will be moving. I mean, I've no -- I can't understand why I should really reply to him saying "put it in writing" or by telephone saying something different. If he wants to think that, let him think it.

Q. Think what?

A. Let him think that Sterling is going to rise back to those prices.

Q. No, let him think that you had called him on the phone on Friday confirming the Sterling move. He was under a misapprehension, was he?

A. As far as I am aware, yeah. I mean, I have never given any information about an own brand product to a supplier.

Q. If you go back to 49, the second page, and the bit under "Richmond Pricing", he has written to you saying that you have advised him about the Dorchester move and you never thought of writing back --

A. Sorry, which --

Q. It's at tab 9, page 2. It's under the heading "Richmond Pricing". The first line:

"Subsequent to our meeting, you have advised ..."

If you didn't do this sort of thing, wouldn't you have written back to him saying "You have got the wrong end of the stick, there is a confusion here"?

A. No.

DR SCOTT: Mr Jolliff, why does this letter refer to 29 October?

A. Presumably he had a meeting with me on 29 October and then he is trying to say that Dorchester Kingsize would move on -- sorry.

MR LASOK: I think the meeting was on 3 October, though, if you look at the first line --

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

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

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

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

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

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

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

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

corresponded with the manufacturer's recommendation, this was because they set the recommendation at a level they knew we would think to be the competitive level. So we followed the recommendation because we decided it made sense for us, not because we agreed the price with the manufacturer. To the extent that this also coincided with the manufacturer's parity or differential aspirations, this was because the manufacturer set cost prices at a level which would encourage that outcome. Again, we were not agreeing to follow PDRs."

As I understand it, what essentially you are saying is this, and you will correct me if I am wrong: It made sense for Asda to follow the RSPs in the price files generally, because the RSPs in the price files provided you with a price that made commercial sense generally; it wasn't a price you say that you agreed with the manufacturer, it's just that when you looked at the position generally, it made sense to follow the RSPs. I'll just stop there. Do I have that wrong?

A. It had to be a commercial benefit for Asda. The commercial benefit for Asda was the actual margin that we had, and I was given a budgeted margin to aim for as well as sales and as well as profit, and that is what I would look at. The deal sheets that were given were recommended retail selling prices, not actual selling

prices. There are cases, for example, when you get a manufacturers' price increase and I'll make this up to make it easier, say for example -- not manufacturers' price increase but the Budget, say for example they went up by 10p from the Government, I would be expecting there to be a 10p price increase on that, because we had to pay the Government back. When you actually looked at the recommended retail selling prices, if for example Gallaher's or Imperial had actually put 11p on, I wouldn't accept that, because it wouldn't be commerciable for the customers to expect the cigarettes to go up 10p and then put 11p on. So the margin had to be correct for me to achieve the requirements that Asda would pay me for.

Q. Now let's move to the next stage. If the manufacturers were setting these RSPs by reference to their own parity and differential strategies, and then generally speaking you adopted the RSPs because they made commercial sense to Asda, which is what you say in your witness statement, as I understand it, you would end up -- Asda would end up -- unconsciously pricing in accordance with the manufacturers' parity and differential requirements, and that's what you appear to be saying in your paragraph 80, last sentence. Is that right?

A. No, the only thing I can say is that I was pricing for

Asda's benefit and not for any benefit --

THE CHAIRMAN: No, that's not the question you were asked, Mr Jolliff.

A. Sorry.

THE CHAIRMAN: The question you were asked is: were you saying that you chose prices which were most of the time at the recommended retail prices, both in relation to ITL and Gallaher, so if they were, unbeknown to you or known to you, actually setting those prices with particular differentials in mind, your prices would then accidentally or unconsciously, as Mr Lasok put it, reflect those?

MR LASOK: Could I just intervene before you answer, because I think it's not recommended retail price, the RRP, we are here looking at the RSP.

THE CHAIRMAN: Oh, I am sorry.

MR LASOK: It's my fault for not making it clear.

I think you confirmed this before, but in the price list that you received from the manufacturer, you had a recommended selling price, the RSP?

A. Yeah.

Q. That's not the same as the RRP?

A. No, it's not.

Q. So I think the Chairman's question is really directed at your following, generally speaking, the RSP?

DR SCOTT: I think you put it very nicely at the end of paragraph 80 in your witness statement, and I think Mr Lasok referred to that, and it may be helpful to you to refresh your memory of that.

(Pause)

A. Yeah, I mean, it's because of the brand hierarchy. For example, you had premium, subpremium, et cetera, et cetera, and it may be for an example that somebody's on promotion with a particular brand, an account manager goes into our stores and sees that we have got a particular product on promotion, and they may want to match that. Now, to me, that makes good business sense, because we are giving the customer the best value that we can get, which is part of Asda's values, and also it's giving Asda a good deal because we are not funding it, the suppliers are funding it. And that's what it's at all about, the suppliers funding their actual products and looking after their products. Because the only thing that we have, the only thing that suppliers have, because of the taxation, et cetera, is the actual product that's on sale, and they can either promote it or not. So the only thing that we have is price.

MR LASOK: Now, would you agree with me that you actually knew that the RSPs in the price files reflected the manufacturers' parity and differential strategies?

A. No, because you haven't got time to sit and look at a Gallaher's price file or, as I call them, deal sheets, and an Imperial deal sheet, both at the same time. And you don't look, for example, at what price may be, because that is the price. You know, if there is a deal to go on, the product has gone up 3p, you put 3p on. If the product goes up at manufacturers' price increase by 5p, you put 5p on, because that's what the consumer is expecting. If it goes up 10p in the Budget, you put 10p on. You don't go around comparing prices against various manufacturers. What you would do, after a price increase and what I used to do, was to go out myself to check what the prices were out in the marketplace. So I would go to Morrisons, Sainsbury's, Tescos, et cetera, to make sure that I was competitive and that I was doing the right thing.

If I was then out on price, I would come back and get hold of the supplier and say "Look, this particular product is being sold at such and such a store, I want a deal to match that, because we just accepted your deal based on the margin that's acceptable to Asda, but I am out on price, so I need a deal."

Q. Could you look at tab 2 of annex 14, {D14/2/6}, please, it's not the witness statement file, it's the one on your right.

A. Right.

Q. Could you read that to yourself, please.

(Pause)

A. Right.

Q. Now, you see that this is an instance in which ITL is writing to you telling you about price changes, and the price changes are listed there, and we have the parity with Mayfair, we have, so far as L&B are concerned, it's Mayfair 20s plus 20p, so far as JPS Kingsize Lights it's Mayfair 20s plus 20p, and in the penultimate sentence the writer of the letter, Mr Downham, says that an updated price file will follow.

A. Yeah.

Q. If you look at the next tab, tab 3, could you read tab 3, please.

(Pause)

A. Right.

Q. So that's the same thing. We also see that price changes to ITL products in the case of Richmond to achieve a parity with Mayfair 20s. In the case of L&B, it's to achieve a plus 20 price versus Mayfair. In the case of JPS Kingsize, again plus 20p versus Mayfair. And the letter states that, because there is an attachment to this, the revised figures are in the price file.

If you look at tab 7, {D14/7/25}, can you read that?

A. Yes. (Pause).

Q. Again, price changes in order to -- in pursuance of ITL's parity and differential requirements, and the last sentence says:

"Details will be confirmed in a price file update."

And tab 13. {D14/13/36}.

(Pause)

It's the same thing.

A. But what's probably happened here is that Imperial -- well, what has happened here is that Imperial Tobacco are reacting against the Gallaher's brands, which they are obviously Mayfair -- these are Gallaher's brand, and the Richmond product is an Imperial Tobacco, and they are looking at bringing the price down for the benefit of their brands and also for the benefit of the consumer who smokes those particular brands who won't be out on price.

I wouldn't accept anything based on somebody saying "Well, because I want them 20p different". When I looked at my price file, provided the margin is correct, and provided that I am in a situation where it is of benefit to Asda, commercially viable to Asda and I am not losing money, I would accept those particular products.

Q. Can we complete the picture by looking at annex 4, please. It's tab 3, and if you have tab 3 you should have at the top an email from Chris Halford sent to you on 22 March 2001. Do you have that?

A. 22 March 2001, yes.

Q. Okay. That's a response to, or at least not a response, it follows on from an email that starts just after the second holepunch on that page. Could you possibly read that email first and then the follow-on email.

(Pause)

A. Right.

Q. Now, if you look at the first email in time, not the one that starts at the top of page 1, but the one that starts just below the second holepunch, he starts off by pointing out that he's attached the new Budget pricing schedule covering costs and retails, and then he goes into various details about holds and stuff like that. If you go on the second page to the penultimate paragraph, just above the first holepunch, it's the single sentence that says:

"Our objective is to maintain price list differentials at discounted prices, all extra discounts for reduced retails are confirmed on the attached."

The first thing is when he talks about discounted prices, is that discounted by reference to the RRPs?

A. No, that's discounted that are put into your margin, so it's your discounts that you receive to bring the price down or up as the case may be.

Q. Okay, but he talks about the objective being to maintain price list differentials and he is confirming an attachment that sets out the price file. You can look at the attachment.

A. I mean, all I can say to that is that coming out of the Budget, obviously both Imperial Tobacco and Gallaher's were suffering a shock from the price increase of the Budget, and they were wanting to hold their prices down, to keep people smoking, because they are all the cheap brands, they are not premium brands. Normally if premium brands could go up, they would hold the cheaper ones down which these are, and there is also various multisaves that are taking place, as well as some price marked pack, and they then wanted to increase the price after the Budget because they had exhausted whatever monies they had available to keep on funding the brands.

Q. The point that I am putting to you, though, is that we can see from these documents that time and time and time again you are being informed by manufacturers of prices that are included in the price files and that reflect the manufacturers' pricing and differential policies. So the point I am putting to you is that you knew that

these RSPs that you were getting from the manufacturers were oriented around the manufacturers' pricing and differential strategies?

A. It doesn't necessarily mean that I moved to these --

THE CHAIRMAN: No, you are not being asked what it meant. Just listen to the question again. You are being asked about the state of your knowledge as a result of receiving these letters that we have seen, or emails, did you know that the prices that were being suggested by the manufacturers were suggested pursuant to their policies about how their brands should be priced in relation to each other?

A. I mean, I would just take it that if they were saying they were 11p below and what have you it makes logical for them to go up by 11p because that's what the supplier would be expecting and the retailer would be expecting if that's what they had funded them down to or whatever the Budget was.

So you wouldn't actually notice the actual parity or the price differential, apart from him saying it in this actual letter, which is obviously saying that he is looking to hold them at those particular prices, which I would make a commercial decision on, ask them to hold them or not.

MR LASOK: You can put away that file. Could you look now

back to your witness statement in paragraph 101, please.

You may remember, we have looked at this before, this paragraph deals with document 40 in annex 14. If you want to refresh your memory, please do so. It's 40.

(Pause)

If you want to read the email, it's the one in the middle of the page, the email from Mr Hall to you.

(Pause)

A. Right.

Q. If we go back to your paragraph 101 in your witness statement, and to a sentence in the middle, which is on the right-hand side of the page and it starts with the words "It may be that ..." Do you have it?

A. Yes.

Q. You say:

"It may be that I had told ITL when we would be increasing Gallaher's Sterling as I wanted the price for ITL's Richmond to increase across the market so that I could restore my margin."

A. Well, I --

Q. You knew, didn't you, that there was a 5p difference between Sterling and Richmond?

A. I knew that Sterling was our brand.

Q. Sterling was a Gallaher brand.

A. Was a Gallaher brand, but we used it for six months as

an Asda only brand.

I mean, if they wanted to move the prices, move us up and they were finishing the actual bonuses, for whatever reason, I can see no problem in moving the price up, because, you know, this Sterling brand was put in there to keep Richmond on its toes, I must be honest, so for it to increase in price wouldn't be of any benefit to me because all I would be doing was to get Gallahers to keep the Sterling down and fund that, because I couldn't afford to fund it.

Q. The point I am putting to you is that in paragraph 101 you actually reveal that you knew that there was a differential requirement in existence concerning Sterling and Richmond, so that if Sterling went up, Richmond would be pushed up; that's so, isn't it?

A. Well, that's what it says here, but I mean, you know --

Q. Well, it's your witness statement.

A. Gallaher's supplied us with Sterling, and I would've been back onto Gallaher's straightaway stating that I didn't want to do this because of various things that had happened in the marketplace and I don't want to move these prices.

Q. Could you go to tab 31, please. Just to be clear about what we have, you should have at the top of the page the name "Stephen Carroll", and you see that at the top of

the page there, there is an email from Martin Downham --
A. Yes, that's right.
Q. -- dated 20 March. The bit we are interested in, again it's a sequence of three emails, the first one starts below the second holepunch, and it's from Martin Downham to you on March 20, 2001.
A. Yes.
Q. So what he wants to do is he wants to increase the retail prices of ITL's roll-your-own range following the increase in the retail prices of Amber Leaf. Your price, which is in the middle of the page, it may be a bit difficult to read, but it's the first page. Sorry, it's the tab.
A. Which?
Q. Tab 31.
A. Yes.
Q. The one we are looking at. It's a bit difficult to read but in the middle of the page there is a "from John Jolliff". Do you have that?
A. Yeah.
Q. You say:
"Martin, this will be okay."
A. Yeah.
Q. So you were confronted here with ITL's intention to increase the price of its roll-your-own range following

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

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

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

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

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

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

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

to make sure we finish.

MR FLYNN: I am absolutely in your hands on that, Madam, I've made my suggestion.

THE CHAIRMAN: Yes. The question is whether we would ask Mr Jolliff to wait here tomorrow outside the room on the off-chance that he would have time at the end of the day, but I realise that's rather awkward.

MR FLYNN: With respect, Madam, and I am not casting any aspersions, it's no-one's fault, Mr Jolliff has messed around quite a bit already and I suggest we decide today whether he be on tomorrow or not. If he has to come back and postpone his holiday yet again, I think he should know that now.

THE CHAIRMAN: I think we will devote tomorrow, then, to Mr Hall, and that, I am afraid, means that you will need to come back next Tuesday morning to finish your evidence.

MR LASOK: Madam, might I raise the question of -- I think that Mr Jolliff doesn't need to continue to sit around.

THE CHAIRMAN: If there are going to be some further logistics questions, I think I will rise briefly, Mr Jolliff, you can leave the witness box. Again, because you are in the middle of your evidence, you mustn't discuss this with your legal team between now and Tuesday morning when you come back.

A. Right.

THE CHAIRMAN: We will rise briefly because one of the members of the Tribunal has to leave now, so if there is further logistical matters I will come back in myself and deal with those.

MR LASOK: Much obliged.

MR FLYNN: Unless my friend has something specific, counsel can discuss that and we can raise it first thing tomorrow.

MR LASOK: That may well be the better course then.

THE CHAIRMAN: Very well. Is it all right to start at 10.30 tomorrow or do you think we need to start at 10?

MR LASOK: I would have thought 10.30 would be fine, but other people may take a more cautious view.

MR HOWARD: 10.30 is fine. I just want to make one thing clear. I have told Mr Lasok on more than one occasion that Mr Hall has to be finished because he is going into hospital on Tuesday, and so I think 10.30 should be fine but I think Mr Lasok does have to make sure that the questions are put in such a way that he gets through in time and leaves time for re-examination.

THE CHAIRMAN: It may be that either you or I do need to make sure that things move along swiftly tomorrow with Mr Hall. So is there anything further that we need to discuss this afternoon?

MR HOWARD: No.

THE CHAIRMAN: We will come back at 10.30 tomorrow morning.

(4.30 pm)

(The court adjourned until 10.30 am on Friday, 21 October 2011)

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