IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

1 November 2011

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

CO-OPERATIVE GROUP LIMITED

Appellant

– v –

OFFICE OF FAIR TRADING

Respondent

WM MORRISON SUPERMARKET PLC

Appellant

– v –

OFFICE OF FAIR TRADING

Respondent

(1) SAFEWAY STORES LIMITED
(2) SAFEWAY LIMITED

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING (DAY 24)

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.

Tuesday, 1 November 2011
(10.30 am)
THE CHAIRMAN: Good morning.
MR HOWARD: Good morning. We will call Mr Hall back to the stand, if that's okay.
THE CHAIRMAN: Yes.
MR GRAHAM HALL (recalled)
THE CHAIRMAN: Good morning, Mr Hall, please sit down.
A. Thank you.
THE CHAIRMAN: Let me remind you you are still on oath from the last time you gave evidence.
A. Thank you.
MR HOWARD: Mr Hall, Mr Williams will ask you some questions.
Cross-examination by MR WILLIAMS
MR WILLIAMS: Good morning, Mr Hall. Do you have your witness statement there? If you could put that to one side, and could you be also given annex 20, which is the Somerfield/ITL volume. I am going to start by asking you some questions about the trading agreements with Somerfield which I think were called the trade development programmes. Is that right?
A. Yes.
Q. The OFT's file contains a number of different versions of this agreement, but they are all expressed in

essentially the same way in this period; that's right, isn't it?
A. Yes.
Q. As far as pricing differentials are concerned, those arrangements worked in essentially the same way over the period we are looking at, as between ITL and Somerfield?
A. Yes.
Q. Could you turn to tab 15 in annex 20, please. {D20/15/63}. This is just an example of the agreements. We are just going to look at one at the moment. Just really for the Tribunal, one can see there are actually two agreements here, there is the Somerfield agreement and the Kwik Save agreement, but they are essentially different documents in the same form. I was just going to focus on Somerfield.
So turning through the document, you can see at tab 14 you have the list of strategy pricing requirements.
THE CHAIRMAN: At page 14?
MR WILLIAMS: Sorry, I beg your pardon, that's at page 14 in that tab.
So that's where the strategy pricing requirements are set out. Could you then turn on to page 24, and here we have a heading which says "Requirements and Rewards for 2001", and the requirement is that ITL

brands should be at strategy pricing, that is comply with the differentials, in a minimum of 90 per cent stores. So that's what you were trying to achieve?
A. As a maximum, yes.
Q. Well, 90 per cent wasn't a maximum, you were trying to achieve compliance with the differentials as much as you could?
A. The differentials were a maximum price. That's the point I am making.
Q. We see the reward is detailed on the right-hand side. Do you agree with that? It says "Pricing Strategy 90 per cent correct" and so on.
A. Yes.
Q. The bonus varied with the percentage of adherence that one sees, so I think you describe it as a sliding scale in your witness statement?
A. Yes.
Q. The purpose of this, from ITL's point of view, was obviously to ensure that Somerfield actually respected those differentials as far as possible?
A. As maximum prices, yes.
Q. They actually had to achieve a high level of compliance, to get anything under this structure, 80 per cent; that's right, isn't it?
A. 80 per cent was the minimum that they would get paid

for, but in all honesty, they were doing better than that most of the time.
Q. In your statement, at paragraph 14, you say you can't recall an occasion when a bonus was withdrawn for lack of adherence. You are not talking specifically about Somerfield, you are talking I think about both Asda and Somerfield at that point. It's in the very last paragraph of paragraph 14. Do you see that?
A. Yes.
Q. Is the reason that you didn't need to withdraw a bonus then because in fact they were achieving the differentials at a high level?
A. Yes.
Q. The language that we see in this agreement of "requirements and rewards", that's the language we see in all of the trade development programmes, isn't it?
A. It is.
Q. So would you agree that, as between you and Somerfield, the understanding was that there was a requirement that they were to price in line with the differentials and you would pay them for that?
A. Providing their prices did not exceed those maximum prices.
Q. I understand that you make that point about the maximum prices, but the point I was asking you about was that

this was articulated as a requirement of Somerfield, from your point of view; it was something you required them to do?

A. As maximum prices, yes.

Q. Just to look at an example of how this worked, could you turn, then, to tab 10 in that file. {D20/10/35}. Do you want to have a read of that? Just so you know, the document seems to stop at the end of that first page, even though that's obviously more than the end of the document, we don't have more than that.

(Pause)

So this is an example of you writing to Somerfield, it's one of a number of examples I think in the file which is expressed in a similar way, and essentially what you say is that the differentials are out of line, that's what you say in the first paragraph, and further down you talk about price differential errors and --

THE CHAIRMAN: Well, are you saying that this is a letter written by Mr Hall?

MR WILLIAMS: I think it is.

I am sorry, I had assumed it was. You comment on it in your statement?

A. This is a letter written by --

MR WILLIAMS: I'm sorry, Mr Hall writes pretty much all the letters in this file from ITL.

Would you agree this is representative of the sort of language you used in communications with Somerfield, that when they got the differentials wrong, that was regarded as an error from your point of view, and something that they ought to correct?

A. Where they were exceeding the differentials, yes.

Q. So could you then just have a look at paragraph 29 of your witness statement, please. This is under the heading "Monitoring", where you comment on the monitoring arrangements that existed and by which ITL monitored shelf prices. What you say in 29 is that ITL is providing a service to the retailer where ITL would inform the retailer of occasions where their shelf prices failed to reflect the pricing strategy set by the retailer's head office.

What I think we see in these letters is you drawing to Somerfield's attention instances where they failed to apply your strategy. So as part of that process of monitoring and communicating with Somerfield, would you agree that one of the things that you were drawing to their attention was a failure to apply the strategic pricing differentials, not only Somerfield's own strategy?

A. They were being advised of the errors so that they could correct them to earn money from us.

Q. Could you then just turn on to paragraph 142 which deals with a similar point. You say at the end of that paragraph what you were doing when you wrote to Somerfield was not enforcing any ITL pricing structure. What do you mean by "not enforcing any ITL pricing structure"?

A. I was drawing their attention to the fact that there were errors, I wasn't forcing them to do anything, they were then aware that their potential earnings under the agreement could be reduced.

Q. But your purpose in writing letters like the one we see at tab 10 and in other instances in the file is actually to draw to Somerfield's attention failures to apply your pricing strategy?

A. It was to ensure that they could earn the maximum money. I was helping Somerfield to actually achieve the payments, because they could then take action to rectify if they so wished.

Q. But you weren't just trying to help Somerfield; you were also trying to achieve ITL's own strategy, weren't you?

A. I was working with the retailer to help them to earn money from Imperial Tobacco.

Q. Could you turn on to tab 29 in annex 20, please. Do you want to read that to yourself? I think you are familiar with it. Sorry, I should just check: is this an email

to Roger Batty from you? Is that what you have at tab 29?

A. No, at tab 29 I have a letter to Ms Smith.

MR WILLIAMS: Yes, I was afraid that might happen. There is a bit of confusion about where this document is in the bundle. Does the Tribunal have the email?

THE CHAIRMAN: No, we also have the letter to Ms Smith. I think it might be 29(b).

DR SCOTT: 29(b) is an email from Graham Hall to Roger Batty of 11 January.

MR WILLIAMS: That's the document I was interested in. {D20/29(b)/134}.

Could you read that email to yourself? I am sorry for the confusion?

A. I have 29A and 29B, but I don't have 29(b).

DR SCOTT: It's a bit before 29A.

MR WILLIAMS: It's an email dated 11 January. That looks like it might be it.

A. Yes, I have it now.

Q. Could you read that to yourself, please.

(Pause)

You don't need to read beyond the words "price-fixing aspect", although feel free to read the whole thing if that's helpful to you.

(Pause)

I am not going to ask you questions about the discussion you had about the legality of what's going on. I was interested in the words which start "Eventually he accepted ..." Do you see those words?
A. Yes.
Q. So is the point that you were making to Mark Brunel-Cohen at the meeting that where you were paying bonuses for adherence to a set of requirements then Somerfield should be willing to do what you were paying them for?
A. Not exactly. That was referring to the fact that where we were paying bonuses to any retailer, they were agreed as being passed through to the consumer, and that if we were paying such bonuses, there should be some negotiation on the pricing, and that if a -- prices were realigned by that retailer, then we reserved the right to reduce those prices, reduce those bonuses, because if they suddenly put all their stores up to recommended retail price, they would no longer qualify for any bonuses.
Q. I think what you have written is that:
"If the manufacturer is paying bonuses and offering an incentive for strategy pricing, then the retailer should be prepared to run with it."
So that seems to be saying that from your point of

view, they should be prepared to meet the strategy pricing requirements because you were paying them to do that?
A. If there was a strategy pricing agreement, yes.
Q. And there was one with Somerfield?
A. Yes, there was.
Q. Could you then turn back to tab 18 in that file, please, and could you read the section under the heading "Strategy Pricing Requirements".
(Pause)
So just focusing on the third paragraph under that heading, "when no additional price reductions are being funded", so what this is saying is that if there is no promotion by another manufacturer, then Somerfield's prices should be in line with the strategic pricing requirements. So do you agree that was the essence of the arrangement between you and Somerfield?
A. Yes, it was in terms of maximum prices because all the strategic pricing requirements were set out as maximum prices.
THE CHAIRMAN: Yes, you are not being asked, though, at the moment, Mr Hall, about whether they were maximum or fixed, so please just answer the questions that you are asked.
MR WILLIAMS: Can you just think about a situation for me

now, which is that Somerfield decides that it wants to do a promotion on, say, Dorchester but it isn't minded to run a promotion on, say, Richmond, which was the brand that was linked to Dorchester under the strategy pricing, so that the price of Dorchester would in that situation be lower than the price of Richmond. Would you agree that that is the sort of thing you were trying to prevent by setting up these strategic pricing requirements? Or that's one of the sorts of things that you would be trying to prevent?
A. In essence, yes.
Q. Can we now consider the position at an MPI. The way MPIs often worked was that they were -- Gallaher and ITL had MPIs at the same time or very soon after one another. That's right, isn't it?
A. Usually one after the other, not at the same time.
Q. So once you have had those two MPIs, what you would want to see, as long as there were no promotions going on, is that prices remained in line with the strategic pricing requirements after the MPI?
A. That they did not exceed them, yes.
Q. Moving to the second paragraph under that heading, this says that:
"If another manufacturer initiates and fully funds an additional price reduction on a competing brand, then

ITL is to be given the opportunity to match the additional price reduction."
Now, that means, I think, that if you did choose to offer a counter promotion of your own, then Somerfield were supposed to, required to, accept that counter promotion and in that way the differentials would remain in line; do you agree?
A. Yes.
Q. What you talk about here is matching the additional price reduction on the relevant lines. So what's contemplated is that you will match the Gallaher promotion, if it's a Gallaher promotion we are talking about, rather than that you will match it and go a stage further and offer an even lower price. That's not what's contemplated here, is it?
A. It's not what was contemplated there, no.
Q. I think that's enough on that.
Could you then move to have a look at tab 15, please. {D20/15/63}. We are on the first page of that, which is the letter of 12 February. Can you see there are some bullet points towards the middle of the page? Do you want to just read those bullet points to yourself? I was interested in the second one.
(Pause)
What this, I think, is telling Somerfield that you

expect the strategic pricing requirements to be implemented by maintaining the price list differentials; do you agree with that?
A. Yes.
Q. Do you agree that if you were maintaining the price list differential, you would be reflecting it exactly; you wouldn't simply be reflecting it as a maximum. What this contemplates is that you would reflect the differential exactly?
A. That is correct as it's written, but we would not penalise them if they went below.
Q. You wouldn't penalise them if they?
A. Went below those prices.
Q. At the moment I am focusing on a slightly different point, which is how you envisaged the pricing requirements would actually be applied, and I think what this envisages is that they will be applied in practice by maintaining the differential rather than bettering it?
A. Yes.
Q. Could you then have a look at paragraph 9 of your witness statement, please. You say that:
"My sole aim was to encourage retailers to price our brands competitively against other brands of manufacturers."

Would you agree that, when you used the word "competitive" here, you mean no more expensive than, but actually in practice what you expected is that you would be no less expensive than them relative to the differential either?
A. Can you repeat the question, please?
Q. Sorry. I think we have just seen in the document at tab 15 that what you actually expected was that Somerfield would maintain the differentials rather than better them. We saw that in document 15.
A. Yes.
Q. In paragraph 9 you talk about your sole aim being to encourage retailers to price your brands competitively against other brands. Now, I think what you must mean by "competitive" is no more expensive than them, but also you didn't expect to be any less expensive than them, relative to the differential either?
A. I didn't expect them to be disadvantaged. As an example, if Benson & Hedges was £4.10 and there was a 3p differential on Embassy No 1, I would expect that brand to be no more expensive than £4.07.
Q. Yes, you would expect it to be no more than £4.07, but I think you would actually expect it to be at £4.07 because you agreed when we looked at document 15 that you expected them to price so as to reflect the

differential rather than to do better than that. The strategy pricing requirements were expressed as maxima, but what you actually expected was that they were priced at £4.07 in that example.
A. The document at tab 15 I think, if I remember correctly, was a clarification for the new buyer, Steve Clarke, at that time of the strategy agreement for pricing and how it worked.
Q. Yes, but when we looked at that, I think we agreed that what you expected was to see the differential reproduced in the shelf price rather than to see something better than that. That's what you said you expected to see.
In the example you have given, that would mean that Embassy would be priced at £4.07. Was it Embassy?
A. Yes.
Q. Embassy would be priced at £4.07, rather than at, say, £4.06?
A. Or £4.06, I would not be unhappy with that.
DR SCOTT: Sorry, the question is this, Mr Hall: not what you might have hoped for in terms of an improvement, but what you expected Somerfield to do.
MR HOWARD: But one has to be clear, I come back to what we have discussed on many occasions and it is actually sort of fundamental. The word "expect" is actually a very loose word.

THE CHAIRMAN: Well, then there needs to be a follow-up question on what made you expect that.
MR HOWARD: Well, I think you have to make it clear whether when you are talking about "expect", was that something you that expected, because that's what you were requiring Somerfield to do, or was that what you expected they would do because of their margins that they probably wouldn't go lower? And the two are quite fundamentally different and it is quite important that everybody distinguishes the two and we don't have questions which are ... I understand the OFT always want to put questions in this ambiguous way, but in my submission it's very important we come back to distinguishing the two situations.
MR WILLIAMS: Sorry, we can go back to tab 15 then.
THE CHAIRMAN: Why don't we just pursue that line of enquiry as to what your expectation was?
MR WILLIAMS: I think it is helpful, Madam, to go back to tab 15, if you're not still there Mr Hall?
A. I am there.
Q. Are you still there?
A. Yes.
Q. What that says is that you want them to maintain your strategic pricing requirements which are designed to maintain price list differentials. Now, what I am

putting to you is that what that says is that the strategic pricing requirements are designed to maintain the price list differentials, that's what you realistically want and expect to see in Somerfield's shelf prices?
A. But only as maximum prices, I have to say again, I am sorry. Somerfield were free to sell at lower prices if they so wished.
DR SCOTT: Would you mind if we interrupted and looked at some of the evidence from yesterday for a moment?
MR WILLIAMS: The evidence from yesterday?
DR SCOTT: Okay, we will come back to it later.
MR WILLIAMS: Can we turn, then, to tab 8, please. {D20/8/29}.
You can read as much of the first page as you want, but I was only interested in the last paragraph.
(Pause)
You have read that?
A. Yes.
Q. Now, this is another example of you communicating to Somerfield what your strategy was, and the way you express this here is similar to the way it was expressed in 15, which is to say that your strategy is to match the shelf price for Dorchester. So what you are telling them that you want to do is match it, not to be better

than it. You are telling them that you want to match it.
A. Which is exactly the price list differential as per the two published price lists.
Q. But the price list differential says "not more than". Sorry, I beg your pardon. The strategic pricing differentials say that your strategy is to be no more expensive than Dorchester, but this is saying something different, this is saying that your strategy is to match the shelf price of Dorchester.
A. This was a document that was written to the buyer outlining the launch of Richmond, and what our long-term strategy was.
Q. Yes, and what it says is that your strategy is to match them, ie to be at the same price as them. It doesn't say that your strategy is to be at the same price or better.
A. I agree with that statement.
Q. So in between the trading agreements, the way in which you are communicating with Somerfield leads them to understand that what you want them to do is to price specifically on the basis of the differential rather than on the basis of the differential or better. That's what you are communicating to them to do, that's what you want them to do?

A. This document was outlining the company's policy going forwards from the launch of that brand, and what their overall objective was to do. The pricing differential document that was then written subsequently when they did ultimately stock the brand, which was not for several months later, included the words "no more expensive than".
Q. Can I just ask you, while we are in this document, about the last words of that paragraph. You say:
"It's very definitely not our intention to drive prices in the ultra low sector down. Indeed, it's our long-term hope that we will be able to encourage prices within the sector up slightly."
Would you agree that the message you are conveying to Somerfield there is that by matching Dorchester with Richmond you are hoping to encourage prices in the sector up over time?
A. Over time that would be the plan to make it more profitable for both the retailer and the manufacturer, as with all products.
Q. And that this strategy of matching Dorchester was going to further that aim, wasn't it?
A. Possibly in the long-term, but this was simply a statement of the company's intention at that time.
Q. Could you now turn over to the next tab.

THE CHAIRMAN: Can I just ask a quick follow-up one?
It does look in that last paragraph as though you are telling them that you wouldn't necessarily be happy if they priced Richmond below Dorchester because we know that that might then bring Dorchester down to match Richmond and then things are being pushed down, prices are being pushed down, which is what you are telling them you don't want to happen.
A. I am more referring to the actual published prices for the ultra low price sector moving up, rather than a pricing strategy in supermarkets.
MR WILLIAMS: Yes, but you expected them to price on the shelf in some relationship to RRP, so if the RRP was higher, the shelf price would be higher; you did expect that, didn't you?
A. What I am trying to express there is that if there were say, a 5p increase on cigarettes as a manufacturer's price increase that we might well increase the price of the ultra low price sector by 6p rather than 5p.
DR SCOTT: And how would that help the retailer?
A. Because the margin would be improved for both the manufacturer and the retailer. There would be a slight increase in percentage margin.
DR SCOTT: Well, if the wholesale price plus VAT goes up by 6p and the price only goes up, the retail price only

goes up by 6p, that actually reduces the percentage margin of the retailer.

A. If we were doing that to improve the retailer's margin by putting an extra penny on the brand, we would share the percentage increase in profit with the retailer. We did improve margins at times.

DR SCOTT: So you wouldn't take the wholesale price up as far as you were putting up the retail price?

A. Correct.

DR SCOTT: And do you remember that happening?

A. I can't give you a specific instance because it's so long ago, but there were occasions when we improved margins.

DR SCOTT: Thank you.

MR WILLIAMS: Could you then turn over to the next tab, which is 9, please, {D20/9/32}, and this is a letter of 6 November. You can read the letter to yourself, if you want, but I was interested in the section under the heading "Somerfield".

(Pause)

So Somerfield have reduced the selling prices of your brands, Cafe Creme and Small Classic, to £2.52, and what you draw to their attention is that your strategy is normally to match Hamlet Miniatures which are at £2.62, and that's the Gallaher brand, isn't it?

A. It is.

Q. So what you are drawing to their attention is that these prices are not in line with your strategy?

A. Correct, but I am not asking them to increase the price, what I'm doing is alerting them to the fact that they have made a price reduction and that we are not funding it, and if they were to submit a claim for that bonus, then we wouldn't be paying it.

Q. But if it's right to say that these prices aren't in line with your strategy, then doesn't that mean your strategy couldn't really have been about maximum differentials, because here you are better than parity, and yet the point you make is that this is not in accordance with your strategy?

A. They don't actually say they are not in line with our strategy.

Q. No, but you did agree with me just a moment ago when I said the point you are making is that these prices are not in line with your strategy?

A. I didn't mean it in that context. What I was saying was that the price had been reduced of their own volition and I was drawing their attention to that fact so that we prevented any dispute over bonus payments in the future.

Q. On any commonsense reading of that paragraph, Mr Hall,

what you are saying is that the prices of Cafe Creme, Small Classic and Hamlet Miniatures are not in accordance with your strategy?

A. I do not say that.

Q. Could you then turn on to --

THE CHAIRMAN: Do we know what that note means, the handwritten note in capital letters?

MR WILLIAMS: The manuscript note? No.

THE CHAIRMAN: Do you know what that means, Mr Hall?

A. "Report as found on the merchandiser's brief when they go through the store door".

THE CHAIRMAN: So is that in effect -- is that your handwriting?

A. No, it's somebody in the office has written that to put onto the merchandiser's brief in the office in Bristol --

THE CHAIRMAN: To keep an eye on what's happening.

A. "Report as found", in other words: whatever price you see, report that price.

MR WILLIAMS: Who would have written that, is that your writing?

A. No, an admin assistant in Bristol.

Q. Right, sorry. What do you think the words "until resolved" mean, then?

A. I can't comment, I didn't write it.

Q. No, but --

A. I haven't seen that document with those words on, because it was an internal document that somebody has put that onto after I had written the typed text.

Q. Yes, but I think, based on the explanation you have given, what that suggests is that you expected this to be resolved, and that means that you weren't, I think, just -- when I say "you", I mean ITL, I beg your pardon, ITL was expecting this to be resolved, so you weren't just making a point for the record that you weren't funding a bonus on those brands, you expected it to be resolved?

A. I did not expect it to be resolved. I say again I had just drawn their attention to the fact that they had reduced the price. I did not write those words on that document.

Q. Could you then turn on to tab 38, please. {D20/38/183}. You only need to read down to the end of the section for Somerfield, although read as much as is helpful to you.

(Pause)

So you talk here about the margin that Somerfield would be making on Superkings and Berkeley. Am I right in thinking that you didn't know what the margin on Berkeley was, you just knew that they would make a better margin at 20.40 than 20.29?

A. Correct, as they would on our brand as well.
Q. What you, I think, envisage here is that they can make a better margin on Superkings at 20.40 rather than 20.29, that's your brand?
A. Yes, they had reduced their margin and I was concerned that they hadn't been conscious of the fact that they had suddenly started to take a lower cash margin, because this was yet another buyer that had come into the scene.
Q. If it's helpful to you, if you want to just turn back to document 36(a), {D20/36(a)/178}, which is an internal memo of 22 April, you can see it says -- and this is from you to Graham Plummer -- and you say that there were going to be new Q5 prices after the Budget, and:
"Dealing with new selling prices the pre Budget selling prices ... should all be increased in line with the increases quoted in our price list with the exception of the following lines."
Then it says:
"Superkings 100s moved to 20.29, the current retro ends."
So I think what was happening was that Superkings was going up by more than just the MPI because there was some funding being withdrawn; is that right?
A. Yes.

Q. Going back, then, to 38, I just wanted to ask you how it was that they would be suffering a lower cash margin at 20.29 than previously? Because it looks as though what you have done is they are going up in line with the MPI, and also you are taking away the funding, so it looks as though the price is just moving up.
A. It wasn't an MPI, it was a Budget.
Q. I am sorry, a Budget. I couldn't quite understand where your concern about their margin comes from.
A. I have to say I can't either at this stage, it is eight years ago, a little longer, nine years ago.
THE CHAIRMAN: Why did you think that the Superkings 100s should be at 20.40 rather than 20.29?
A. I can't answer that. There is a discrepancy between those two documents which are only a week apart, and I really can't recall why that happened. I may have made a mistake on the letter of the -- or the internal document on 22 April. There may have been a subsequent document which we don't have which changed it.
MR WILLIAMS: So there is a bit of confusion about that, I agree. Reading this, one thing that occurred to me is that on the face of it you would be happy if your brand was attractively priced at 20.29 and your strategic differential requirements are being applied, but rather than simply rub your hands happily about that, you point out to Somerfield that they can make more money at a higher price as long as they continue to respect parity. You seem to be encouraging them to put prices up when actually it would be in your interests if they kept prices down, wouldn't it?

A. It would be, but, as I said before, there may well be a document which we don't have here which changed the document from 22 April, there may have been some change that I can't recall what happened in between, but there is clearly a discrepancy between why I was looking for £20.29 on 22 April and £20.40 on 29 April, 10p off of the multipack would have been roughly where Somerfield Somerfield normally charged for a multipack, ie 10p off of the five packs of 20.
Q. I think where we have gotten to is it's not clear why you might suggest that they increased the price to 20.40, but what is clear is that you are encouraging them to put both prices up, aren't you?
A. There must have been a valid reason for that, and I cannot recall what it was.
Q. Now, what you envisage, I think, is that they put your brand up so as to improve their position on your brand, but you also say that when they put your brand up they should increase the Gallaher brand as well, don't you?
A. I am saying that I believe both brands ought to be at

£20.40. I do not say "you should put both up" or "one or the other up".
Q. No, but I can understand the idea that you write to Somerfield in principle and say "Well, you could be making a better margin on our product at 20.40", I can understand the idea that that's going to improve your relationship with Somerfield. But the point I am making is that what you envisage is that when they put your brand up to improve their position on your brand, they should put up Berkeley as well to maintain the parity?
A. I am pointing out that they could make a better margin on both brands at a higher price.
Q. But you do envisage that when they put your brand up, they will put Berkeley up as well, don't you, because --
A. I don't envisage anything, I am simply pointing out to them a fact.
Q. You say:
"Superkings multipacks are correctly matching Berkeley."
So it's correct that they are matching?
A. Yes.
Q. At 20.29, and so if they move your brand to 20.40, in order for them to be correctly matching, they would need to move Berkeley to 20.40?
A. I am saying they really ought to be if they want to get

the same margin that they were getting previously.
Q. On Superkings?
A. On the multipacks.
Q. On Superkings?
A. Yes.
Q. Yes, and if they improved their position on Superkings, they should move the shelf price of Berkeley to the same level?
A. No, they were free to do whatever they wished.
Q. Well, you say that, but this says that the brands are correctly matching, so --
A. At that price of 20.29, but I am not saying they must move Berkeley up, I am simply giving them the opportunity of making a higher margin if they wished on our brand and/or the other one.
THE CHAIRMAN: Well, you do say "They ought to be up" there, and is that "they ought to be in order to comply with the agreement", or why do you say they ought to be there?
A. Unless they want to take a lower cash margin, as I state at the end of the sentence.
THE CHAIRMAN: Lower than what?
A. That's what we don't have, because there was a difference between what I was asking for on 22 April, which was 20.29, and I cannot tell you what happened

between the 22nd and 29 April when the £20.40 price applied.
DR SCOTT: Mr Hall, if they had put Superkings up and left Berkeley down at 20.29, how would you have reacted?
A. They would have potentially been earning less money under the pricing differential agreement. Potentially.
MR WILLIAMS: I think in 30/38, and it's probably helpful if we just separate these two points out, there were two things going on. There is discussion about what the absolute price ought to be, whether it should be 20.29 or 20.40, and I think the point you are making to me is that it's up to Somerfield whether they price these multipacks at 20.29 or 20.40, you are saying that, aren't you?
A. I am saying they were free to do as they wished.
Q. Yes. Well, as regards the absolute price level, I can see that they are free to do as they wished. But what you do say is that the brands are correctly matching and that both brands ought to be up at 20.40. So would you agree with this: if they choose to put Superkings up to 20.40, in order to improve their margin as you are suggesting, what you expect them to do is to put Berkeley up as well because they have agreed to price the brands at parity?
A. They would be free to do either brand at £20.40, if they

chose to keep the Berkeley brand at 20.29, then as I said previously they would be potentially earning less money under the strategy pricing requirement.
THE CHAIRMAN: Because they wouldn't be adhering to that set out in the agreement?
A. No.
MR WILLIAMS: Could you then turn to tab 70 and just read that to yourself? It should be two emails in January 2003. Do you have two Somerfield files? Do you have tab 70, Mr Hall? {D20/70/307}.
A. 20 January?
MR WILLIAMS: That's right. I have one Somerfield file. I think some people have two files.
(Pause)
So would you agree that what we see here is you trying to broker the end of a price war between Kwik Save and Supercigs?
A. I am responding to their request for information on the Supercigs price structure. I didn't give them any actual indication other than about half the stores were still running at a deep discount to match Kwik Save.
Q. That's the first paragraph. Sorry, I should have made clear I was talking about the second paragraph, "if there were a will".
A. What I am trying to put in a sensible form there is if

Kwik Save move their price up, then Supercigs will obviously follow them to improve their margin. There was a bit of a battle going on between the two store chains at that time.
Q. So it's another document where what you have in mind is a move towards higher prices across the board, isn't it?
A. It will have been a penny increase across the board, increasing their margins, because they were slugging it out at virtually no margin at all.
Q. Could you then turn back to tab 34, please. {D20/34/167}. It says 11 March 2002 at the top, it's an email, but there is a series of emails.
We can do it, read it email by email if we want, if it's easier for you to keep one email in your mind at a time, or you can read the whole thing, whatever you think is most useful. I was going to ask you questions about it email by email, starting with the first email which is at the bottom of the second page. So whatever you think is most helpful.
(Pause)
Have you read the first email rather than the whole thing?
A. Yes.
Q. So what's happened is that Panama multipacks, which is the ITL brand, has been moved up from 13.29 to 13.39.

You say:
"While this would normally meet our strategic pricing requirement of 15p, we are in fact paying an additional retro bonus against the Panama multipacks to achieve 13.29."
And you ask them to put the price back down. Am I right in understanding that if it hadn't been for the promotion, the increase from 13.29 to 13.39 would have given effect to your strategy pricing?
A. Yes, it would.
Q. Doesn't that again tell us that your strategy was to be exactly at the differential, in this case parity, in the absence of any promotion? Because if you wanted to be no more expensive than in this case Hamlet, then increasing the price would have made no difference to your strategy.
A. Except that we were paying them money to put into the consumers' pocket, and they weren't passing it on at this stage, and that's why I am flagging it up to them.
Q. Yes, and if it hadn't been for that promotion, then increasing the price of Panama to the same price as Hamlet would have been the right thing to do under the strategy?
A. That would have been the maximum price they could go to, yes.

Q. If it had been a maximum price, you would have been just as happy with 13.29?
A. I would have been very happy with 13.29 if I wasn't paying for it, but on this occasion I was paying for it and I was very unhappy because the consumer wasn't getting the money.
Q. Let's move up. So Liz Smith then replies to you, and she says:
"Surely then I will not receive my bonuses for pricing. How am I supposed to know when I should comply and when I should not?"
You answer those two questions in two paragraphs in the next email up and you say:
"The answer to your first question is assuming it is corrected, we will pay the bonus."
So am I right in understanding that what you are saying is that because you have a brand on promotion you have effectively suspended your requirements, so you are not expecting the two brands to match because you have got a promotion running on Panama?
A. We never expected them to match, we said they would be maximum prices against the competing brand.
Q. Perhaps I've expressed that in a contentious way when I didn't mean to. Liz Smith's concern is that she will not get her bonus because the two brands aren't at parity?
A. Her concern is about the bonus money of 10p per pack that we were paying to get into the consumers' hands, and I am saying that if she corrects it, then she will get paid that bonus money.
THE CHAIRMAN: Isn't she saying that she thought that she needed to move the Panama price up to 13.39 in order to achieve the pricing differentials in the trading agreement, and so she thought that by moving it up to be minus 15p against Hamlet multipacks, she was complying with the differential requirements? And what you are then saying is, "Well, ordinarily, yes, but actually because we are paying you to keep it down at 13.29, in fact it should be presumably minus 25p against Hamlet multipacks"?
A. That is correct.
MR WILLIAMS: Then in terms of the second question "how am I supposed to know when I should comply and when I should not?", you say:
"The answer to your second question is that we do advise the additional retro bonuses and the selling prices on the price increase/decrease form which is the one that we were asked to use by a previous generation of Somerfield staff."
Then you say:

"Of course, this highlights once again the point that I have made so many times, that if we were given a file of your selling prices regularly we would know immediately something had gone wrong."
So what you are saying is that she will know at what price you want her to price because you will set it all out in the price increase/decrease forms?
A. Somerfield required a price increase/decrease form whenever a price changed showing the bonuses that were applicable and the percentage margin they were making, and until you submitted that form, whether you were going up or down in price, the price would not change. We had to complete that price form.
Q. Yes, and they would know what was the right price from ITL's point of view because it would be set out in that form?
A. We would submit the form but they would not always get it right, they may change it of their own volition, we were not setting the price, we merely completed the form as per their request.
Q. She says:
"How will I know when I should comply and when I should not?"
So she seems to be talking about: how will I know what I am supposed to do from ITL's point of view; do

you agree?
A. In essence, yes.
Q. You say:
"The answer is that we do advise the additional retro bonuses and the selling prices on the price increase/decrease forms."
So Somerfield will know where you want them to price, because it will be set out in the price increase/decrease forms?
A. What we were doing there was either applying an additional retro bonus, so if a price was going down by 10p, showing our contribution of 10p including VAT, or if we were ending a promotion, removing the 10p, simply for their own purpose.
Q. Well, it's not simply for their own purpose, because she is asking "How will I know when I am supposed to supply and when I should not?" You say "Well, it will be set out in the price increase/decrease forms". It's not simply for their own purpose. This is all about what you want them to do?
A. The price increase/decrease form takes the existing price that's on the shelf, which they have already set, and either applies the reduction or the increase if we were removing a bonus. We take the existing price on the shelf. That's why it was important that we --

THE CHAIRMAN: But you are saying to her "if you stick with the prices on the price increase/decrease form, then we will have taken care of your obligations under the trading agreement, and provided you stick with those, you will always be all right as regards what we want the price of Panama to be"?
A. Yes, indeed, but as we saw previously with Cafe Creme, they actually instituted a lower price of their own volition.
THE CHAIRMAN: Well, they may have intended to do that or not, we don't know, but --
A. That's exactly why I'm saying --
THE CHAIRMAN: -- we are just trying to tease out what we see in this email exchange at the moment.
MR WILLIAMS: What you don't say in this email is "of course you will get the bonus for strategy pricing if our brand is at 13.29, because that would be better than Hamlet"; you don't say that, do you?
A. There was no need to, because it was no more expensive than, or no more -- at least 15p less expensive, so it was more than, so it was better.
Q. Yes, but Liz Smith's concern when she says "Surely then I will not receive my bonuses for pricing", her concern is that if she keeps your brand at 13.29, she won't be entitled to her bonus for strategy pricing?

A. I would have read that as being the bonus is being paid for the 13.29 price.
Q. I think you agreed with the Chairman earlier on that that's probably not what it refers to, actually.
Anyway, let's move on to the next email. Liz Smith says:
"Sorry, Graham, can you just send me this form so I know exactly what we are talking about."
So there seems to be a bit of confusion because of a change of personnel.
The next email you say:
"Liz, please see attached."
So you obviously send her a price increase/decrease form as an example. Then above that, she emails you back again and says:
"So if your competitors change their prices, should we or shouldn't we match as per the strategy pricing differentials, as this is what we have been doing?"
So her understanding of the strategy pricing differentials was that she should move prices around to match whatever was happening on the rival brand; do you agree?
A. That was her understanding at that time, yes.
Q. And that's consistent with the way in which we have seen that you communicated with Somerfield, using language

like "match" and "maintain the differentials"?
A. Yes.
Q. You reply to her, and just focusing on the first two points, you say:
"We would expect to be told whenever you are changing any of our selling prices and Steve used to call me to tell me of any changes he was making."
Secondly you say:
"The change that you made to Panama multipack did not reflect any change to Hamlet multipack. Had I known that you were planning to move Panama multipack up, I would have effectively told you that there was a promotion."
So this was a mistake in this instance, because you had a promotion on Panama, but normally it wouldn't have been a mistake to move your price up to match the Gallaher price, as long as you are told what's happening?
A. This was a new buyer that had come into the scene, Liz Smith, at this stage and she had made obviously a mistake, and moved the price up. And what I was saying was: if we had known that she was planning to make that change in advance of the change being made, we would have reminded her that we were funding the additional price cut.

Q. But it was only a mistake because of the promotion?
A. Yes.
Q. So if there hadn't been a promotion, you would have been happy, indeed it would have been correct for her to move the price of Panama up when Hamlet went up, as long as you were told what was happening, kept in the loop, so that you could double check whether there was any mistake?
A. Only in so much as if she wanted to move from 13.29 if we weren't funding it, she was free to do so.
Q. Well, I think what your first email says is:
"Whilst this would normally meet our strategic pricing requirements ..."
So normally the increase in the price would have been correct?
A. Yes, she would not have been suffering any penalty for not achieving the strategic pricing requirement.
Q. But what you don't do, I don't think, you don't reply and say "No, we don't want our prices to go up when the Gallaher price goes up"; what you say is "just tell us what you are doing with our prices".
A. I am unclear of your question.
Q. One reaction to this would be for you to say "Well, there is no reason for you to put our prices up just because the Gallaher price has gone up, what we do with

our prices is up to us". But you don't say that. You say "If you are moving our prices up because the Gallaher price has gone up, then just tell us what you are doing".
THE CHAIRMAN: Just to be clear, I am not sure that the Gallaher price had gone up here, because Mr Hall says in the top email:
"The change you made to Panama multipack did not reflect any change to Hamlet multipack."
So we need to be a little careful as to what assumptions we make.
MR WILLIAMS: You are right, Madam.
A. That's why I was getting confused.
Q. I'm sorry if I have confused matters. I think that's exactly the point, that there has been confusion here about what's actually happened, and what is envisaged here is that I think in the second paragraph you say:
"The change that you made to Panama multipack did not reflect any change to Hamlet multipack."
But I think what's contemplated is that if there had been a change to Hamlet multipack, then moving prices around in line with these differentials would have been the right thing to do?
A. They could change their prices whenever they wished, they were free to do so.

THE CHAIRMAN: But she is asking you, how I would read this, Mr Hall, is that you are drawing to her attention that Panama has moved up to 13.39, she says "I thought that's what you would have wanted because that maintains a minus 15p differential against Hamlet multipacks, which is what we have agreed to do, or what you would expect", and you say "Well, normally yes, but in fact we are giving you an additional bonus to bring it down to 13.29", and then she says "Well, how am I supposed to know when it's supposed to be minus 15p and when it's not supposed to be minus 15p," and you say "We will send you the increase/decrease form, if you stick to that price you will be doing the right thing". Then there is an exchange about what the form looks like, and then you say "Just tell us what you plan to do with the pricing and we will check for you whether what you plan is right, having regard to the strategic pricing requirements and any additional tactical bonuses that we are paying you".
Now, would you accept that is a summary of what is happening in this incident?
A. Yes, I would.
MR WILLIAMS: Yes, and I think that the reason my question confused you is because I was focusing on Liz Smith's email where she says:

"So if your competitors change their price, should we or shouldn't we match as per the strategy pricing differentials as this is what we have been doing."
Your reply is:
"We would expect you to tell us whenever you are changing any of our selling prices."
So you don't say, "Don't move our prices around so as to comply with the strategy pricing differentials, ie if the Gallaher price goes up, please put our price up", what you say is, "Tell us what you are doing"?
A. With our prices.
Q. Yes.
THE CHAIRMAN: Are you moving on? We will take a break for ten minutes at this point. Mr Hall, as with last time, because you are in the middle of giving your evidence you mustn't talk to anybody about your evidence. We will come back at five to 12.
A. Thank you.
(11.45 am)
(A short break)
(11.55 am)
MR WILLIAMS: Mr Hall, before we move on from this document I want to understand where I thought we had got to before the break. I think where we had got to was that in a situation where the Gallaher price went up,

Somerfield would be right, as far as the strategic pricing requirements were concerned, to put your price up to match the Gallaher price but you wanted to be told what they were doing with your prices in case they got something wrong?

A. Not in every instance. There could be an occasion on which Gallaher had an MPI, in which case it wouldn't be correct to suddenly increase our brand before we had an MPI.

Q. In a situation which is not an MPI where your MPI would come in due course, and that's a matter for ITL, in a situation like this, which is prices moving around between MPIs, would you agree with my summary?

MR HOWARD: Perhaps we could have an explanation of what the price movement is. If it's not an MPI, what is the price movement referred to?

MR WILLIAMS: If one has a situation where, for example, there is the end of a Gallaher promotion and so the Gallaher shelf price goes up, Somerfield would be doing the right thing as far as the strategy pricing requirements are concerned to put your price up to match, but you wanted to be told what they were doing with your prices.

A. But if the Gallaher brand had been on promotion and we hadn't been matching that promotion, then our brand

would already be higher anyway.

Q. Yes, but assuming that you are matching them at the lower price ...

A. They would be right to increase our price as and when we ceased funding that lower price. We may continue it for another week, two weeks or a month.

Q. Coming back, then, to the question that Liz Smith asked you, she says:

"So if your competitors change their price, should we or shouldn't we match as per the strategy pricing differentials as this is what we have been doing."

Your reply to that is the first two points you say:

"We would expect to be told whenever you are changing any of our selling prices and Steve used to call me to tell me of any changes he was making."

So you don't say to her that you don't want prices to be changed to match as per the strategy pricing differentials, what you say to her is that you want to be told what's happening to your prices?

A. Yes.

Q. So what that points to is that you did want them to move prices in line with the strategy pricing requirements, but you did want to be told when they were moving your prices around, in case there was a mistake, as there had been in this case?

A. Yes.

Q. So if, in the example I gave you, where it's the end of a promotion, Somerfield would be right to assume that what they should do to your price --

MR HOWARD: Whose promotion is ending?

MR WILLIAMS: The example I gave you where there was a Gallaher promotion and the Gallaher promotion cam to an end so that the Gallaher shelf price went up, Somerfield would be right to assume that what that meant in that situation was that the ITL price should go back up to where it was --

A. Not if we were funding that lower price --

Q. Sorry, I hadn't finished the question. They would be right in thinking that what you wanted was for your price to go back up to match the Gallaher price, but you would need to have a conversation about the bonus?

A. As long as we were funding that lower price, we would determine when we were going to end that lower price. It may be one week, two weeks, or a month later, dependent on the availability of money within the company.

Q. But really the only point I am putting to you, Mr Hall, is that you don't say any of that in response to Ms Smith's question. What you say is: "We would expect to be told whenever you are changing any of our selling

prices."

So the thrust of the conversation seems to be: yes, prices are supposed to move in line with the strategy pricing differentials, but I expect you to tell me what you are doing with my prices, and in the example we were just talking about, you would need to have a conversation about the level of the bonus?

A. If we had agreed that we were going to run that promotion for a specific period of time, that may well be different to the Gallaher period of time.

Q. I'll move on to document 19, if that's all right. I am going to move on to a new topic now, Mr Hall.

(Pause)

Have you read that? There is a confidential box in this, but I was proposing to ignore it, if that's all right? {D20/19/100}.

MR HOWARD: Absolutely.

(Pause)

MR WILLIAMS: So this is an internal communication talking about a move in the price of Amber Leaf from 15 August. The date of this is 7 August. So you probably can't remember, but are you able to say who would have advised you that Amber Leaf was moving up in a week's time? I presume it would have been Somerfield.

A. It would have been probably Stephen Clarke at that time,

because I don't think Liz Smith was in the chair in 2001.
Q. What we can see is that on the 12.5 gram pack of Drum, you have set out a new selling price, 2.08 and 2.09, and there is going to be no retro bonus paid on either of those when they move to those prices; yes?
A. Correct.
Q. Now, you probably don't remember, but there was an MPI a bit later, at the beginning of September 2001, so I think that means that apart from the removal of any retro bonus that you were paying, there is no change in wholesale price at this stage, if the MPI was a month away?
A. I don't believe so, no.
Q. If you want to just turn over the page to 19(a), and just read that to yourself, or you can probably just read the first paragraph if you want, because I am only interested in the number you get from the first paragraph. This is essentially just saying that Kwik Save has decided to put all its prices up a penny at this stage to match Asda. {D20/19(a)/101}.
A. Yes.
Q. So this is 24 August, and as I said to you, there was an MPI on 3 September, and that put 3p on the price of Drum, and also Gallaher had an MPI which put 3p on the

price of Amber Leaf. So I am just telling you that, because I think it's helpful when we come to look at the next --
A. Can you clarify which came first, please, the Gallaher or the ITL?
Q. I haven't got the dates right in front of me.
DR SCOTT: ITL was on 3 September, and Gallaher was on 11 September.
MR WILLIAMS: So ITL came first.
A. Thank you.
Q. Moving then through the file, you can see that there is a trade development programme at tab 20, I am just looking at the sequence of documents here, because I think you signed that on 13 September. I beg your pardon, Somerfield signed it on 13 September. So that's there. That has Drum and Amber Leaf at ... actually I beg your pardon, there is no schedule attached to that. We know from other schedules that they were at parity. That was normally the requirement on Drum and Amber Leaf, wasn't it?
A. That was the price list differentials in the published price list, yes.
Q. Can you then turn on to 23 and read that to yourself, please. {D20/13/119}.
(Pause)

So you see the price of £2.12 in Kwik Save, that fits I think with what I've just told you, which was that it was at 2.08 in tab 19, and then there was the penny increase at 19(a) and then 3p at the MPI, so that gets you to £2.12. Do you follow?
A. Yes.
Q. Could you read paragraph 188 of your witness statement, please.
(Pause)
I think the way in which you explain this document here is to say you are thinking about whether you might end a promotion on Drum, but would you agree that can't be what you are doing in this letter because we have just seen that you stopped paying retros on Drum in the document we saw at tab 19. That's how you get to the price of £2.12.
(Pause)
A. Except for one thing, the one penny increase that you referred to in document page 19(a) is referring to 1p per 20 pack of cigarettes, not to the Drum price. So in effect, somewhere down the line between 7 August and 23 October, whilst there had been a 3p increase on 2.08, which would have taken it to £2.11, there seems to be some confusion there as to where that extra penny has come from.

Q. You are quite right and there is a document at 19(b) which expresses the one penny point in more general terms. So there is a bit of confusion about this.
A. But it was 1p per 20 pack of cigarettes. There was no reference to tobaccos there.
Q. Right. But it does look as though you are not paying any retros, doesn't it? You have stopped paying retros?
THE CHAIRMAN: This is on 12.5 grams of Drum?
A. Drum, yes.
MR WILLIAMS: Yes.
MR HOWARD: Does that work? Surely on what Mr Williams said the retros stopped in August, then there is a 3p price increase in September, which, as we know, very often they hold the price by paying a retro bonus. It's actually how, you will remember, that's one of the questions the Chairman --
THE CHAIRMAN: Did the MPI put up the price of roll-your-own tobacco?
MR HOWARD: I haven't looked at it, but that was what Mr Williams said. It was 3p.
MR WILLIAMS: Yes, it was a 3p increase. Mr Hall is quite right, there is some confusion about this penny, I accept that, but 19 is clear that the retros are stopped at that point, and what we -- we know that what ITL is expecting to see by tab 23 is £2.12 in Kwik Save.

THE CHAIRMAN: So you say that indicates that they can't have put a hold on Drum --
MR WILLIAMS: There can't be any retros because we have gone --
THE CHAIRMAN: -- when the MPI took place?
MR WILLIAMS: There can't be any retros, because we have gone from 2.08, MPI of 3p and now they are expecting to see £2.12, so there just can't be any retros on the price.
A. Can we clarify, please, the MPI amount on the tobacco? I suspect it was 3p on cigarettes --
DR SCOTT: No, on 3 September MPI, your increases on handrolling tobacco were 3p on the 12.5, 5p on the 25, and 10p on the 50.
A. Thank you.
DR SCOTT: All brands except Gold Leaf Concept, which remained unchanged.
A. Thank you.
MR WILLIAMS: You are quite right, perhaps I have misread that penny as explaining the reason why you expect Kwik Save to be at 2.12, but I think what is clear is that you can't have been paying any retros and expecting the price to be 2.12.
A. I understand what you are saying, and I can't for the life of me recall why Amber Leaf would have been at 2.18

either, because I would have expected it, based on this evidence, to have been 2.12 or thereabouts.
Q. Yes, so the point you are making to me now is that it's surprising to see that Amber Leaf has gone to 2.18 because that's out of line with the MPI price increase?
THE CHAIRMAN: Well, was the Gallaher MPI price also 3p?
MR WILLIAMS: It was 3p as well.
DR SCOTT: Yes, just to confirm, Gallaher on the 11th was 3p for 12.5, 5p for 25 and 10p for 50. So the same --
A. So they seem to have suddenly leapt up by 15p. I can't explain that, I am sorry.
MR WILLIAMS: And the point --
MR HOWARD: I think it's just in danger of getting confused. In fact, although this is a week or so later, it's perfectly clear there was Gallaher price activity going on in October and it looks like there was therefore competing activity going on in October.
It's quite important, if one is going to put questions on the basis that this is what happened, one actually has to put the facts fairly. Tab 25 actually shows, because it cross-refers back to October when there was part of the price war going on.
MR WILLIAMS: I am not sure it can be part of the price war because it's at 2.18 so it is significantly more -- I think Mr Hall's point is that he can't understand why

Amber Leaf is significantly more expensive than Drum rather than there being a price war.
But anyway, what the email says is that you visited 50 Kwik Save stores stocking Amber Leaf in the past three days, 49 have a price of 2.18, which is the higher price, and one store has a shelf price of 2.05, while 99 stores have Drum at 2.12. So we don't know exactly which stores are pricing what at what, but I think the impression I get from this is that there are a lot of stores where Drum is cheaper than Amber Leaf. Would that be right?
A. That would be right, but my comment is based on disagreeing with what the buyer had told me when I had met him or when we spoke previously.
Q. Yes. So what you go on to say is: "we would like to have Drum at the same price as Amber Leaf, whatever that is, for each packing in each fascia". So we have a situation where in a lot of stores you seem to be cheaper than Amber Leaf, and you are not paying a retro bonus for that or anything, and yet you tell Somerfield that you want Drum to be at the same price as Amber Leaf, whatever that is.
A. It does appear that way, yes.
Q. So perhaps it's helpful, we see an application of this in the next tab which is tab 24. {D20/24/120}. You

will see there is a heading "Somerfield Sheffield Store", Amber Leaf 12.5 appears to have increased to 2.18. I should say this is an email from Nick Law which was copied to you, and this is in November, so I wasn't sure if this would be during one of your trips to the Caribbean that we heard about last time you were in court?
A. You are absolutely right, it was.
Q. So Nick Law sends this email, but he is really, in this paragraph on the Somerfield, making the same point that you were making in the last email, which is that Amber Leaf is at 2.18, Drum is at 12.5(sic), then there is discussion of the other packs:
"If Amber Leaf has increased in price, as it appears to have done, then ITL would wish to increase the price of Drum to match Amber Leaf and achieve parity pricing."
So I think we have agreed that there is no retro bonus being paid at this point, so this is just an increase in the shelf price?
A. It does appear that way, but without the price increase/decrease forms to look at, I can't be specific.
Q. Unless you want to look at it, we don't need to go back to 166 of your statement, because there you make the same point you made in 188 about this document, and saying "Oh, well, I think what we wanted to do here was

we were thinking about whether we should move a retro bonus." I think we have discussed that and it doesn't look as though that's the case. Do you want to look at that paragraph? Perhaps that's the easiest thing. I do not want Mr Hall to be confused by the question.
A. It does appear that way.
THE CHAIRMAN: When you referred in 166 and 188 to "our similar promotion on Drum", when you wrote this witness statement, did you at that stage have any more information about whether there had been in existence a promotion on Drum than you have now? Or were you just assuming that this must have related to the removal of a promotion?
A. Based on what I was reading from this document -- those documents, then I made the assumption that it was the removal of a bonus. And without further clarification in terms of all the price increase/decrease forms that applied at that point, I cannot be more specific.
MR WILLIAMS: I think you have agreed that if you were not paying a bonus at 2.08 and then you moved through an MPI of 3p and you are looking at prices of 2.12 and so on, it's actually hard to see how a tactical bonus could have entered the picture here, isn't it?
A. It does appear that way, yes.
Q. So would you agree that actually this is an instance of

you firstly -- you as in ITL -- complaining that your brand was priced too cheaply relative to the Gallaher brand, Amber Leaf, and secondly suggesting that the two brands are moved to the parity without there being any change in the wholesale price or the bonus being paid on Drum?
A. I wouldn't say I was complaining, because I wasn't complaining. What it does appear is that the price is looking to be increased without any change of bonus, and I can't be any clearer than that.
Q. Can we then move on to tab 25, please. {D20/25/122}.
Under "Pricing", "Steve has reassured me", and do you want to read the first bullet?
(Pause)
So that "Steve has reassured me", so effectively this is a situation where ITL was concerned to see, you know, a resolution of the problem, and you have been reassured that there is going to be a resolution. Do you agree?
A. This is an email from Nick Law to me.
Q. That's right, but that's the flavour of this exchange in the context of the last two documents we have seen also dealing with this point?
A. But in this context, Amber Leaf is actually coming down to match Drum. Drum isn't going up at all.

Q. No, so that's how it's resolved in the end. We have seen that you have been telling them to put your brand up to match Amber Leaf at 2.18, in the end the Gallaher brand is going to be brought down to match you at 2.12, it doesn't matter to you actually whether the brands are matched by your brand going up or Somerfield bringing the Gallaher brand down. What you want is the brands to be priced at parity?
A. Having seen this document now, I would suggest that when they applied the Gallaher increase and put it up to £2.18, it was one of their administrative errors and they have now realised that and brought it back down to match the Drum price.
THE CHAIRMAN: You didn't answer the question that Mr Williams asked. He is not interested particularly in whether they resolve at 2.12 or 2.18, what he asked you was: what was important to you, for whatever reason, was that they should be at the same price.
A. We did not want to be disadvantaged against them, no.
MR WILLIAMS: Yes, but you didn't want to be advantaged either, did you, because when Drum was at 2.18, you were saying "We wanted your brand moved up from 2.12 to 2.18" -- sorry, when Amber Leaf was at 2.18, you said you wanted Drum moved up from 2.12 to 2.18 so you didn't want to be advantaged as well as not being

disadvantaged?
A. I had been told by Steve Clarke, when he had met with me, that they were both at £2.12. I had found out that they were not both at 2.12, and I had flagged this up to him.
Q. Yes, and what you said is "we would like to be at the same price, whatever that is"?
A. Yes.
Q. Mr Howard's raised the reference to Gallaher pricing activity during October. I have to say I struggled to understand that myself, because the issue here is that Amber Leaf was at 2.18 rather than being at 2.12. So I've struggled to understand how that can be the result of pricing activity in the sense that we normally understand that?
MR HOWARD: It's absolutely clear --
THE CHAIRMAN: The reduction is as a result of these --
MR HOWARD: In order to get to 2.12, they are having to pay a bonus, so that the whole premise of what we are discussing would appear to be wrong.
MR WILLIAMS: I am sorry, that's not right, this is an email sent in November, and they are saying the reduction is as a result of Gallaher pricing activity during October. So I am simply making the point to the Tribunal, I haven't overlooked this feature of it, it's just quite

hard to understand, because the complaint was that Drum was at 2.18, rather than 2.12. It's now coming from 2.18 to 2.12 --
A. Drum was never at 2.18, Drum was at 2.12.
Q. I am sorry, Amber Leaf was at 2.18. The explanation that is given is that there was pricing activity during October, but during October, it was at too high a price rather than too low a price, so I just find that hard to understand. I am simply making the point that I had not overlooked that part of the story.
MR HOWARD: Whether Mr Williams understands it, the contemporaneous documents plainly refer to Gallaher pricing activity during October.
THE CHAIRMAN: Well, do you remember any pricing activity or being aware of any pricing activity in Amber Leaf in October, Mr Hall?
A. No, I don't, and I come back to the point I made earlier, that I believe it was an administrative error on their part going to £2.18, and when they realised it, they went back down to £2.12, because they would have probably found that their benchmark stores and Sainsbury, were also at 2.12 and that they were off --
THE CHAIRMAN: So you suspect that Steve is waffling to cover up his own error here?
A. Well, of course that was an email from Nick Law to me,

so I can't really comment on it.
MR WILLIAMS: Another possibility is that --
THE CHAIRMAN: Let's not speculate about it, let's concentrate on asking Mr Hall questions.
MR WILLIAMS: Can we then move on to --
MR HOWARD: Can I just say we actually do have a document from annex 10, which is the Gallaher documents, which actually shows Mr Hall isn't actually right and that Gallaher appear to be bonusing down by 6p to get to £2.12. It's annex 10, document 13.
THE CHAIRMAN: What is the date of that document?
MR HOWARD: 21 September 2001.
MR WILLIAMS: I don't have any difficulty with the explanation that there is a bonus from 2.18 to 2.12. I was simply making the point that it is hard to explain the problem which had arisen on the basis of pricing activity during October, that's all.
Could you move to tab 32, please, Mr Hall, and there are two emails there. {D20/32/165}. Do you want to read the one at the bottom and then the one at the top?
(Pause)
So on 4 March at 9.30 in the morning you say that you picked up from another retailer that Gallaher are moving prices up on Sterling, Dorchester, Superkings. Then you say:

"If you are moving these prices up at all, could you please let me know by how much and when."
Then we see that the following afternoon you send a chaser, which says:
"Liz, is anything happening on Sterling and Dorchester prices, please? Regards, Graham."
Is it fair to say that the reason you were pressing on this is you were concerned to move Richmond up quickly if the Dorchester price went up?
A. It would suggest that there was funding on both sides from Gallaher on Dorchester and Sterling and from us on our brands and that, yes, we would be looking to end our funding as soon as possible.
Q. Then if you want to turn to tab 33, {D20/33/166}, again we have a series of emails starting at the bottom. So we can see that Liz Smith was actually investigating your question on the afternoon of 4 March. I think she simply hadn't got back to you before you sent the chaser at 20 to 5. Then she replies to you 15 minutes later, at 16.55, forwarding on the email we see at the bottom, which says:
"I am giving you this information only as the activity has already taken place in the other retailers and is therefore not news sensitive. Please advise changes you wish to make asap."

So is it fair to say that everyone here was working on the basis that whatever Gallaher does in one retailer is going to happen in the other retailer sooner or later? If they have put the price up somewhere, then it's not really news sensitive to tell you about this, because everyone knows it's just a matter of time before this happens in Somerfield as well?
A. Yes. Two weeks later.
Q. Is it also fair to say that this is also assuming that all the supermarkets are going to pass on whatever change in the bonus level Gallaher makes, so that you can expect that if Gallaher reduced the bonus in one supermarket, the result will be all the supermarkets are eventually going to put their price up?
A. If they want to maintain their percentage margins, yes.
Q. That's why this isn't news sensitive, because as soon as Gallaher does it in one place, effectively what's going to happen everywhere else is predictable, isn't it?
A. She is saying it's not news sensitive because it has already happened and can be seen on the shelf somewhere.
Q. Yes, but it is news sensitive as far as what's happening in Somerfield is concerned, because -- when I say "news sensitive", what I mean is it is future price information, because we can see that the change in the price of Dorchester relates to 12 March, which is just

over a week -- in fact it's a week away.
A. But there would be no way that I could match that 12 March because --
THE CHAIRMAN: No, that's not the point you are being asked. The point you are being asked is that: she is saying this is not news sensitive even as regards Somerfield because it's already happened in other retailers, so it's not news sensitive because everybody knows or assumes that if it's happened in another retailer then you know it's going to happen in Somerfield within whatever time period they can bring that about, and therefore she is not telling you anything sensitive by telling you that they are going to increase the prices. That's the point.
A. Yes.
MR WILLIAMS: Then she says:
"Please advise changes that you wish to make asap as changes will have to be made before 5.30 pm today."
So effectively this is a bit like the opportunity to respond clause that we saw in the trading arrangements, but it's working the other way around here, she is making sure that you are given the chance to adjust your bonus levels on Richmond in order to continue to match Dorchester?
A. Yes.

Q. In the top email you say:
"Liz, thanks for this. I note that you have in fact already moved Sterling prices up" because the bottom prices relate to the 3 March and these emails are on 5 March.
Is that you making the point that you would have expected to have been told before then?
A. No, I am merely noting that she has in fact already moved those prices up.
Q. You make a bit of a point of that to her, don't you?
A. Sorry?
Q. You make a bit of a point of that. The point you seem to be making is well, I have been asking you to tell us what has happened and in fact something's already happened?
A. I think I am picking up on the point that she is saying that it's going to happen when some of it has already happened.
Q. So would you agree with this: Liz Smith understood that in this sort of situation, that is to say where Gallaher reduced the bonus on -- or increased the price of the Dorchester brand, she could anticipate that you would also want to see an increase in the price of the Richmond brand?
A. She could anticipate that, yes.

Q. And that's because you had made it clear to them that you were trying to achieve parity on those brands?
A. Except that on some occasions we would hold for another two weeks or three weeks.
Q. Yes, but the reason she understands that you are going to want to put your price up or that you are likely to want to put your price up in this situation is because you have told Somerfield, made it clear on many occasions, that your strategy is to achieve parity?
A. Yes, because there is not an unlimited supply of money.
MR HOWARD: I assume from this that the case that Mr Williams is trying to put is that where Gallaher withdraws a bonus, that Somerfield don't put up the retail selling price of Imperial, they anticipate that Imperial may wish to withdraw its bonus and they are contacting Imperial to ascertain whether it wishes to do so.
That's the case that's been put. That's of course different to the case which they seemed to be wanting to put earlier, which is that well, there is an obligation or expectation or requirement that independently the retail selling price of Imperial be put up. Again I just rise because it's very important that we are clear as to which one of these different cases and different stages the OFT is putting.

THE CHAIRMAN: Is it --
MR WILLIAMS: It's clear that in relation to this document there is a change in the level of the ITL tactical bonus. I accept that.
THE CHAIRMAN: No, that's not the point that's being made. The point is: are you putting to the witness that the obligation to change the Richmond price, or the obligation as regards Richmond, when there was an increase in the Dorchester price, was that to change the Richmond price immediately, or to contact Mr Hall to tell him that was what was happening with the Dorchester price to see if ITL wanted to respond by reducing their own bonus on Richmond, after which they would then increase the Richmond price to maintain the parity?
Is that the point that you are making, Mr Howard?
MR HOWARD: I would suggest it's entirely clear that the question --
THE CHAIRMAN: Well, is that the distinction that you are treating --
MR HOWARD: The distinction is if -- you have used the word "obligation", I am not actually sure that again that's right, even on the basis that Mr Williams has been putting questions, it's perfectly clear that he hasn't, but in order to earn the bonus, where Richmond here is being funded, is Mr Williams suggesting that Somerfield

be expected to put up the price of Richmond because Gallaher has withdrawn its bonus, or is he suggesting -- which I think is what I understood him to be suggesting -- simply that here Liz Smith, whoever it is who has written this, Liz Smith, is contacting Mr Hall to ask whether or not they wish to withdraw their bonus, and the question would be: do you wish to do so and when? Because you can see it's actually two weeks later that they make a minor change in respect of Richmond.

THE CHAIRMAN: Well, which is it that you put to the witness in this instance?

MR WILLIAMS: In relation to this document on the basis that there are tactical bonuses being paid, it's clear that for as long as the tactical bonus is being paid that Somerfield is going to price at the level implied by the tactical bonus. That's a function of the payment of the tactical bonus. What we see in this document is a series of communications which are all designed to make the shelf price work in accordance with the parity requirement and to deal with the tactical bonus accordingly. Sorry, that probably wasn't very clear --

THE CHAIRMAN: No, no, I understand what you --

MR WILLIAMS: But we see a series of communications which are designed to achieve parity, working around the fact that there is a tactical bonus being paid in this

document. When we looked at the Drum and Amber Leaf exchange where there was no retro bonus being paid, the exchange works in a different way. These exchanges are a function of their circumstances. So I don't shrink from the fact --

THE CHAIRMAN: So you are not putting to this witness that where tactical bonuses are engaged there was an expectation that the Richmond price would move as soon as the Gallaher price moved, to be followed up perhaps by a reduction in the Richmond bonus?

MR WILLIAMS: What I've put to the witness is that in the email "please advise changes" I've put -- and Mr Hall agreed, I think, although I can't remember the answer word for word -- the reason she was contacted before, the reason they were engaged in this exchange is because she understood that he wanted to be at parity and that where there was a tactical bonus being paid which was affecting the level of the shelf price, he would want to make an adjustment to that so as to achieve parity. But the mechanics are a function of the fact that there is a tactical bonus being paid.

MR HOWARD: This actually is quite fundamental, because remember Mr Williams put some questions about prices moving around, and I said "What do you mean?", so we then got to the situation where he said "Where it's

an MPI", and he put a question which was on the premise --

MR WILLIAMS: I didn't put a question --

MR HOWARD: Well, an MPI, we can see it on the transcript, Mr Williams says "No, where there is an MPI by Gallaher not followed by Imperial at that stage, then there is no obligation or expectation or requirement", whichever word they are using in the different stages "to put up the price of Imperial".

We then said are you talking about withdrawal of a bonus, and at an earlier stage in the cross-examination seemed to be saying if Gallaher withdrew the bonus, its bonus, then that would necessarily follow that the Imperial price would go up. We now have a different point, we now have a situation where it's perfectly clear that the OFT's case is not where there are bonuses.

THE CHAIRMAN: I think how you are characterising the OFT's case is not how the OFT is characterising it, because you have a different view of the significance and the purpose of the bonusing, and these examples of behaviour are being put to the witnesses as being examples by which the P&Ds are achieved. So, as I understand it, Mr Williams' questions don't expect the same mechanism to apply in a number of different circumstances, whereas

you focus on the bonusing and he's focusing on the P&Ds and regards the bonusing as incidental to that or as part of a mechanism for that. But I don't see that Mr Williams has to push his questioning into the framework that you rely on.

MR HOWARD: With respect, that's not right, it's not that I am establishing a framework. The OFT's -- they made this clear, that their case is that where there is a Gallaher price increase --

MR LASOK: I hate to intervene but there must come an end to this.

THE CHAIRMAN: Yes.

MR LASOK: This is not the occasion, with all due respect, for submission. What you do is you permit the cross-examination to run as the cross-examiner wishes to run it. At a later stage, if you take the view that the cross-examination was defective, because it missed something out or whatever it is, you make your submissions then.

THE CHAIRMAN: Yes. I think the reason why we had the debate yesterday morning is in due course we will understand from the OFT what their case is, and we will not have to glean it, as you are trying to do, from the questions being put in cross-examination. I think I am going to allow the cross-examination to continue.

MR HOWARD: No, I am not seeking to stop allowance of cross-examination. If I can just make my point, and then I'll sit down, but I think it is an important point.
THE CHAIRMAN: Just one moment.
(Pause)
MR HOWARD: Yes. In fact, when I rose I wasn't seeking to stop Mr Williams asking whatever questions he wants. But what I am saying is very simply this: if the OFT is going to run a case that -- I understand that they want to approach things, as you say, from a different perspective. But also we know within the decision, within the skeleton arguments, within what Mr Lasok has said, that in respect of a price increase by Gallaher, they have said that there is a requirement that the retailer puts up the price of the Imperial brand, the competing brand. And all I am saying is that that is a different case to the one that is being put in cross-examination. If in cross-examination it's sought to be said that when Gallaher change the price as a result of withdrawing the bonus, that there is to be a change in the Imperial price, whether it withdraws its bonus or not, that would need to be put in terms.
THE CHAIRMAN: The cross-examination is not finished yet, so let's see what questions are put.

Carry on, Mr Williams.
MR WILLIAMS: It will probably seem a long time ago, Mr Hall, that we were talking about the document at tab 33. I only have one other question about that, and that is that the discussion here, I think, is focused on shelf prices. You are told what the Dorchester shelf price is, and your top email says:
"I note that you have already moved Sterling prices."
You then say:
"I will be in touch shortly regarding a minor change on Richmond Superkings."
So is the position this: you were foreshadowing the fact that you would want the shelf price to move as a result of the change to the shelf price of the Gallaher brands, and that you would be in touch with the details of that in due course, which would include matters such as bonus?
A. Yes, that's correct, because I probably wasn't aware at that stage of exactly how much we might want to move Richmond by.
Q. Could you turn to paragraph 12 of your witness statement, please, which is on a different topic, it's dealing with price files, and I just wanted to ask you some questions about price files.

(Pause)
You say in the middle of that paragraph:
"The retailers required a document which allowed them to see the effect a suggested price change would have on their margin before making their own decisions on the prices to put on their shelves."
So are you talking there about documents which clearly set out the margin, the percentage margin that the retailer will earn on a particular brand at a particular price?
A. Yes.
Q. The example you give of Somerfield is in tab 53 of annex 20. {D20/53/243}. Do you want to have a look at the price file?
(Pause)
There is a covering email which we don't really need to look at. It says at the top "Somerfield Price File."Do you see that? This isn't one of the sorts of documents that I think you just referred to, which sets out the margin.
A. No, it isn't. This is the document that they introduced and circulated to us -- when I say "us", I mean all the manufacturers -- to look at their retails, not the margins.
Q. So although this is the example you give in

paragraph 12, you are thinking of something else in paragraph 12, are you?
A. Yes. If I can explain what I mean: if, for example, there were a Budget or an MPI, then we would have to do a price increase/decrease form which did show all the margins for them, both prior to and post the price change.
Q. Would you agree that the document we see at tab 53, that sort of document was actually introduced at your request?
A. Yes.
Q. The reason why it was introduced was because you wanted to have better visibility of Somerfield's shelf prices so that you could check them for your own purposes?
A. This was to understand if they were changing prices week on week, and it did only show one price tier out of, I believe, four or five. It showed the chain price and then there were three or four other prices, including recommended retail price.
Q. It actually shows, if we look at the example at tab 53, both Gallaher's brands and your brands, doesn't it?
A. That's correct.
Q. And the reason you needed that information was so that you could check the differentials between them?
A. Exactly so.

Q. Could you turn, then, to tab 4, and we can just look at how you got to the point where these documents came into play. Did you want to just read what it says under "General"? I am most interested in the paragraph that starts:

"Some considerable time ..."

A. You did say tab 4?

Q. I did, yes, it's an email of 28 April 2000?

A. 14 May I have.

MR WILLIAMS: Right. Are you in the first annex or the second? 14 May 2002? That's totally out of sequence, Madam. The document you have is out of chronological sequence, whereas the document I have is in the right sequence.

THE CHAIRMAN: No, we have 28 April 2000.

MR WILLIAMS: Oh, you don't have 28 April?

A. 14 May 2002 I have at tab 4.

MR HOWARD: That's what I have as well.

MR WILLIAMS: Right.

THE CHAIRMAN: Well, have a look before and aft, and see if you can find an email of 28 April 2000.

MR WILLIAMS: There are a couple of these gremlins in the Somerfield annex, I am afraid, we thought they had been dealt with, you saw earlier 29 and 29(b), I think perhaps this was another one.

THE CHAIRMAN: Are there any copies of the email that you can provide to Mr Hall?

(Pause)

MR HOWARD: I think we are in difficulties on this side, because we have the same gremlin that the witness has.

MR WILLIAMS: We will make sure that you have a bundle for the minute now, but I am happy for Mr Hall to have that. (Handed). I think there are some of the Tribunal's scribblings on that document, but you can ignore that. Mr Hall is ITL, so it doesn't matter. Sorry, it's confidential Somerfield. It's from Mr Hall, so it can't be confidential from Mr Hall. Can we give Mr Howard a copy. (Handed).

I was interested in the section "General" and particularly the last paragraph:

"Some considerable time ago ..."

(Pause)

Do you want to read ...

A. I've read the paragraph.

Q. Thank you. So what you are looking for here is "notification to the manufacturers of selling prices by way of price lists so that we could be more aware of changes before they are implemented in store."

When you say "manufacturers", you are talking about you and Gallaher and BAT there? Rothmans?

A. Yes, because they had discussed it. They -- Barry McNally, who was a new buyer into the business, had talked about how he communicated with his suppliers.

Q. Was what you had in mind that all of the manufacturers should have their own prices and your prices before they were implemented in stores?

A. Or at the point at which they were being implemented, yes.

Q. So you are contemplating all of the manufacturers having all of the prices for all of the different manufacturers' brands?

A. That's what he was suggesting at the time, yes.

Q. You say "that's what he was suggesting", I think you agreed earlier on that this was introduced at your instigation, didn't you?

A. I think all the manufacturers were trying to understand what Somerfield were doing, and I believe Barry McNally was discussing with all of us how he could achieve that.

Q. I think it will be useful, I did not want to look at too many documents, just to go back, I am afraid, to tab 2 and to the second page of that, just to put this in context. Do you see "You will no doubt recall ..."?

A. In that context I am talking about our prices.

Q. But you are asking for the spreadsheet at this point?

A. Yes, I am.

Q. Then when we move back to tab 4, there has been a discussion about this, and it's moved to a discussion about all manufacturers getting everyone's pricing information.

A. Yes.

Q. You have agreed, I think, that you wanted this information so that you could check the differentials?

A. And to understand what prices we should be seeing in the stores.

Q. Yes, but sorry, in part so that you could check the differentials?

A. Yes.

Q. Was it your understanding that Gallaher also wanted this information so that it could check the differentials?

A. I would assume so, yes, but I didn't have knowledge of what they were doing.

Q. Well, you do have knowledge that they want all of the same information as you do, and that they want information of your prices as well as their own prices?

A. Do I?

Q. Well, I think that's what you agreed that this paragraph is saying, that you discussed the notification to manufacturers of Somerfield's selling prices for, you agreed, I think, everyone's brands, before they were implemented in store?

A. I discussed with Barry McNally what he was putting forward, and he was talking about coming forward with a plan to publish to everybody, but whether Gallaher were using it for any purpose, I didn't know.
Q. I think the question of how far you were aware of Gallaher's strategy was explored last time you were here, and I think where you got to is that you said you had worked out quite a lot about their strategy, even though you said you didn't have direct knowledge of it; is that right?
A. That is correct.
Q. So you would have been aware, when you sent this email, that they were likely to use the information for the same sorts of purposes as you were using it?
A. Possibly, yes, but I didn't know for certain.
MR WILLIAMS: Madam, is that a convenient moment, before I move on to another document?
THE CHAIRMAN: Yes. How long do you think you are going to be, Mr Williams?
A. I think if I start at 2 I hope I will be finished by 3 or quarter past, I would hope.
THE CHAIRMAN: I am just wondering whether -- we have Ms Williams also lined up for this afternoon, so we may well get on to her this afternoon, then?
MR HOWARD: It's possible.

THE CHAIRMAN: Yes. Very well, we will come back at 2 o'clock. Thank you.
(1.00 pm)
(The short adjournment)
(2.00 pm)
MR WILLIAMS: Mr Hall, before lunch we were looking at the price files and the circumstances in which you asked for a price file and then we looked at a number of emails in which you explained you and Somerfield discussed the arrangements that would be made to have price files provided to you and to Gallaher.
Could you then turn to tab 39 of annex 20. This is really just so that we see how things developed. {D20/39/184}.
This email says:
"Dear all, ongoing every Monday I will be sending you current instore retails for both Kwik Save and Somerfield on the attached spreadsheet. I would request that you check the selling prices are correct and communicate by returning the spreadsheet ... any amendment to required will be considered and if approved will then be keyed for the following Wednesday."
DR SCOTT: We just clarify one thing, this is sent not just to Mr Hall but to Mr Hutcheon and Chris Halford. I take it they are the other manufacturers?

MR WILLIAMS: That's what I was just going to come back to but you are right, Dr Scott.
Chris Halford is Gallaher.
That's right, isn't it?
A. I believe so, yes.
Q. And Alan Hutcheon, he was Rothmans, I think?
A. I believe so, yes.
Q. It's helpful just to turn over to tab 43, because we don't have the price file at tab 39, if you turn over to tab 43 you can see how this works. {D20/43/197}. There is a similar email underneath, in the same language, from Martin Thomas of Somerfield, and we see your reply:
"Suggested changes on Classic five by five multipack in Somerfield."
If we turn over, in the price file itself at page 306, it says:
"Castella Classic multipack five by five", do you see it says "should match Hamlet" in the middle, 13.64?
A. Yes.
Q. So this is you correcting one of these price files to make sure prices are in line with the pricing differentials?
A. Yes.
Q. If we go back to the covering email, you say that:
"The suggested changes are shown on the

spreadsheet."
Then you say:
"I would appreciate it if you would confirm these have been actioned."
So although Somerfield say in the email below they will consider the amendments and if they are approved they will be keyed from the following Wednesday, I think that your reply shows an assumption that they are going to action these changes because they are what is needed to maintain the differentials?
A. I am asking for them to actually confirm that they are doing so. They are suggested changes, and I am asking for confirmation that they have been actioned.
Q. Yes, but when you say "I would appreciate it if you would confirm that these have been actioned", there is a fairly strong assumption that they will action them?
A. Not until they tell me they have done, no.
Q. Just to sort of follow this in the chronology now, we saw the first price file being circulated at tab 39, could you then be given annex 10, please, which is the Gallaher bundle, and could you look at tab 29 of that. You will be given it now. Do you see page 201, bottom right?
A. 201.
Q. Is that right?

A. Yes.
Q. Do you see at the bottom there we see the same email we saw at tab 39, the "ongoing every Monday" email?
A. Yes.
Q. What we see then is an exchange between Liz Smith and Chris Halford of Gallaher which you may well not have seen any of this before, have you?
A. Never.
Q. You have never seen it?
A. No.
Q. Could I ask you to read the various emails? I have a couple of short questions arising from it.
(Pause)
So we see here that Liz Smith comes to talk to you, after a number of emails to and from her and Gallaher, in order to find out what your price is going to be on Golden Virginia so that she can maintain, make sure that there is parity between Old Holborn and Golden Virginia, and that is, it seems, Gallaher's requirement, and it was also your requirement, wasn't it?
A. We required to be no more expensive than Old Holborn, yes.
Q. It's clear that Chris Halford of Gallaher knew that Liz Smith was talking to you about how to get the differentials in line. When she came and talked to you,

did you know that she had been speaking to Chris Halford and was coming to talk to you at Chris Halford's instigation?
A. No.
Q. Could we then just focus on the top email. It says:
"As previously confirmed, there is no extra bonus for Old Holborn. Both Golden Virginia and Old Holborn are sold at price list terms. Neither manufacturers pay bonuses. Both have same costs hence why same retail applies in other multiples."
Now, when he says "neither manufacturers", he seems to be talking about Gallaher and ITL. Do you agree with that?
A. He appears to be, yes.
Q. So he had a pretty good idea about how your price was structured; would you agree with that?
A. He would know what our price structure was from the published price list, but how he would know that we didn't pay any bonuses at any time I don't know.
Q. It does look as though he knows, doesn't it?
A. He says that in the email, but how would he know that? I don't know.
Q. Would you agree that Gallaher seems to have a good understanding of your strategy and what you are doing from this document?

A. I don't think I am really qualified to answer that question. It appears so from that document, but I am being asked to comment on a document I have never ever seen before and has no relevance to me.
Q. It has relevance to you in the sense that there is a conversation with you in the middle of the exchange. When we were looking at tab 4 earlier on, do you remember that you said that you knew that Gallaher was going to be provided with the price files containing your prices and Gallaher's prices, I think it was anticipated that they would be provided at that stage before they were on the shelf?
A. Yes, the selling prices are not changed here.
Q. I think you agreed that you had worked out, at least, that Gallaher was pricing on the basis of pricing differentials?
A. That was my understanding from what I had seen in the past, yes.
Q. Really what I am suggesting to you is that both of you seemed to have had a good understanding of each others' strategies, and that this process of sending the price files around seems to have arrived at a position where Somerfield could make sure that it was maintaining parities and differentials with input from both manufacturers and with both manufacturers knowing that

each other was providing that input?
A. Yes, but at the time that I would put forward a change, then there could be an opposing change put forward at the same time by the other side, if you follow me.
Q. There could be, and there was Somerfield in the middle, sorting this out, and we see from this email going between Gallaher and you to make sure that the differentials were respected?
A. And probably also trying to see if they could get extra money from us as well.
Q. But do you agree with the point I put to you, which is that Somerfield was going between you and Gallaher using these price files and making sure that the differentials were respected?
A. I certainly wasn't aware that the conversations I had with Liz Smith were being repeated to Gallaher, if that's what your question really is.
Q. No, that wasn't my question. My question was whether you were aware that Somerfield was using the input of both manufacturers to make sure that the pricing differentials were respected, through this process of circulating the price files to all manufacturers?
A. It would certainly appear so from the document, but they were literally trying to feather their own nest, if you will excuse the expression, because if they could screw

us for more money, they would.
Q. While we are in this file, could we look briefly at another tab, which is 22, which is a much shorter email.
A. In the Gallaher one?
Q. Yes, while we are there, yes. I am sorry, I say it's a much shorter email, it's a slightly shorter email. I can perhaps focus your attention at tab 22, do you see you have page 282?
A. Yes.
Q. At the bottom of that, do you see it says:

"Liz, we are trying to normalise retails in the run-up to the Budget and ITL have confirmed in another account following us up. Can you comment?"

Then over the page, he says:

"Therefore I do not think it very wise to move any down", and so on.

I am not going to ask you any questions about that, I just wanted to be sure that you have seen enough of it to be able to answer the question.

Above that Liz Smith says:

"I have chased Martin to respond today to your query with regard to Mayfair.

"As to Imperial, I have been out of the office and have not seen or heard anything yet.

"If they asked then I would take the attitude of how

would they feel if you asked me the same question with regard to pricing on their products and [I think that should be 'you matched']. If you don't mind me telling them then I will and vice versa when they have promotional activity but I would have thought that this would defeat both companies' objectives with regard to Imperial v Gallaher!"

Chris Halford replies saying:

"Liz, given the nature of the market (I would guess) that probably we both think it's fair to take a more relaxed view and that unless either say 'please keep this confidential' assume that the information will be discussed in the context of pricing/normal trading. Given that the increases are already in place for both Gallaher and ITL brands in some of your competitors, it's not news sensitive, especially when you email us all at the same time!"

Would you agree that you took the same relaxed view as Gallaher about this, about the exchange of information between you through these pricing schedules?
A. No, I don't think I would.
Q. Do you still have the email at tab 4?
A. In my bundle?
Q. Do you remember it was the one that was incorrect?
A. No, I don't have that. I still have 14 May.

Q. I am sorry, tab 4 in the other file. It says:

"Some considerable time ago now we discussed a notification to manufacturers of your selling prices by way of a price list so that we could be more aware of the changes before they were implemented in store. Is there any progress on this as it would be a very definite improvement in the supply of information?"

So he seemed to think that that sort of supply of information between the manufacturers is going to be helpful?
A. I was more interested in knowing what my prices were going to change from, to, at any one time, not so much what the others were, and that's why I was seeking the information in the first place.
Q. But you have no difficulty with the idea of your pricing information being provided to Gallaher before it's on the shelf?
A. They would only be the suggested prices and I wouldn't know what changes Gallaher had put forward at any one time until they appeared on the shelf.
THE CHAIRMAN: Why would they only be the suggested prices if they are the prices that Somerfield is providing to you?
A. I am saying that when this document went out, I wouldn't know what changes Gallaher would put forward until they

appeared on the shelf, because I would reply to Liz Smith, Chris Halford would reply to Liz Smith but not to me with what changes he was putting forward, so I wouldn't know what was happening on the Gallaher prices until they appeared on the shelf.
MR WILLIAMS: I was asking you whether you took a relaxed view about your pricing information being provided to Gallaher, which is what Gallaher was talking about in the email we have just looked at, and what I am putting to you is that this email shows that you do take that relaxed view?
A. My point is that Gallaher wouldn't know what changes I had put forward for any one week until they appeared on the shelf and vice versa, I would not know what changes they had put forward. I would know what the prices were and the prices that were on there were the prices that were actually on the shelf at that point in time. I would not know what changes were being put forward for a 10-day period forward.
Q. But I was asking you about whether you took a relaxed view about Gallaher being provided with your pricing information before it was on the shelf?
A. The prices that were on there when the sheet was published were the prices that were on the shelf at that point in time. We then put forward changes that would

be implemented in 10 days' time.
DR SCOTT: Sorry, have I misunderstood this? I thought that what this email said, what you said was:
"Some considerable time ago we discussed a notification to manufacturers of your selling prices by the way of a price list so that we could be more aware of the changes before they were implemented in store."
Have I misunderstood that?
A. No, I'm pointing out that the prices they put down there were the prices that were there on the shelf that week for us to then come up with any amendments going forwards. If they had changed the price of their own volition, for example we had the situation with Cafe Creme where they reduced the price from 2.62 to 2.52, I would then be aware of that before they actually suddenly did something to my brand without my say-so and funding.
DR SCOTT: What you say here is that you are expecting that the manufacturers, yourselves, Gallaher and Rothmans, will receive a document which is not an historic document, it's a document which says what Somerfield have in mind to do next. Now, I accept that there are some qualifications to that, in that what you are saying is that you might write back with a correction, Gallaher

might write back with a correction, Rothmans might write back with a correction. But insofar as they don't, this is a document which shows Somerfield's intentions of how prices are going to be when they next move them. Is that right?
A. Yes.
DR SCOTT: Yes. Thank you.
MR WILLIAMS: Could we then -- you are back in tab 20, aren't you -- turn to tab 41 of that, please? {D20/41/187}.
A. Gallaher?
Q. Sorry, ITL. You can put that one away now, we don't need that again, and we can put away annex 10. Are you at 41?
A. I am.
(Pause)
Q. So starting at the bottom, the bottom email follows the exchange we saw a few moments ago about Golden Virginia and Old Holborn, and Ms Smith says:
"Graham, can you confirm the margin is correct on the current retail for Golden Virginia or should it be changed?"
I think you say:
"I am not sure what packing you are talking about, but whatever margin you are making, that's the right

margin because Imperial isn't funding a better price anywhere."
Is that right?
A. And Budget increases had been applied by the previous incumbent.
Q. You go on to say what's happening in other retailers and that the other retailers have Golden Virginia and Old Holborn at parity, which is what your strategy requires at this time; that's right, isn't it?
A. Yes.
Q. So that told Somerfield, if it didn't already know, that your strategy was also being followed in the other retailers; would you agree?
A. Yes.
Q. Under that it says:
"Can I suggest it might actually be helpful to me and my Gallaher and Rothman counterparts if you could give us a definitive statement on your normal pricing policy as for each fascia in terms of which of your competitors you are trying to match."
Then we see at the top Liz Smith tells you who they are benchmarking against?
A. Yes.
Q. So am I right in thinking that what you are trying to do here is to make sure that all of this runs smoothly in

Somerfield, both in terms of whether your strategy was being followed, but also in terms of Somerfield's strategy, that is benchmarking against its competitors, because if you can make that happen, everyone will be happy?
A. I wasn't trying to make anything happen, I was simply trying to establish where they want to be in the marketplace vis-a-vis their competition, because their pricing did change from time to time relative to their competitors.
Q. You say it would be helpful to you and your Gallaher and Rothman counterparts if you could understand what their strategy was. I had understood that that was because it would then allow you to take that into account when you send them the price files?
A. No, because we would simply take their existing price and add any MPI or Budget increase to whatever their existing price was.
Q. But you do make corrections, as we have seen, to make sure the differentials are correct, don't you?
A. If they have made an error, yes.
Q. Yes, and what you seem to be contemplating here is that it's going to be helpful to you and Gallaher and Rothmans in order to understand what they are doing, so that all of you can make this process of checking the

price files work smoothly?
A. In the same way that the retailer had knowledge of where we were competing in the marketplace, we were simply seeking to understand where they were competing in the marketplace.
THE CHAIRMAN: But why? Why was it of interest to you to know that?
A. It had always been part of the culture to understand what the competition were doing within the marketplace.
MR WILLIAMS: Perhaps it will help if we look at some examples on exactly this point. Do you want to turn to tab 79, for example. {D20/79/333}. The price file is sent around, we see at the bottom, above that you make some amendments, and you make an observation about them overlooking a price increase on some Gallaher brands. Then Martin Thomas says:
"Is this to make us in Asda prices?"
Above that, you say:
"Yes and to meet the strategy pricing requirements of the trade development programme with you."
Actually there is another example at the previous tab, at 78, {D20/78/332}, which says:
"Please find attached this week's price file for Somerfield and Kwik Save."
Above that you say:

"Somerfield prices all alright.
"However in Kwik Save I noticed only increased B&H Kingsize 20s by 5p rather than 6p. I assume this is to match Asda. If that's correct then there are four amendments on the Embassy brand to match Asda and meet our strategy pricing requirements unless of course you intend moving B&H up."
So what you are doing is you are taking into account both your own strategy for pricing requirements and their benchmarking strategy, and making sure that the prices in the price file meet everyone's aims?
A. I was simply trying to help Somerfield meet their own strategy at the same time as ours. They wanted to be at Asda price, and not more.
Q. So can we then just go back to 43, please. I beg your pardon, I mean 41. {D20/41/187}. Going back to the words "can I suggest that it might actually be helpful", what I am suggesting to you is that you knew that you and your counterparts were using these price files to make sure that the differentials were in line, and you took the view that it would make the whole process run smoothly if all of you knew who Somerfield and Kwik Save were matching, so that you could make sure the prices were in the right place as far as everyone was concerned?

A. We were trying to help Somerfield administratively achieve their own objective, and at the same time ensuring that the money we were putting behind the brands was going behind the brands and not being milked into their profit.
Q. Could we then move on to tab 61, please. {D20/61/268}. We will just look at one or two examples of this in action. At the bottom, complete listing is sent around, and you say:
"Just one correction for our brand in Somerfield. Classics multipacks up to 13.94. However, I note that Dorchester haven't moved up in Kwik Save yet. Should they have gone to 3.58?"
So you seem to notice that some sort of price increase hasn't been applied to Dorchester yet. Would you agree the reason you were interested in that is because it affected the maintenance of your strategic pricing differentials?
A. And that we might well want to fund a price reduction on our brand if necessary.
Q. But your interest in Dorchester was because of the relativity between Richmond and Dorchester?
A. Yes.
THE CHAIRMAN: Wouldn't, if they moved Dorchester Superkings up, that make it likely that if you were funding

Richmond you would reduce the funding of Richmond so that Richmond would move up?
A. I am saying that if they haven't gone up, and they hadn't at that point, should they have gone to 3.58, they were obviously at a lower price. If they are not going to go up, then maybe I want to fund to 3.55 or whatever price they are at.
MR WILLIAMS: Because Somerfield has agreed to meet your pricing differential requirements, you feel able to point out to them where the price of Dorchester ought to be?
A. In theory, yes.
Q. Well, not in theory; in practice?
A. Yes.
Q. Could you turn, then, to 68. This is about Mayfair. I think it's another example of the same thing. Your interest in Mayfair is the relativity between Mayfair and your brand, and if the relativity is not correct, you feel able to say you should change the price of Mayfair?
A. They had told me they had moved the price of Mayfair, and they clearly hadn't, and I had a till receipt to prove it.
Q. Yes, but your interest in it was because of the relativity between Mayfair and one of the ITL brands?

A. Yes, and because they had told me something that was untrue.
Q. Yes, and because you have that agreement around pricing differentials, you are able to point out to them when the Gallaher price isn't correct?
A. Because they had told me something that was untrue.
Q. Could you then turn on to 72. {D20/72/309}. This is a bit more straightforward:
"Four changes in Somerfield and Drum and Golden Virginia to meet our strategic pricing requirements".
Could you have a look at what you say about this document in your witness statement, please, at paragraph 151. What you say about this document is that it's in commercial shorthand. What do you mean by that?
A. We had to complete this form and put a comment in in a small box as to why you had put that change there, and I put a brief comment "to match Amber Leaf and to match Old Holborn".
Q. I think 151 says:
"Although my email is brief, it is commercial shorthand and not an instruction to set the prices referred to in the price file."
So I wondered what you meant by saying that the email was commercial shorthand?

A. The whole thing, the whole document I was referring to, and the four changes are the suggested changes that I am putting forward to bring the prices down in price.
Q. What's it shorthand for?
A. I could have written at great length as to why, and listed margins and shown them another document or two, but I had simply replied directly to their email with the form that they asked me to complete each week.
Q. Isn't it right to say that what you wanted them to do at this point was to make changes to Drum and Golden Virginia to meet your strategic pricing requirements?
A. Yes, downwards to reduce the price.
Q. So it's not in commercial shorthand, it just says what you want them to do?
A. What I was looking for, yes.
Q. Can we then turn on to tab 77, please. {D20/77/331}.
You say:
"Natalie, no problems on the pricing of our brands. However, it would appear that in Somerfield, you have overlooked the Gallaher increase on Berkeley and Berkeley Smooth multipacks which are still at 2010 and therefore at 30p less than Kwik Save."
What you say about this in your witness statement, it's at paragraph 184, do you want to read that to yourself?

(Pause)
What you say here is, in the middle:
"There was a problem with their prices. I sent an email relating to a Gallaher brand because I had spotted an issue with Somerfield charging a much lower price than Kwik Save which was very evidently a mistake. I wanted to confirm that this was intentional because eventually it would impact on ITL's brands."
I wondered, is it very evidently a mistake or did you want to confirm whether it was intentional?
A. It was clear to me that it had been overlooked in so much as Somerfield never, as a rule, undercut the Kwik Save price. Kwik Save was always the lowest price, and it was very clear that they hadn't applied the MPI, and I was flagging it up to them. If it was intentional on their part, then I would have had to look to fund my price in Somerfield.
Q. Sorry, either it was very evidently a mistake or you were seeing whether it was intentional. I don't understand.
THE CHAIRMAN: Well, I don't understand the question you are putting. You think both those statements can't be true?
MR WILLIAMS: Yes. Either it's very evidently a mistake and Mr Hall is pointing out a mistake, or he is making an enquiry about whether this is what Somerfield really

wants to do.
Anyway, this is like the other documents we saw, isn't it? You are pointing out an error in the pricing of Berkeley because you are concerned about the relativity between Berkeley and Superkings?
A. And the impact it would have on the sales of my brand in that store.
Q. So it's another instance of you feeling able to point out to Somerfield where the price of the Gallaher brand ought to be because you have Somerfield's agreement to apply your strategic pricing differentials?
A. No, I think that's why I put it "or is it intentional".
Q. That's really the point I am making to you. If you thought it was very evidently a mistake, you weren't really asking if it was intentional, you were really pointing out a discrepancy between the shelf prices and your strategic pricing requirements.
A. I stick to what I said in my witness statement. I was seeking clarification of exactly why that price was much lower in Somerfield than in Kwik Save when it was not their norm.
Q. Could we then turn, on a slightly different subject, to tab 58 of this file, please. (Pause). {D20/58/265}. So in the bottom email Somerfield ask you some questions about Sainsbury's prices, and in the middle email you

say what Sainsbury's price is, and then you say:
"We require it to be 4p less than Old Holborn."
That's a comment about what you required in Sainsbury's, isn't it?
A. It's due to the fact that we hadn't had a manufacturers' price increase and Gallaher had at that point in time, I believe.
Q. Yes, but the line "Sainsbury's price on Golden Virginia is currently 2.31", and then you say "We require it to 4p less", you are telling Somerfield there I think that you require Sainsbury's to price Golden Virginia and Old Holborn at the same relativity as Somerfield was required to under your agreement with Somerfield?
A. No, because Somerfield set their own prices, it was up to them who they benchmarked against. I was asked to tell them what Sainsbury's price, and confirm what Sainsbury's price was currently, not forward, but at that point in time.
Q. Yes. I am focusing on the words after that "we require it to be 4p less than Old Holborn", so you are communicating to Somerfield that you require Sainsbury to price Golden Virginia at 4p less than Old Holborn?
A. Due to the fact that we had not had a price increase.
Q. Yes, but this is telling them effectively about ITL's arrangement with Sainsbury, isn't it?

A. No, it's telling them the price list differentials in the Gallaher price list and the ITL price list are 4p at that point in time.
Q. Isn't this a comment about what you required of Sainsbury?
A. No, this is a comment that relates to the whole trade sector. We had not put our prices up, they were 4p less for Golden Virginia at that point in time than Old Holborn, because we had not put our manufacturers' price increase --
THE CHAIRMAN: Are you saying that the differential was the same across the whole sector for Sainsbury's and Somerfield and everybody else?
A. And even if you went into the corner newsagent you would find 4p difference because we had a price increase.
MR WILLIAMS: I understand that the requirement was common because it was based on the published price lists. What I am saying is that this communicates to Somerfield that you have the same requirements in Sainsbury, that you have the same sort of agreement with Sainsbury as you have with Somerfield.
A. With the whole trade.
Q. Yes. So would you agree that that gives Somerfield comfort that complying with your pricing differential requirements isn't going to put it at any disadvantage

as against its close rival, Sainsbury?
A. If they were benchmarking Sainsbury, that would be the case, yes.
Q. At the top of the page, there is an email from Martin Thomas which says:
"Thanks, Graham. These prices are rather complex but I think I am getting more proficient at them now."
What do you think he means by that?
A. Nine years on I cannot remember.
Q. All right, I won't ask you to speculate.
Then could you just turn on to 74, please. (Pause). {D20/74/323}. So Somerfield have sent you some extra pricing information, and your comments on it are really providing feedback as to whether their understanding of Sainsbury's prices is correct; is that right?
A. Yes.
Q. Then under the heading "Drum 25 grams", the second paragraph:
"Our strategy requirement is to match the Amber Leaf prices on each packet which is exactly where we are in Somerfield. Sainsbury price for Drum 12.5 grams at £2.07 is matching Amber Leaf in their stores."
So this is another example of you feeding back to Somerfield Sainsbury's compliance with the pricing differentials?

A. Which they could see themselves if they went into a store to see it at that time.
Q. Yes, but again it's feeding back to them the fact that these prices in Sainsbury's are set in the context of your pricing differential requirements?
A. I am simply the eyes that have gone into a store and seen what the prices are and told them.
Q. Yes, but because of the context of this, again it's again telling them that Sainsbury's are matching the prices, and it's in the context of your strategy requirement, which is that the prices should match. So it's just another example of what we saw in the last document telling Somerfield how Sainsbury is operating your strategy pricing requirements?
A. Purely conveying public information which they could find themselves, and indeed they did go out and check some stores themselves, as the top paragraph shows.
THE CHAIRMAN: You have said at the end this there:
"I am seeing my colleague that handles Sainsbury tomorrow, will draw his attention to these points."
What were the points there that you drew your colleague's attention to?
A. Sorry?
MR WILLIAMS: I can help, Madam. If you see under the heading "Golden Virginia" --

A. Yes.
THE CHAIRMAN: Yes.
MR WILLIAMS: So ...
MR HOWARD: Surely Mr Hall should answer the question.
THE CHAIRMAN: Well, what were the points in this email --
A. Without the preceding email, I can't comment really.
MR WILLIAMS: I was just thinking that I had looked at these documents a bit more recently than Mr Hall, and in case it helps, Madam, I think you can see --
THE CHAIRMAN: Well, can you put a question to him, if you think it will help.
MR WILLIAMS: Under the heading "Golden Virginia" it says:
"Again we track the 12.5 gram pack which is at 2.36 in Sainsbury. However, our strategy requirement is to match Old Holborn which is at 2.35."
So it looks as though Sainsbury's are not pricing in line with the strategy pricing requirements on those two brands; do you agree?
A. Yes.
Q. So when you say a bit further down:
"I am seeing my colleague that handles Sainsbury tomorrow. I will draw his attention to these points."
What you seem to have in mind are the apparent discrepancies in Sainsbury in the application of your strategy pricing requirements?

A. I would be pointing out to him that we are being disadvantaged in Sainsbury, yes.
Q. Which you had actually picked up by coincidence because Somerfield had asked you to look at these prices?
A. Yes. In fact they had sent me the prices.
Q. Could you then turn to tab 45, please. Actually, no, can we go to 37 first. Do you want to just read that to yourself? {D20/37/181}.
(Pause)
So there is a customer complaint in the bottom email which is all about is a discrepancy between prices in Somerfield and Co-op, and this is referred to you in the middle email, and you draft a reply or a suggested answer in the top email. I don't think we need to look at that. I wanted to look at what you say about this in your witness statement at paragraph 194.
(Pause)
I was interested in the words in the middle where it says:
"It appears therefore that Co-operative Group had decided not to implement both price increases simultaneously but had staggered them or it could have been an error. If this was in fact an error on behalf of Co-operative Group and they have unintentionally failed to reflect either the MPI or the duty increase in

full, then I felt that the ITL NAM for the Co-operative Group had an obligation to notify his contact to confirm whether this was in fact an error or an intentional price position."
Whereas what the email says:
"I am passing details of the Co-op pricing to my colleague responsible and doubtless he will be taking action to move the price up as soon as possible."
So the way you express it in the witness statement, it's not really the way that it's expressed in the email, is it?
A. There was a clear need to move that price because at 3.99, they would have been selling at a loss, there wasn't sufficient margin for them to sell at 3.99. So there was an obligation on the part of the ITL NAM to say to the Co-op "you are losing money".
THE CHAIRMAN: But they have moved it up to 4.04, haven't they? What you are worried about --
A. Even at 4.04.
THE CHAIRMAN: -- they didn't move it up to 4.10.
A. Even at 4.04 they would have been losing money probably.
MR WILLIAMS: Would you agree that when you sent this email you seemed to have in mind that the ITL NAM for Co-op would just be able to get the shelf price put up?
A. He would certainly be talking to them along that line.

How long it would take, I wouldn't like to say.
Q. But you did contemplate that he would be able to have that sort of influence over the shelf price?
A. At some stage, yes.
Q. This hasn't got anything to do with pricing differentials in particular at this stage, but it is indicative of the way that ITL dealt with the retailers, isn't it? That's to say that it could get the shelf price moved to a particular level if that's what it needed to do?
A. No, it's indicative of the fact that we funded a price reduction for a very long period of time and somewhere down the line, at that moment in time, the price increase and the Budget increase hadn't been reflected in their stores and for quite a period of time as well I believe, because the 28 April is like a month after the Budget.
Q. Could you then turn to tab 45, {D20/45/208}, and this is the last document I am going to ask you to look at. It's a slightly complicated one. There is a covering memo and then there is an email attached to it.
(Pause)
You have read it all?
A. Yes.
Q. So focusing on the email on the second page, which says:

"Liz, okay then, if you were to reduce selling prices on St Bruno."

You then talk about how margins stack up as against rival brands. Underneath you say that:

"Whilst I appreciate the frustration you are feeling generally on pricing, our aim is merely to see our products competitively priced against those of our competitors, ie maintaining our published list price differentials. This is surely no different to your seeking to be competitively priced against the other retailers."

Is it fair to say that Somerfield was interested in the extent of the margin it was making on your brand and the rival brand, but that wasn't what you were interested in, you were interested in making sure that the shelf prices complied with the price list differentials?

A. I wanted to bring our prices down because we were being disadvantaged at that point in time.

Q. Your interest was in the shelf price?

A. Yes.

Q. Liz Smith is raising issues about the margins that are being made, but that's what she is interested in, she is interested in the margins?

A. Yes.

Q. You are not interested in the margins, you are interested in the shelf prices?

A. I was interested in both.

Q. Well, you say:

"Whilst I appreciate the frustration, I was merely interested to see our products competitively priced against our competitors."

So what you are seeking to achieve through this exchange is that the shelf prices meet the requirements, that's what you want by way of an outcome?

A. Yes.

Q. And it's Liz Smith that is raising the question of the margins, the margins on your brand and the margins on the rival brand?

A. Yes.

Q. And you weren't trying to make sure that those margins were the same?

A. But in point of fact they very probably were because the price list differentials would have been reflected in the wholesale price as well and they were identical at the time I believe.

Q. What she says at the top is:

"This is similar if you want to move."

So she is not saying that the margin is the same, she is saying it's sufficiently similar?

A. I believe if you check, they are the same.

Q. Wouldn't that depend on what discounts were being applied and what bonuses were being applied to the list price in a --

A. As a general rule we certainly at Imperial Tobacco never paid bonuses on pipe tobaccos because it was a very mature market, and from the evidence that we saw in the marketplace, apart from an MPI and a Budget, prices rarely changed on the Gallaher brands in terms of retails. So you have a set of brands which were published price list brands selling at a discounted price out of the retailer's margin.

Q. If we go back to the bottom email, what you say is:

"Reference our telephone conversation, it would be helpful if you could let me have your current margins on a couple of lines Condor Long Cut" and so on.

Those are the Gallaher brands, so you are asking for what margin she is making on those brands?

A. Yes.

Q. So you don't know?

A. Only from the published price list, and I know that they stacked up.

Q. If you knew, why would you be asking what her margin is?

A. In case she was trying to tell me that she was getting some improved margin for some reason that I wasn't aware

of or had never heard of.

Q. That's right, so you didn't know?

A. From all my previous knowledge, I did not suspect that there would be any bonus there, but I was giving her the opportunity of telling me if there was.

Q. What we do see in the following email is that your focus in this exchange is actually not on making sure that the margins are the same, it's actually on making sure that the shelf prices are the same, that's what we see from the email in the middle of the second page?

A. Yes.

MR WILLIAMS: Madam, I don't have any further questions.

THE CHAIRMAN: Should we have our break now, or how long do you think you are going to be in re-examination, Mr Howard?

MR HOWARD: I am not sure how long. Unless anybody has a strong desire, why don't I start and we will see.

THE CHAIRMAN: Dr Scott actually has a question which is probably best asked before re-examination.

Questioned by THE TRIBUNAL

DR SCOTT: First just going back a few moments, we were talking about margins and you said you were interested in both margins and shelf prices.

A. Yes.

DR SCOTT: Presumably you were interested both in the

margins for ITL and in the margins for the retailer; is that right?
A. In the margin for the retailer inasmuch as, if necessary, and I needed to fund something, to match their margin on the competing brand. The percentage margin I mean.
DR SCOTT: Right. Earlier on, at page 98 of the transcript, you explained that you were trying to help Somerfield administratively to achieve their own objective, and then you added "without Somerfield milking the margins into their profitability"?
A. Yes.
DR SCOTT: So you were concerned that they shouldn't make too much margin?
A. Which they had been doing on the pipe tobaccos in this instance that we have just looked at.
DR SCOTT: Right. Now, if we look at your witness statement in paragraph 6, you explain:
"As retailers' margins on the sale of tobacco were generally small, and yet retailers were always trying to increase their margins, my role was complex."
A. Yes.
DR SCOTT: Now, that's somewhat confirmed, if you could be handed core bundle volume 3, please, you may already have it.

A. Where am I going to?
DR SCOTT: You are going to tab 34, page 385. {C3/34/385}. I should explain what this document is. This is the witness statement of David Cheyne, who at various stages worked with Alldays and with First Quench and with Somerfield. Do you know ...
A. I had no dealings with the gentleman --
DR SCOTT: Had no dealings with him?
A. No.
DR SCOTT: Never mind. Just really to get the context of how you saw the retailers concerned. We have seen from what we have already discussed your concern that their margins shouldn't be too high, and yet the pressure you saw them putting in to keep those margins up.
If we look at the evidence here, if you look down the bottom of page 385, you will see in 26(a):
"In my experience, even larger supermarkets are driven by a desire to increase their margins to the highest level possible without reaching the point at which the loss of sales outweighs the increased margin."
So he's talking there both about convenience stores -- been talking about -- and the larger supermarkets. Does that tie in with your experience?
A. Yes, but in terms of Somerfield and Kwik Save, I wasn't dealing really with convenience stores.

DR SCOTT: Yes. Understood. Here he is talking about even larger supermarkets are driven by a desire to increase their margins.
A. Yes.
DR SCOTT: Now, earlier on Mr Howard, quite properly, intervened to explain that there were two different sorts of expectation. Do you remember?
A. Yes.
DR SCOTT: I wanted to ask you not about the expectations that exist because you put something in a contract, you have explained very clearly that your expectation was that people would treat prices in price files as maxima; yes?
A. Yes.
DR SCOTT: I wanted to ask you what, given the discussion we have had about the pressures on margins amongst retailers and their desire, as far as possible, to use your phrase, to milk the product, your expectation was of where a retailer would price given what you have described as a maximum price? Appreciating they have the freedom to price below, but given your expectation of their concern about margin, where would you expect them to price?
A. It would depend really on which retailer it was. Different retailers had different customer profiles.

Kwik Save, for example, had probably the higher CDs it needs going through the door and therefore needed to be at the rock bottom of prices. If you went to the other extreme of Waitrose, they could be very much higher, and it's a very complex scenario. Going back to the tobacco issue that we just looked at in terms of those variances that I was looking to reduce the price of the tobaccos of ours, Somerfield had a very high turnover on pipe tobaccos, and the reason for that was that many of the carers that went to the homes of the old people that couldn't get out to buy the tobacco were going through the door of Somerfield and buying the tobacco. So it was important in that context to try and make sure that we were in the right parish with the brands versus our competitors. Does that make sense?
DR SCOTT: That makes a lot of sense. I suppose the question in my mind is this: if a retailer is to come below the price set out in the price file, which is either the unbonused price or the bonused price which is therefore lower, then they have to fund that themselves out of their narrow margin.
A. They would have to if necessary, yes. There was an occasion in the Somerfield/Kwik Save scenario where, when they integrated their supply depots -- you can understand that Kwik Save, before it was taken over, had

one set of bonuses, Somerfield had a different set. When they had to integrate the depots, they sought and achieved an increase in the bonuses, and we gave them the higher bonus rate for each brand irrespective of the lower one, if you follow me. So they actually achieved an increase in their margin as a result of the integration of Kwik Save and Somerfield.

DR SCOTT: So they achieved that increase of margin that you talked about earlier on in your evidence, as I recall you said -- and this is at Day 24/19, I think -- there was a long-term hope to encourage prices up which would be more profitable -- I am not quoting I am just remembering -- for both the retailer and the manufacturer. It was an instance like that where they were making more money as a retailer.

A. Yes.

DR SCOTT: Later on, in response to the Chairman, you talked about occasions when you improved margins. But as I understand it, they would take those margins, if they could?

A. If they could, they would.

DR SCOTT: If they could, they would. That's very helpful, thank you very much, Mr Hall. Thank you.

MR SUMMERS: Mr Hall, I am not going to take you to any documents, you will be relieved to know, but it would be

helpful to us, I think, if we could just get an understanding of the origin of the trading agreements. When you were at work, you were a NAM, and you had colleagues who were also NAMs, and did you all work on the same floor, or how were you arranged?

A. We worked from home.

MR SUMMERS: So, I see, not in an office?

A. No, with a fax machine and a telephone.

MR SUMMERS: How interesting. Do you know, I had not envisaged you doing that. I see. So any staff that you had, were they all again at the end of wires?

A. All at the end of the wire in Bristol. I mentioned earlier on that an admin assistant had written something on a document because I had typed the letter on my PC at home, I mailed it myself in the postbox down the road, and faxed it to them or emailed it to them in the office.

MR SUMMERS: So when you said earlier on today that you would see your was colleague responsible for the Co-op tomorrow, that was because on certain days of the week you would go into the office and meet or --

A. Once a month we had a monthly meeting with Roger Batty.

MR SUMMERS: Right, okay. Do you remember who first suggested the concept of a trading agreement?

A. If I remember correctly it was Geoff Good.

MR SUMMERS: Right. I am sorry, I can't remember immediately who Geoff Good was. Can you just remind us?

A. Geoff Good opened up the hearing, he was a trade marketing manager around 1989/90.

MR SUMMERS: Right, okay. So he broached the idea of having such an agreement?

A. Yes.

MR SUMMERS: Did he then say "Look, chaps, this is really rather a good idea, don't you agree, why don't you all go away and negotiate in your own sectors"; in other words, was it left to you how you were going to frame these agreements or was there a central blueprint that you were all given and said "Look, these are the main headings that you should all observe"?

A. I think there were the four main headings of pricing not being disadvantaged against the competition in terms of price list differential, achieving space on the gantries because very often, the gantries were owned by one of the other manufacturers, be it Rothmans or Gallaher, so we were trying to get a good share of our space on their fixtures, the number of facings given to our brands and the range that was stocked. Very often in terms of the range that was stocked, because Gallaher actually owned the furniture in the stores, for example in Asda and in parts of Somerfield, they would only do the planogram

changes once a year, and that would make it very difficult to get new brands in, such as when we launched Richmond and we were like six or seven months trying to get the brand onto the shelf.

MR SUMMERS: As you say, within those headings, it was then up to you as to what wording you used to describe what you wanted to achieve?

A. No, we were always told that we must word the pricing strategy in terms of "no more expensive than" or "not less than", et cetera.

MR SUMMERS: So that was a central direction, as it were, that came from Mr Good.

A. Yes, and I believe from the legal department would have come --

MR SUMMERS: The legal department would have also had a part to play in that?

A. In terms of the phrasing of that strategy pricing requirement.

MR SUMMERS: I see. I think if I am right, looking back again at the agreement you negotiated, we saw today that where you said the objectives of 90 per cent, I think in some of the other documents it said the 90 per cent margin is there but you have actually gone further than that, you have specified certain adherence levels going down to 80 per cent, haven't you? You have set it out in rather more detail than some of the agreements that we have seen.

A. The reason for that was that in Somerfield the store disciplines were very poor. You could get a price displayed on the shelf with a shelf barker, but it would be different to the price that was on the system.

MR SUMMERS: So that was your reaction, as it were, to the situation you faced in your particular account rather than being just a central way of doing it, a centralised way of doing it, a centralised format?

A. Yes.

MR SUMMERS: I see. What part did the marketing department play in this?

A. We had to justify before we went to a customer with a trading agreement the amount of money we planned to spend in return for what we were hoping that the customer would sell during the year, and we had to get the sanction for that before we could go to the customer.

MR SUMMERS: So the marketing department, I think you give evidence that the marketing department specified a particular promotion, and the price at which a particular promotion would be implemented?

A. No. I am confusing you there. In terms of the trading agreement, there would be a sum of money allocated in

terms of price strategy, space on the shelf and other parts of the that agreement. The money for ad hoc price cuts, 10p off whatever, would come from a separate funding altogether in the marketing department. Geoff Good, as trade marketing manager, had the pursestrings for the money that was invested account by account.

MR SUMMERS: Right. Okay. Thank you very much.

THE CHAIRMAN: I think we will take our mid-afternoon break there.

MR HOWARD: Of course.

THE CHAIRMAN: So we will come back at 25 past 3.

(3.17 pm)

(A short break)

(3.27 pm)

Re-examination by MR HOWARD

MR HOWARD: Thank you.

Mr Hall, I have just a few questions for you. Could you please go to tab 15, where you started the questioning this morning. At tab 15, the trade development programme. You were asked some questions by Mr Williams about how the trade development programme worked. You have told us that the strategy pricing requirements are on page 14. Firstly, in relation to those requirements, can you just explain the extent to

which what are stated as the requirements reflected what you intended or was it something that was simply written down where the agreement was intended to be something else?

A. I am not clear on the question.

Q. You have been asked various questions as to how this was intended to operate. To what extent does this represent your understanding of the terms of the agreement?

A. Quite simply, if we take the top line of Embassy No 1 Kingsize, they should be at least 3p less than Benson & Hedges, so if Benson & Hedges were £5, for example, and Embassy No 1 should then be £4.97 or less.

Q. We see this schedule or a similar type of schedule appears in all of the trading agreements. As far as you were concerned, did you ever amend the terms of this to change it from this type of situation where it's less expensive than or no more expensive than?

A. No, I always used that terminology.

Q. Right. You were taken to tab 10, {D20/10/35}, I think, as an example, and we see interestingly the paragraph you were taken to in the letter is the paragraph which is below Regal Kingsize, two-thirds of the way down:

"These price differential errors will of course impact on the pricing payments under the trade development programme and I trust therefore this

information will enable you to make the necessary corrections."

If Somerfield did not reflect in their pricing the strategy pricing requirements that we see in the contract, what was the potential impact?

A. The potential impact related to the trade development programme and the money that was available to them to earn.

Q. Right.

A. However, two or three brands out of several lines, 30 or 40 lines in total, wouldn't negate it completely, but it would perhaps reduce them from a 90 per cent level to a 80 per cent level, whatever.

Q. Other than their not receiving the reward or bonus payable, was there any other impact?

A. No.

Q. No. Now, you were I think asked some questions about tab 18. {D20/18/95}. First you were asked some questions about the third paragraph, and I think you were asked a question about there being no promotion by another manufacturer. If Somerfield chose to fund a promotion out of its own margin, for instance in respect of Dorchester, what would be the impact as far as you understood it under the trade development programme? Sorry, let me make that clearer. Let's say

a particular brand is to be no more expensive than, so Drum is to be no more expensive than Amber Leaf, and let's say they decide that Amber Leaf, they for their own purposes want to promote, just for the sake of argument, and they therefore have Amber Leaf below Drum. Okay? What's the impact as far as you are concerned?
A. We would want to get our price down to not more than Amber Leaf. There is the possibility there that the customer could be asking us for money to fund that.
Q. In fact, if they put the price of Amber Leaf below the price of Drum, will you be able to tell whether they have done that of their own volition or they are being funded by Gallaher?
A. If they were the only customer to do it, then they could well be doing it of their own volition. However, if every customer in the land reduced their price, then it would be reasonable to assume that it was being funded by Gallaher.
Q. Now, let's assume Gallaher comes along and says to Somerfield, here to Mr Clarke, "We want to get Amber Leaf at a competitive price compared to Drum, or just at an absolute competitive price, so we are prepared to reduce our wholesale price to you via a bonus or just by reducing the wholesale price". As far as you were concerned, were Somerfield entitled to

accept the lower wholesale price from Gallaher and reflect that in their retail selling price?
A. Yes, they were.
Q. If they did that, so if Gallaher manages to reduce its wholesale selling price so that the wholesale selling price of Amber Leaf is below that of Drum, and they reflect that in their retail selling prices, what do you have to do if you want to be competitive with Amber Leaf?
A. We would probably have to reduce our price one way or the other, with a bonus or reducing the wholesale price itself in our price list. However, it would depend on whether we wanted to do that or not. There were occasions when we would elect not to compete with a price reduction.
Q. Let's just break it down. In practice, firstly, were there instances where Gallaher's prices, retail selling prices, of their products were below what you were expecting under the strategic pricing differentials? In other words, was there a greater differential?
A. I can't recall now ...
Q. What I mean is, for instance, did you find from time to time that Amber Leaf was cheaper than Drum, as an example, or Dorchester was cheaper than Richmond?
A. On occasions, yes.

Q. When that arose, what did you do?
A. I would report back to Roger Batty or Geoff Good, my boss at the time, and we would get a detailed instruction as to whether we should put funding in place to reduce the price of our brand accordingly or not.
THE CHAIRMAN: Wouldn't you first get on to Liz Smith or whoever and check out what was happening? There seems to be lots of times when the first thing you seem to do is go back to her and say "This price doesn't look right because it's out of line with the differentials"?
A. Yes, certainly, I was going ten steps forward from counsel --
THE CHAIRMAN: Let's go one step. Where would one step forward take you?
A. The first step would be to check out whether the prices that had been reported to me were accurate.
THE CHAIRMAN: So who would you check that out with?
A. With Liz Smith and of course with the price file that was coming through from them that showed what the price was at that point in time.
THE CHAIRMAN: Suppose that that showed the discrepancy that the Gallaher brand was cheaper, what would step two be?
A. To try and establish whether it was being funded by Gallaher, which would really be looking at the rest of the trade to see whether it was across the piece or a

one-off in that one account only. And then there would be the debate and discussion as to whether we should be funding it and moving forwards from there.
THE CHAIRMAN: Would there be a step where you would say to Liz Smith "Well, wait a minute, what about our strategy pricing requirements? Can you please change the price of our brand to bring it into line"?
A. Well, if it was a large reduction, say 5p or 6p, it would not be reasonable to expect them to lose 6p out of perhaps their 7p or 8p margin, so you have to be realistic when one looked at that.
THE CHAIRMAN: If it was a smaller amount than that?
A. If it was a 1p change in price or a 2p, then it may be possible to try that route as well, as I did with the pipe tobaccos, for example.
MR HOWARD: So in relation, let's turn to the pipe tobacco, because that's rather an interesting illustration, I think, of all it all operates. Go to tab 45, and look at page 283 there, so we see that the first communication from you is you say:

"Reference our telephone conversation in which you said that Gallaher pipe tobacco prices are correct and they are maintaining your margin."

If we just go back a stage, what here have you first observed which has caused you to speak to Liz Smith?

A. I can't remember the exact prices but the prices or our brands were significantly higher than the Gallaher brands.
Q. Okay, that's what I thought.
Then you have your telephone conversation, and when she says that the prices are right and I am not looking actually whether she was trying to mislead you or not at this stage, I am just trying to understand what it was she was trying to say. So when she says "They are maintaining your margin", or her words must have been "they are maintaining our margin", what did that mean to you in terms of what she was trying to tell you about Gallaher's wholesale price as compared with yours?
A. Given that we knew their actual wholesale price in the published price list, it appeared from what she was saying that she was getting a bonus from Gallaher.
Q. Right. So we then see that what she then says to you -- I mean, you ask her for information about the current margins, "I will then endeavour to come up with a package to match their margins". Now, who is the "their" that you are referring to there?
A. The Gallaher margins within Somerfield on those brands.
Q. Now, in order to come up with a package that match their margins, what are you going to have to do to your wholesale price of, here, the pipe tobacco?

A. I would have had to reduce it.
Q. To? In comparison with Gallaher, what would your wholesale price have to be in comparison with theirs?
A. If it was going to match their margin, it would have to match their cost price.
Q. Right. Then if we look at the bottom of the next page, we see Liz Smith replying to you, saying that she is trying to give as much information as possible. Then she says she is not in a position to give you the margins, "but should you feel you are in a position to match and maintain margins", that would obviously be seen as a positive.
Firstly, was this an unusual situation where the retailers wouldn't actually divulge to you the margins and the net wholesale price of Gallaher?
A. The net wholesale price of Gallaher in terms of these tobaccos was very likely to be the published price list.
Q. Right. Insofar as they weren't the published price list, because somebody is saying "I have got a special bonus or discount", would you actually know what that was?
A. No.
Q. But insofar as she was saying to you here "match and maintain their margins", that would obviously be seen as a positive, although you don't know what their margins

are, what is she then trying to do, trying to tell you to do, as you see it?
A. She is trying to tease a bonus out of me.
Q. So although you don't actually know the precise net wholesale price, not worrying about this pipe tobacco for a moment but of anything, you see the price of a Gallaher brand below yours, if we take Dorchester and Richmond. So you want Richmond to be not more expensive than, but you see in Somerfield, and let's assume across the market that Dorchester is several pence below --
DR SCOTT: Have you moved off this example, and what happens afterwards? Because this is pipe tobacco.
MR HOWARD: I know.
DR SCOTT: Sorry, but you have now gone to Richmond and Dorchester.
MR HOWARD: I am looking at a more general position.
DR SCOTT: Okay.
MR HOWARD: Sorry, let's go back a stage. I am moving off the specific example of this pipe tobacco, just using it as a vehicle to understand how things work. I was looking at Dorchester and Richmond. If you see that Dorchester is -- let's take it in stages. The strategic pricing differentials, to what extent did they represent the differentials in the RRPs?
A. They were identical.

Q. Now, where we see Dorchester and Richmond and then your requirements were that Richmond was to be not more expensive than, in the wholesale price lists for any bonuses, how did the wholesale price of Dorchester and Richmond compare?
A. I believe they were the same in the printed price lists.
Q. Then you see in Somerfield Dorchester is, let's say, 5p below Richmond, and let's say you see that replicated across the market so that you know it's not just Somerfield messing around trying to squeeze a bonus or deciding to do something of their own initiative. Insofar as you -- what do you then have to do if you want to achieve a situation where Richmond is likely to be priced by Somerfield, who you were dealing with, what do you have to do in order to achieve a situation where you can incentivise them to price Richmond at no more expensive than Dorchester?
A. I would have to fund their price reduction down in full.
Q. When you fund the price reduction, so if you fund a price reduction of 5p, what is your understanding in that situation of the relative net wholesale price of Richmond as compared to Dorchester?
A. Can you clarify the question, please?
Q. Yes. When you see that Dorchester is 5p below Richmond, and you then pay a bonus which is equivalent to a 5p

reduction, so that the retail selling price of both of them is £3.29, for sake of argument. In that situation, what do you understand, having done that and the retailer having been prepared to price them here at the same level, what do you understand is the position as to your wholesale price, your net wholesale price taking account of the bonus as compared with Gallaher's?
A. They would have come down to the same.
Q. If you didn't bring it down to the same level, so that you remained above them, let's say the bonus you were offering was not sufficient to reduce your net wholesale price below that of Dorchester, what would you then anticipate the retailer would do?
A. The retailer would decline to promote.
Q. Can I ask you: if we go back to tab 45, {D20/45/208}, as I understand your evidence earlier about the pipe tobacco, although we see this discussion taking place, pipe tobacco -- I think you explained to us -- is a mature market; is that right?
A. Yes.
Q. And that your experience was that there was actually little bonusing going on in relation to pipe tobacco; is that right?
A. Correct.
Q. Just explain to me why that is.

A. Because in the majority of instances it wasn't the end user that was actually purchasing the tobacco. As I said previously, it was the carer who was going to the house, doing the chores in the house, getting the shopping, would go into Somerfield, get the loaf of bread, the butter and the tin of tobacco for the old boy at home on his own.
Q. Pipe smoking I think is on the decline, isn't it?
A. Yes.
Q. The people who indulge in pipe smoking, are they brand loyal; is that what you are telling us?
A. Very often, yes.
Q. So the carer who goes into the supermarket to buy Old Bruno or whatever the stuff is called, St Bruno, basically the old boy, as you have put it, who wants to smoke his pipe in his armchair wearing his cap, no doubt, fitting the picture of the pipe smoker, he I assume you are telling us has said to the carer "It's St Bruno" or Old Bruno, whatever it's called, "that's what I want". Is that what you are telling us?
A. Yes.
Q. So in this example where Liz Smith was suggesting to you that the reason for Gallaher being at a more favourable price was because essentially they had a lower price, did you believe that?

A. No.
Q. But this type of situation where the retailer tries to set you up in order to effectively get you to reduce your price, was that something that you had experience of happening?
A. From time to time, yes.
Q. Move on from that, and I think you were -- again I am just trying to understand the mechanics of the differential arrangements -- asked by Mr Williams some questions about the effect of an MPI, a manufacturers' price increase. As I understand it, he asked you a question which was in the context of there being two MPIs, so here we are looking at Gallaher and Imperial, so they both have an MPI of the same amounts. I want to ask you a different scenario, just so we can be clear, and I think we have probably gone over this last week or the week before with when you gave evidence, but let's be clear about it when you are talking about Somerfield.
In the event that there is an MPI by Gallaher, putting up its prices, but Imperial decides not to have an MPI either at the same time or at the same amount, what in that -- so in that event your wholesale prices are lower than those of Gallaher, what then did you understand, or what did you expect the retailer, here Somerfield, to do in respect of your prices where they

have put up Gallaher's prices?
A. To hold our prices until such time as we announced a price increase.
Q. Conversely, if Imperial went first and had an MPI, and Gallaher sought to gain competitive advantage by not having an MPI and held its prices, what did you expect that the retailer would do there to Gallaher's prices having put up Imperial's?
A. They would hold Gallaher's prices down.
Q. Right. Now, could you go to tab 34. {D20/34/167}. As I understand it, you told us that Liz Smith was at this stage new to the scene; is that right?
A. I believe so, yes.
Q. We see in paragraph 1 at the top of that page that you say:
"We would expect to be told whenever you are changing any of our selling prices and Steve used to call me to tell me of any changes he was making."
In relation to the situation that we were discussing a moment ago, where Gallaher have an MPI and the retailer, here Somerfield, is putting up the price of the Gallaher product, if they had rung you up and said -- you not having an MPI at this stage -- "oh, well, because we are putting up the price of Gallaher we are going to put up the price of Imperial", what would

you have said?
A. That we would review our position on their total bonus payment, because the money wasn't going through to the consumer, we were holding our prices down for the consumers' benefit and they were effectively putting our prices up when we had made no increase.
Q. If they rang you up and said, "Look, we have had a bonus from you to bring your price down, let's say of Richmond, to £3.29, and we know you were trying to match Gallaher, and they had a bonus, now Gallaher are putting their prices up and we are moving the price of Gallaher to 3.34, so because we are doing that, we are going to move you to 3.34 as well"; what would be your response there?
A. We would want to consider our position as to whether we wanted to continue it for another two or three weeks or whether there was a price increase or a Budget increase to be applied, whatever was applicable.
Q. Yes.
DR SCOTT: Just to be clear at that point, you would have received a document from Somerfield expressing their intention in the wake of the Gallaher price increase; would you have sent out a price file so that she was clear what she should be doing at that point?
A. No, we would send a revised strategy pricing document if

they had increased with an MPI and we hadn't.
DR SCOTT: Right, with the new differentials in?
A. Correct, so that there was no confusion.
MR HOWARD: What you were referring to in the email was actually not a price file, it's in paragraph 1:
"We would expect to be told whenever you are changing any of our selling prices and Steve used to call me ..."
So I am looking at a telephone conversation between you and Steve or you and Liz, and again so we get it absolutely clear, Liz rings you up and says "Look, Gallaher have had an MPI so we are putting them up, should we put up the price of Imperial because we have put up the price of Gallaher?", what would you say to that?
A. We would say "No, we are holding our prices down".
THE CHAIRMAN: Why would you hold your prices down? What we have seen more is that you want to know as soon as possible if Gallaher are increasing their prices so that you can reduce the bonus that you are paying in order to keep the ITL brand down to match the Gallaher price.
MR HOWARD: This is a situation of the MPI we are just talking about.
THE CHAIRMAN: Yes.
DR SCOTT: Sorry, you are off this email? Because this

email isn't taking place in the context of an MPI, as I understand it.
MR HOWARD: No, I am just using the email as a vehicle to ask my questions.
THE CHAIRMAN: Well, then I am not sure whether the answers he is giving are different from the answers that he gave to Mr Williams when he was being asked about this incident.
MR HOWARD: I am going to come on to the specific incident, I am just sort of testing the --
THE CHAIRMAN: Oh, I see.
MR HOWARD: -- phone call, what is actually being discussed in the -- what type of phone call one is anticipating.
THE CHAIRMAN: But you are not asking him about the particular phone call being referred to --
MR HOWARD: He is talking about what happens in the past, "what we expect to happen", is what it actually says:
"We would expect to be told whenever you are changing any of our selling prices and Steve used to call me up to tell me of any changes he was making."
DR SCOTT: But you seem to be drawing a distinction between what one might describe as the ad hoc telephone call and the more formal exchange of documents which may be a price file coming from Somerfield to the manufacturers, the price file going from ITL to

Somerfield, and the strategy pricing requirements changing after a unilateral MPI.
MR HOWARD: No, I am just --
A. Can I clarify something here?
DR SCOTT: Yes.
A. At this point in time there were no documents going backwards and forwards. It was only when Liz Smith had been in the chair for some while that we started to get the documents flowing backwards and forwards.
THE CHAIRMAN: Well, no, because this refers to the price increase/decrease forms and the updating the price file, this is in March 2002.
MR HOWARD: Well, no, I think the point is that it's actually quite clear on the second page, there isn't a price file at this stage, that's actually one of the points that's made by Mr Hall on 8 March at 2.31.
MR WILLIAMS: If it helps, Madam, there is an example of a price increase/decrease form at tab 6, which I think is the sort of document that Mr Hall is talking about in this email.
MR HOWARD: I don't think it's controversial, the price files come in after this.
THE CHAIRMAN: What's the reference in paragraph 3 of the email at the top, then?
MR HOWARD: Paragraph ...

THE CHAIRMAN: Point 3 at tab 34, {D20/34/167}, the first email on the page at the top of the page:
"Even more important is that we need to know your actual shelf prices for every ITL line in both Kwik Save and Somerfield ... so we can update the price file with your actual current selling prices. This will enable us to apply the Budget increases correctly to your current prices ... grateful if you could arrange for the information to be supplied."
MR HOWARD: Let's ask Mr Hall.
If you first go to the email over the page on 8 March, the one beginning "The answer to your first question ..." Do you see that?
A. (Witness nods).
Q. Mr Hall, on the second page, the --
A. Yes.
Q. Then the next paragraph, "the answer to your second question ..." Then the last sentence there:
"Of course this also highlights once again the point I have made so many times, if we were given a file of your selling prices regularly we would know immediately something had gone wrong."
What file are you referring to there?
A. This is the listing of their selling prices as opposed to the price increase/decrease form. However, at the

time of the Budget we needed the exact selling prices in order to apply them to the whole of the price increase/decrease form which they needed to input their new post Budget prices.
DR SCOTT: So that's a fourth sort of form?
A. Sorry?
DR SCOTT: It's a fourth sort of form.
A. We have the price increase/decrease form, but at the time of the Budget, you would have to do that form for every single line.
DR SCOTT: Absolutely, and so then you need, for that purpose, a snapshot of where their prices are on the shelf at that moment.
A. Correct.
DR SCOTT: So that you have the basis for making a change.
A. For them as --
DR SCOTT: That's different to what's envisaged by the end of the paragraph, which is the forward looking price file?
A. Correct.
DR SCOTT: Thank you.
MR HOWARD: Let's just break it down. It's probably simpler. There is a Gallaher MPI, and you don't have an MPI. Would you, in that situation, send a price increase/decrease form to Somerfield where you have not

had an MPI?
A. No.
Q. Right. Now --
THE CHAIRMAN: Oh, so the price increase/decrease form --
MR HOWARD: It's initiated by Imperial.
THE CHAIRMAN: But is it indicating an increase or decrease in the shelf price?
A. Either would be an increase or a decrease.
THE CHAIRMAN: Yes, you never discuss the actual wholesale prices, it's always in terms of the shelf price?
A. The price increase/decrease form included cost price, bonus and selling price and a percentage.
MR HOWARD: Perhaps we should look at tab 6 and you can see what it is. {D20/6/21}.
Just explain to us what, if we look at that, is that showing?
A. If you take Embassy No 1 Kingsize their current price was £2.07 for 10, giving them a margin of [redacted] per cent, and then it shows the new cost price, a new selling price of £2.10, applying a 3p increase as per the price increase at that time, and showing a margin improvement of [redacted] per cent.
Confidential ITL
Q. That was very helpful. That's on page 126. Is that --
A. Correct.
Q. Sorry, I was on the wrong page. So it's page 126.

Sorry, I was on an earlier page, and that's why I was completely puzzled.
A. Sorry.
Q. And I think Dr Scott is saying the same. Just run through that again. I am sorry that we are slow and behind you. Page 126.
A. This was in respect of a price increase that was taking place on 23 August.
Q. Yes.
A. You will see the form was sent on 11 August ready for them to key. The current cost was [redacted]. They were selling at £2.07, making [redacted] per cent margin. Then the new cost price post the storage account, because they would buy forward a quantity of cigarettes which we would sell to them at the old price, they would be making [redacted] per cent at the new price of £2.10 for 10.
Confidential ITL
Q. So their margin actually, is this an example of the margin going up where there is a price increase?
A. As it did at every MPI, their margins improved.
Q. Right. So that the way it operates is that -- so where you announce an RRP or an increase through an MPI of, say, 6p, that the extra margin that that gives rise to actually feeds through, is split between the manufacturer -- between you and the retailer?
A. Correct.

THE CHAIRMAN: But isn't that because this will have followed a Budget increase where the absolute number of pence has to be added on, and that results in a narrowing of the margin?
A. It does temporarily, but an analysis I did on Embassy No 1 for one account, and I can't remember whether it was Asda or Somerfield, actually showed that over a period of like four years, the margin in percentage terms did definitely increase.
DR SCOTT: Yes, I think we saw that last time you were here. Just staying on this but not mentioning the numbers, which are confidential, the larger packs, the multipacks, are being retro bonused to keep the prices down. That's --
A. Correct.
DR SCOTT: Thank you.
MR HOWARD: Just again so we are clear about bonuses, what's the HO bonus per outer?
A. That was the ongoing bonus that we were giving them because they were selling our brands at below RRP.
Q. Right.
A. And this would have been at that time. Probably the bonus that was balanced when we had integrated the Kwik Save and Somerfield bonus rates.
Q. Does anything being sold below RRP at any particular

time get the HO bonus?
A. Sorry?
Q. Any brand that is sold below RRP, does that attract what's called this HO bonus?
A. Not necessarily, no.
Q. So how is that determined?
A. For example, Player's Medium, if they chose to cut the price, that was of their own volition, but we didn't bonus plain cigarettes.
Q. Because plain cigarettes are something on the way out, as I understand it --
A. Correct.
Q. -- and not really interested. But where you wanted them to sell below RRP, anything that you wanted to sell below RRP, did that attract an HO bonus?
A. I believe so, yes.
DR SCOTT: The packets of 10 don't seem to get a bonus.
MR HOWARD: I think packets of 10 you are not really that interested in, is that right?
A. Correct.
Q. And they get sold, as I understand it, at a premium by the retailers as well?
A. In some cases, yes.
Q. So the price increase/decrease form, that's, as I understand it, initiated by Imperial; is that right?

A. At their request. They asked us to fill this form in, in this shape and form.
Q. In the event of a Gallaher MPI, not followed by Imperial, if you are rung up and asked by Liz Smith or by her predecessor to fill out an increase/decrease form, what would be your reaction?
A. There is no need, there is no change in prices.
Q. And equally, if we have a situation where Gallaher withdraws from a promotion, whose decision is it as to whether Imperial withdraws its promotion?
A. It would be Imperial's decision. Sometimes I would make that decision and sometimes I would get directed from above as to when to make that decision.
Q. And pending your communication of your decision to withdraw your bonus, in other words until you tell the retailer what you want to do, here Somerfield, what do you expect them to do to your retail price?
A. To pass that contribution through to the consumer and hold the price.
Q. Now, if we go back to tab 34, {D20/34/167}, as I understand it, you told us that you were paying a bonus to reduce the price of Panama multipack; is that right?
A. Correct.
Q. Right. If we look at paragraph 2 on the first page, you

say the change that you made to Panama multipack did not reflect any change to Hamlet multipack.
"Had I known that you were planning to move the Panama multipack up, I would have drawn your attention to the fact that we were funding the lower price on an ongoing basis."
What were you intending to communicate there?
A. That we were giving price support for Panama multipack to achieve that 13.29 price.
Q. If they chose to move Panama multipack where you were paying this bonus to reduce the price, if they moved it up, what was your reaction?
A. We would have terminated the bonus accordingly.
Q. Okay, I think I have asked you about the other scenarios where Hamlet's price reduced.
Could you go to tab 33. At tab 33, at the foot of the page, we see a Martin Thomas, he was Liz Smith's assistant, was he? {D20/33/166}.
A. That's correct.
Q. We see him talking about Dorchester Superkings increasing from 12 March, Sterling from 3 March, having various increases of Kingsize, Superkings and so on. I think it's Liz Smith advises you:
"Please advise changes you wish to make as soon as possible as changes will have to be made before 5.30 pm

today to be in place next Wednesday."

We see "today" is Tuesday, 5 March. When she said "need to make changes today to be in place next Wednesday", is next Wednesday 6 March, ie the next day, or is it 13 March?

A. The 13th.

Q. Right. If you wanted to make changes, I think you told us at this stage Richmond was being bonused, what decisions would you have to make firstly about the change in the bonus?

A. By how much I was going to reduce it.

Q. Right, and who would decide when any changes were to take place?

A. The company would issue a directive as to what we were going to do, how long we were going to hold it down for.

Q. Right. So we see you here talking about making a minor change on Richmond Superkings from 20 March, so whose commercial decision would it be whether or not you make a change which is going to come into effect on 13 March, when Liz Smith seems to have been talking about it, or 20 March?

A. Probably my boss, Roger Batty.

Q. What would be the factors which would decide whether you decided "we must do this straightaway" or "we are going to keep our price down for an extra week"?

A. How much money was left in the till.

Q. And what would be the benefits of keeping the price down, for instance, for an extra week?

A. Gaining market share.

Q. Right. Is that what happened here? Do you know whether you actually kept your price down in order to gain market share?

A. Judging by the timing of that email, I had missed her 5.30 pm deadline, so it must have been 20 March at the earliest.

THE CHAIRMAN: Was that why you wanted to have advance notice, so that if you in fact didn't want to hold the price down, you wouldn't get caught out like you rather had here, of having to keep the bonus in place for a couple of weeks when you might have decided you didn't really need it to be in place because Gallaher had reduced the bonus on the Dorchester product?

A. It played at both ends, if you can follow the expression, in that at the start you would always have to start a bit later, and then you would end a bit later by a week or two, very often with Somerfield, because of their lead time in changing prices. With Asda, you could agree a price change as late as a Thursday, it would happen on the Monday. With Somerfield, it was agree the price change by Tuesday for the Wednesday

week. They were always over a week in terms of implementing anything, if there was a good fair wind. Sometimes it could be two weeks.

THE CHAIRMAN: If she had told you a week earlier "next week we are going to increase the price of the Gallaher product because they are reducing their bonus", then you could have reduced your bonus and increased your price at the same time as Gallaher were going to, without there being that time lag which could be quite expensive for you?

A. Possibly, yes.

MR HOWARD: At this stage, what was the relativity between Richmond and Sterling?

A. I can't answer that question off the top of my head.

Q. We can see it, it's a silly question to ask in that form. Why don't you go to tab 29. I think that's the latest version. If I am wrong, Mr Williams will tell me.

MR WILLIAMS: There is one at 31.

MR HOWARD: Does the one at 31 have the list? Yes, it does, I am grateful. Tab 31. {D20/31/143}.

So we can see there various Richmond brands being compared to Sterling brands; correct?

A. Correct, not more than 5p more expensive than Sterling Superkings.

Q. Right. If you go back to tab 33, we see that the Sterling brands are going up. Well, actually something seems to have gone wrong in the first one, the Superkings says there is an increase from 3.49 to 3.42, which I think must be a mistake, it must mean an increase to 3.52, I think.

MR WILLIAMS: I think it's 3.39.

MR HOWARD: I am grateful. Anyway, there is a mistake. So 3.39 to 3.42. So we see the Kingsize 100 MPs going up, and the other two.

As far as you understand it, were you intending to make any changes subsequent on the Sterling changes as opposed to the Dorchester Superkings?

A. I don't believe so at that point in time.

Q. Right. So the decision as to whether or not to -- I mean, where there is a change, where you have a bonus and Gallaher withdraws its bonus, to what extent does a commercial judgment have to be made as to whether you are going to withdraw your bonus and when?

A. The cost, the market share, where we want to go in the marketplace, a very big picture.

Q. Right. Now could I go to a separate point, about tab 4. If we look at the context of this, could you just cast your eye over the section beginning "General".

(Pause)

Okay?
A. Yes.
Q. If we take the first paragraph, where you refer to reports of Gallaher seeking to move the price of Mayfair 20s down to 3.39, "Please bear in mind that if you are planning to implement such a reduction we would be looking to reduce Richmond to [those prices] and Lambert & Butler and JPS brands also."
In the event that Mayfair did go down and you then wanted to implement these reductions, what did you understand you would have to do to your wholesale selling price?
A. We would have to reduce it by way of a bonus.
Q. Then in the next paragraph we see you say:
"It was our intention to terminate the additional reductions on Small Classic 10s and multipacks from 3 May as previously advised. However, if the Gallaher reduction on Hamlet Miniature 10s and multipacks is to continue ongoing, then I would wish to continue the reductions on Small Classic and bring down Cafe Creme and Mild 10s and multipacks to match the Hamlet Miniature prices."
If we take the first sentence, the additional reductions on Small Classic 10s and multipacks, what's happened there? What does that mean?

A. We had been funding price reductions by way of a bonus on those packings.
Q. You then say there was an intention to terminate. So what was the reason that you were terminating those arrangements?
A. Because we had run out of money or were running out of money to fund them.
Q. Right. Then you say:
"If Gallaher's reduction on their brands is to continue, then you wish to continue the reductions on Small Classic and bring down Cafe Creme and Mild 10s and multipacks."
So in terms of the competitive position and what Gallaher might do, what's happening there?
A. If Gallaher were to continue, then we would increase the pressure on Gallaher effectively with further price cuts on Cafe Creme and Cafe Creme Mild because Wintermans wanted to put money behind those brands as well in the event that Hamlet Miniatures were going to continue at a lower price.
Q. Then the next paragraph where you say:
"Some considerable time ago now we discussed the notification to manufacturers of your selling prices by way of a price list so that we could be more aware of the changes before they were implemented in store. Is there any progress on this?
I terms of at this stage when you were writing this email and you were talking about notification to manufacturers of your selling prices, which brands were you expecting them to notify you of?

A. Our brands.
Q. Right. What about Gallaher's and British American Tobacco's brands?
A. If they gave us their current prices that would be a bonus.
Q. When you refer to "your selling prices", whose brands were you intending to refer to?
A. We were initially interested in our brands, we wanted to know what the prices should be in the stores, given the poor store performance in displaying the right prices. If they were then telling us the other manufacturers' selling prices current at that time, not in the future but current at that time, that would be a bonus.
Q. Tab 41, please. {D20/41/187}. This is a discussion taking place where you were giving current retails for Golden Virginia in other grocers, Asda, Tesco, Sainsbury's and Morrisons. Is there anything confidential about that?
A. No, because they were public prices on the shelf that Somerfield could drive down the road and see just around

the corner.
Q. Right. Then if you go to tab 78, {D20/78/332}, which was some of this discussion about -- yes, it was a discussion, I think, about -- you can see in the middle -- Embassy, and you say that:
"In the Kwik Save I note you have only increased Benson & Hedges Kingsize 20s by 5p instead of the full 6p and I assume this is to match Asda. If that's correct, there are four amendments on the Embassy brands to match Asda and meet our strategy pricing requirements, unless of course you intend moving B&H up 1p to 4.52."
Then Martin Thomas replies:
"I've discussed this with Sue and we are willing to change the price of Embassy, provided there is funding for the reduction. If this is possible, please confirm and I will get the price updated."
So just explain to us, what, as you understood it, the retailer here has done in terms of Benson & Hedges pricing?
A. Because they have seen Asda only go up by 5p rather than the full 6p, they, Somerfield, have followed the Asda price on B&H and taken a penny out of their own margin.
Q. Right, and insofar as you wanted them to bring down the price of Embassy in order to meet what they were doing

here and to get to your desired differential, what did you have to do as far as they were concerned?
A. As far as they were concerned, they wanted me to fund it.
THE CHAIRMAN: So do we assume from this that they had put the price of Embassy up the full 6p and Asda were pricing Embassy at 1p more than Benson & Hedges?
A. Yes.
MR HOWARD: So their position was, because Asda were down on Benson & Hedges, what had they done to meet Asda?
A. They, Somerfield, had matched Asda out of their own margin.
Q. Right. Did you respond to this, saying that they couldn't do this and that they had to fund it themselves or anything of that sort?
A. I can't recall for certain, but I would have been highly unlikely to have followed that and funded it, I would have weathered the storm.
Q. So you weathered the storm, so did you seek to stop them doing it?
A. No.
Q. Now --
THE CHAIRMAN: Would you have reminded them at that stage of the strategy pricing requirements in the agreement to say "Well, you should bring down the price of Embassy of

your own accord"?
A. Probably, yes, in a conversation.
MR HOWARD: What would their response be?
A. As per the top line of that email. They wanted it being funded.
Q. So either fund it, and if you don't fund it, then what?
A. Then we had to wait for Asda to put their price up, which ultimately they would do.
Q. Could you go to tab 61, please. {D20/61/268}. We see here, this is again, I think, pricing in Asda in the middle of the page. You note in the middle of the page that:
"Dorchester Superkings have not moved up in Kwik Save yet. Should they have gone to 3.58?"
So what was the purpose of that question?
A. Trying to establish whether Somerfield had made a mistake or whether it was being funded by Gallaher.
Q. Right. In the event that it was a mistake and that they had just not properly keyed in the price increase that Gallaher had put in, what then would you anticipate they would do vis-a-vis their mistake?
A. Try and correct it very rapidly, because they were losing margin.
Q. Right. In the event it wasn't a mistake and Gallaher were inducing them to keep the price of Dorchester down,

by reducing their wholesale price, by a bonus or otherwise, then what would you have to do if you wanted to get the price of your competing brand not to be disadvantaged?
A. I would have had to fund it.
Q. Right. Then at 68, {D20/68/292} we see that you were referring to the fact that Mayfair in a store in Nottingham was £3.55 and you had a till receipt to prove it, and we see the answer was that:
"I have investigated this, and for some reason the price has been locked (as if it were on promotion) -- even though I adjusted the price it wouldn't get re-hosted correctly. I have now had the lock removed and the price should change tomorrow. Thanks for highlighting this."
What was it that you were highlighting and that he was thanking you for?
A. They are losing margin.
Q. Just explain what had happened, as you understand it, what had happened that had caused Mayfair to be at 3.55 rather than the price that they intended?
A. They failed to implement a price increase or a -- a price increase I think at that time, and because the thing was locked on the Somerfield system, they couldn't literally change it, and they had to go to great lengths

to do so, and in the meantime they were losing profit.
Q. So when he says "thanks for highlighting this", what sort of service were you providing them here?
A. An alert service.
Q. Yes. I think finally on this point, tab 72, {D20/72/309}, which is your email, and you explain that the email was in shorthand, and by that you meant to refer to the attachment as well. Can we just look at the attachment. What we see in the attachment is that you are, on page 79, seeking to have four products reduced in price; is that right?
A. Correct.
Q. So we see the first, the two Drum ones coming down, the first one from £2.09 to £2.04, the next one is £8 to £7.89, each to match Amber Leaf, and then the Golden Virginia, £4.51 to £4.49 and £8.82 to £8.80 to match Old Holborn.
Now, this document doesn't, I think, tell us anything, does it, about who funds these price reductions?
A. That's correct.
Q. Right. So bearing in mind what you said about shorthand, what is the longhand for who bears the cost of these reductions?
A. These changes were to meet the strategy pricing

requirement, we weren't funding them.
Q. Right. So in terms of your relative net cost, then, at this stage, what did you understand your relative net cost of these Drum 12.5 grams was compared to Amber Leaf?
A. The same.
Q. So in terms of disadvantage, what did you understand the disadvantage was that you were suffering in terms of margin being applied to your product?
A. They were taking excessive margin as compared to the smaller brand.
Q. Okay. Then could I ask you to go to tab 77, {D20/77/231}, and again so we can just get the position straight, in the middle of the page you are corresponding with Natalie Smith. Who is Natalie Smith at this stage?
A. She was an assistant to Sue Boardman, Sue Boardman was yet another buyer in the Somerfield outfit.
Q. You say:
"There is no problems on the pricing of our brands. However, it would appear that in Somerfield you have overlooked the Gallaher increase on Berkeley Superkings multipacks and Berkeley Smooth multipacks which are still at 21.10 and therefore 30p less than in Kwik Save."

I think you explained that the Somerfield pricing strategy was for Kwik Save to be cheaper than Somerfield; is that right?
A. Very much so. Somerfield were never ever cheaper than Kwik Save, unless it was a mistake.
Q. So as I understand it, therefore, if you see that these products are cheaper in Somerfield than in Kwik Save, you infer that that's a mistake; is that what you are telling us?
A. Yes.
Q. If it was a mistake, what did you anticipate, if they have made a mistake, they would then do, you having pointed out the error of their ways?
A. That they would rectify it to restore their margin.
Q. If this was intentional, if they responded "No, this isn't a mistake, this is actually what we intend that these brands should be priced as they are", in that scenario, what would you infer had been done by Gallaher or anyone else to achieve this result?
A. I would believe that Gallaher must be funding it, given that Somerfield's profits were negligible as a business at that time, hence the demise of Somerfield and Kwik Save ultimately.
Q. Right.
A. Say no more.

Q. Again, if that had been the response, "We do intend this", then if you had wanted to get to a more competitive position for your brands -- I think here it would be Richmond -- what would you have had to have done?
A. I would have had to fund it.
MR HOWARD: Thank you very much indeed.
DR SCOTT: I have only one curious question, Mr Hall, and it's this: when you went out and bought the rival's products in order to get the till receipts, what happened to them?
A. My wife smoked them.
MR HOWARD: That's a very disloyal thing to say!
DR SCOTT: Thank you.
THE CHAIRMAN: All in the cause of research. Thank you very much for coming back today, Mr Hall, it's been very helpful, and I can release you from the witness box now.
A. Thank you very much.
(The witness withdrew)
Discussion re timetable
THE CHAIRMAN: That's it for today, I would guess.
Now, we need to be a bit careful with the timetable for the rest of this week, so that we don't get out of sync, because over the next two days we have to fit in Cynthia Williams, Mr Culham and Mr Wragg, and also have

listened to Mr Lasok, if he wants to say something about the matters that we discussed yesterday.
So what I would like you to come with tomorrow morning is a pretty strict division of time in relation to tomorrow and Thursday, which I am afraid we will have to operate as a guillotine in order to make sure that we get everything done over the next two days that we need to get done.
MR HOWARD: Yes. Can I raise one thing which I do remember had been raised, actually, I think by Mr Thompson with me, so I just ought to ventilate it, and I think the OFT have raised it, which relates to the time for expert evidence. At the moment the time is split four days and four days I am perfectly content for my part that that's how we are proceeding, but obviously in the event that the OFT is going to take any additional time than that, I think they wrote to you at one point saying they wanted more than four days, and I think you said we would have to wait and see but for the moment we are stuck with the eight days, but obviously it is quite difficult to manage the logistics of all of this, and I do think we need to really have a pretty clear idea as to whether we are going to stick to a pretty firm guillotine on this, or there is going to be additional time set aside.

THE CHAIRMAN: Do we have a more detailed timetable for which experts are intended to appear on which days? At the moment on the timetable I am looking at, it just says "Appellants' experts, four days", and "OFT's experts, four days".

MR HOWARD: The OFT, I think the reason I raise this, they have given an estimate which is five days plus two hours for the appellants' experts, so that estimate exceeds the four days that's currently allotted. I mean, I don't know, they may have modified their stance since they came up with that, but we just obviously need to know rather than just doing it on an ad hoc basis. If they are saying it's five and a half days, not least it affects people who are coming from abroad, as you know.

I mean, as we see it, in a way it's a less problematic point for me in that my experts are coming first and so Mr Ridyard is coming on first, followed by Professor Froeb.

THE CHAIRMAN: But that's the time estimate the OFT have given, isn't it, the five days and two hours?

MR HOWARD: That's right, but the first day to two days will be those two witnesses, but it may be they will have to take less time.

MR WILLIAMS: Madam, in case it helps, I think that the best estimate has been revised down to five days rather than

five days and two hours, because the two hours was potentially to be used for two particular experts who are now not going to be cross-examined, so it is five rather than four.

THE CHAIRMAN: That still leaves one day more than we have allocated in the timetable. Have you an idea as to which of your experts are going to take up the time? Is it going to be mostly Professor Froeb?

MR WILLIAMS: Madam, the part of the team that is best placed to answer that question isn't in court, so can we take this question away and come back with an answer first thing in the morning?

THE CHAIRMAN: What makes sense, then, is that we need a timetable for tomorrow and Thursday which fits in everything that needs to be fitted in, with clear times that we will stick to, and then I would like to see a timetable for the two weeks beginning on 8 November with the names of the experts and the time estimates to be taken for them.

MR HOWARD: Essentially you will remember there is a reserve day set on the 21st.

THE CHAIRMAN: Yes.

MR HOWARD: So essentially if the OFT says they are going to take five days, if that remains their position, then the Tribunal has to decide whether it is going to allow

that or say, no, you must do it in four days. If you say they can have five days then obviously we are then heading into using 21 November.

THE CHAIRMAN: I appreciate this is rather tied up also with the other points about how the experts are going to be handled more generally. At the moment I don't think we are in a position to say whether we are going to need that 21 November day. I would like to see a more detailed timetable. If the OFT can keep their cross-examination within four days, that would clearly be to everyone's advantage.

MR HOWARD: That clearly is the ideal scenario, not least because we are then losing time for closing submissions, and the party that gets most disadvantaged by cutting into the week of the 21st is Imperial because we have to go first with the oral closings.

THE CHAIRMAN: Yes. I don't think we can take that any further this evening.

MR HOWARD: No, I just thought I would raise it so that you had it on the agenda before the end of the week.

THE CHAIRMAN: Would it help if we started at 10 o'clock tomorrow morning?

MR HOWARD: That's a matter for ...

THE CHAIRMAN: Well, can someone get in touch with Ms Williams and tell her?

MR HOWARD: I think that's possible, I think it is really a question of what the estimate is for tomorrow as to whether ...

MR LASOK: If the Tribunal feel more comfortable with starting at 10, it's a reasonable course to take, because I don't think starting one day this week at 10 is a tremendous strain, and if it means that we finish slightly earlier on Thursday, I suspect that nobody would complain about that.

THE CHAIRMAN: Very well, we will start at 10 o'clock tomorrow morning with Ms Williams. Thank you.

(4.50 pm)

(The court adjourned until 10.00 am on Wednesday, 2 November 2011)

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