This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House, Bloomsbury Place, London WC1A 2EB

27 September 2011

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

CO-OPERATIVE GROUP LIMITED

Appellant

-v-

OFFICE OF FAIR TRADING

Respondent

WM MORRISON SUPERMARKET PLC

<u>Appellant</u>

-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

Transcribed using LiveNote by Opus 2 International 1 Bell Yard, London, WC2A 2JR
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HEARING (DAY 4)

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.

'	ruesday, 27 September 2011		agreements, if any, that the parties have, the hature of
2	(10.30 am)	2	the retailers' policies as well as those of the
3	Opening submissions by MR FLYNN	3	suppliers, and the substance of their dealings,
4	THE CHAIRMAN: Yes, Mr Flynn.	4	descending almost into at certain points into questions
5	MR FLYNN: Good morning, madam, sirs. Mr O'Donoghue and	5	of personal chemistry, which I shall come back to.
6	I appear for Asda in this case, as you know.	6	The OFT has paid lip service to this need, and it
7	Before we, as it were, metaphorically roll up our	7	supplied it in practice by finding that Tesco didn't
8	sleeves, it's worth remembering that in the decision	8	have an infringing relationship with either Gallaher or
9	which is challenged in these appeals, the OFT has	9	Imperial. Now, obviously Tesco was accepting
10	characterised the arrangements it describes as an object	10	promotional bonuses and so forth from the manufacturers
11	infringement, despite both their admitted complete lack	11	along with the best of them, but it's been found not to
12	of precedent in law or economics and despite the fact	12	have accepted any restriction on its pricing freedom.
13	that it couldn't prove that the arrangements had had any	13	We say you can't read across simply from one case to
14	deleterious effects, even after an investigation that	14	another, you have to find whether the retailer in
15	lasted so long that it felt obliged to give the parties	15	question has accepted any restriction. Asda's principal
16	a 10 per cent discount on the fine.	16	contention is that it likewise accepted no such
17	For those novel and entirely open and undisguised	17	restriction, and the OFT has quite failed to demonstrate
18	arrangements, it has imposed extremely significant	18	that it did.
19	penalties which are entirely analogous with those for	19	Now, madam, I'm mindful of your injunction, as it
20	the most serious secret horizontal cartel.	20	were, not to count any chickens on the evidence, but
21	Obviously the level of penalty is for another day,	21	I think it is important that I set out our stall of what
22	but we say even that bare outline of what's happened in	22	Asda's evidence-in-chief will be, not least because you
23	this decision shows that the OFT has gone wrong in this	23	will not be hearing that live, and that will mean that
24	case.	24	there will be no doubt as to what the OFT will have to
25	It expected, from the outset, to find serious and	25	aim at in cross-examination, if it wishes to disturb
	1		3
1	deliberate violations of competition law. It never	1	Asda's case. I will also try to focus principally on
2	found a horizontal case. It's been progressively forced	2	the evidential deficiencies in the way that the OFT has
3	to abandon an ABC or a legitimate indirect contact case,	3	put its case.
4	and its effects case. But although the alleged	4	Now, before getting into those evidential points,
5	infringements are now said to be a series of purely	5	I should say of course that isn't the only issue in the
6	bilateral arrangements between various pairings of	6	case, despite I think an indication to the contrary in
7	retailers and manufacturers, the decision is littered	7	the OFT's skeleton. The question whether its case is
8	with references to matters that might be relevant to the	8	economically sound is also a relevant issue, we join the
9	sort of case that it's had to abandon, but ones that are	9	others in saying that it isn't, and you will have seen
10	not relevant to the case that it now asserts. Mr Howard	10	that our expert Mr Dryden's conclusion overall is that
11	has given some examples of that. It is necessary to	11	a small change in the form of the agreement can change
12	bear in mind the whole time what is the arrangement that	12	the predictive effects from anti to pro-competitive, and
13	the OFT is now seeking to prove.	13	the finding or the assertion in economic expert evidence
14	We say that in all these changes of the nature of	14	that the case is so fact sensitive is a significant one,
15	the infringement and its theory of harm, the OFT has	15	in our submission.
16	rather lost sight of the fact that it needs to prove, in	16	That point also feeds into the question whether the
17	respect of each manufacturer/retailer pairing, that the	17	arrangements, even if they are found to exist, even if
18	arrangement of the type it alleges was actually entered	18	the OFT proves the factual case, whether those
19	into, specifically in Asda's case then it bears the	19	arrangements are suitable for object characterisation as
20	responsibility of showing that Asda entered into such	20	a matter of law. Again, we join in saying that they are
21	an arrangement with each of Gallaher and Imperial.	21	not. I don't intend to supplement in any detail what
22	That's the importance of the point that these are	22	Mr Brealey has said yesterday, by and large those are
23	vertical relationships, they are individual	23	our submissions too. We say that the OFT has fallen
24	relationships, and they may vary significantly,	24	into error by generalising from a horizontal context
25	depending on factors such as the nature of the written	25	where really any price discussion might be suspect, and
	0		, , , , , , , , , , , , , , , , , , ,

1	you can, as you know, start off a lasting cartel from	1	prices, were theirs to set, and they alone took them.
2	a single meeting, whereas in the supplier/retailer	2	They took them essentially on the basis of making
3	context pricing discussions are normal and legitimate.	3	a small margin, it's a tight market, as we know, they
4	We will come to the evidence, but many of the	4	make a small margin on the cost price, and always being
5	communications simply reflect manufacturer concern as to	5	extremely price competitive vis-a-vis their chosen
6	their own level of pricing, and we can't leap from that	6	competitor set. I think there is some ambiguity in the
7	to a conclusion that it's in the context of a different	7	documents as to whether it's confidential with whom they
8	sort of agreement. We have also made the point that	8	were competing, but I think you will have seen those.
9	mere capability, a propensity to harm competition, isn't	9	An example, and we could turn it up, is Mr Mason at
10	enough; you have to show that it's overwhelming or	10	paragraph 27. That's tab 110 in volume 10. {C10 tab
11	preponderant, at least a very high one. We said in our	11	110 paragraph 27} If the Tribunal has that,
12	skeleton that if you have a type of agreement where nine	12	paragraph 27, page 414 in the bottom right-hand corner,
13	times out of ten it's not going to harm competition,	13	paragraphs 27 to 29 set out his account of pricing and
14	it's inappropriate to treat that as an object	14	the pricing policy that Asda has, notably its Every Day
15	infringement because in some remote circumstances, it	15	Low Pricing proposition, where he said:
16	may have a capability of harming competition.	16	"It's of crucial strategic importance to be as
17	Mr Brealey has been through the case law, and we	17	cheap, if not cheaper than, its competitors wherever
18	agree with that. We said in our skeleton it's	18	possible and it is fundamental to everything we did in
19	particularly wrong of the OFT to suggest that the	19	tobacco."
20	T-Mobile case represents step change in the law. We	20	Then something apparently confidential.
21	have made that point, and I won't go over it here.	21	"We wouldn't price above RSP, and we wouldn't price
22	But all this, the object characterisation, is all	22	more highly than the rivals."
23	the more problematic, because in the decision, the	23	He says:
24	theory of harm is that the harmful effects would take	24	"Of course the prices were influenced by cost prices
25	effect over the long-term, and they recognise that the	25	and promotional funding. If we were offered promotional
	5		7
1	immediate effect may be to provoke competitive	1	or tactical funding at a discount price for a brand we
2	responses.	2	would always accept it in order to offer lower retail
2	responses. We say it's not appropriate for the OFT, in the	2	would always accept it in order to offer lower retail price for the benefit of our customers", and they would
2 3 4	responses. We say it's not appropriate for the OFT, in the defence, to backtrack on that and say there is likely to	2 3 4	would always accept it in order to offer lower retail price for the benefit of our customers", and they would try to resist cost price increases, especially if they
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1	the footnote there, they are addressed by Mr Jolliff in	1	reference to the brand pairs identified by the OFT in
2	his witness statement at paragraphs 90 and 91. There it	2	the decision, and that analysis shows examples of
3	can be seen those price increases are the result of	3	differentials being widened by Imperial rather than
4	a withdrawal of a tactical bonus, as it made expressly	4	following a Gallaher price rise itself, as Mr Howard
5	clear, and he accepts that, as he must, and agrees	5	said on our first day I think, and more generally that
6	a date for the implementation, knowing that he has to	6	the adjustments to the differentials followed
7	put up his shelf price if he wishes to maintain his	7	adjustments to the wholesale prices, not the other way
8	margin.	8	around.
9	Now, just for your note and just for the sake of the	9	I think this may be similar to the floating point
10	good order, there is a second quotation in footnote 41.	10	that Co-op make. We don't make it in the same way, but
11	That does not appear to be an Asda document at all. You	11	we just say observedly the changes to differentials
12	can see, if you look across, I don't suggest you do it	12	follow the reality of pricing in the market rather than
13	now, but as I say it's just for the sake of good order	13	the other way around.
14	because there is obviously a glitch, paragraph 6.149 of	14	So any theory of rigid or automatic adherence to
15	the decision gives that same quote and it's a Somerfield	15	P&Ds isn't borne out on the facts, and the OFT accepts
16	document, not an Asda document. So that's not something	16	that, and tries to deal with that by finessing the
17	that Asda can speak to.	17	meaning of its parallel and symmetrical language, and
18	All in all, what the witnesses say, they didn't have	18	making points about compliance which I will come to.
19	a cosy relationship with the manufacturers, they were	19	Approaching the evidence that is given by the OFT in
20	always alert to the possibility of being disadvantaged	20	relation to relationships between Asda and each of the
21	vis-a-vis their competitors, they didn't take anything	21	manufacturers, can I just make four preliminary points
22	on trust, they always checked up for themselves.	22	and then I'll come to each manufacturer.
23	There are plenty of examples in the witness	23	Firstly, the way the OFT has put this consistently,
24	statements, we will not go to them now, but Asda	24	actually, its forensic case has five pillars, which are
25	retained pricing flexibility and it exercised it, and	25	set out in paragraph (ii) of its skeleton, and are based
	9		11
1	you can see this at a more abstract level by the fact	1	on a similar categorisation which you will have seen in
2	that it's the agreed position between the OFT's expert	2	its approach 1.8, I think, the introductory part of the
3	Dr Walker, and Asda's expert Mr Dryden, that Asda's	3	decision, and 6.15 which is when they get into the
4	pricing, actual pricing, matched the manufacturer parity	4	description. Those five pillars are: firstly the
5	and differential aspirations, that phenomenon non-being	5	manufacturers' strategies; secondly written trading
6	called adherence, 40 per cent of the time. In other	6	agreements; thirdly contacts, which are mainly in the
7	words, 60 per cent of the time it didn't.	7	form of email between the manufacturer and the retailer
8	So on the agreed basis between the experts, Asda was	8	concerned about prices of that manufacturer's product,
9	only complying 40 per cent of the time with manufacturer	9	retail prices of competing manufacturers' brands, and
10	aspirations.	10	the retail prices of the retailers' competitors, so that
11	I think the OFT relies at one point on, I think,	11	sort of breakdown.
12	an Imperial report inside saying "Asda is doing jolly	12	The fourth point is the payment and withdrawal of
13	well and they comply most of the time with our	13	bonuses, the tactical bonuses, to incentivise the
14	requirements or our desired P&Ds", not so apparently	14	retailer to follow the manufacturer's strategy. The
15	according to the actual evidence.	15	fifth one is monitoring by the manufacturer, and in
16	Mr Dryden also shows that Asda's adherence in that	16	certain cases, realignment of the retailer's price.
17	technical specialised sense is higher if you measure it	17	Now, the OFT says not all of those have to be
18	against RSPs, the recommended selling prices. So the	18	present in each case, not all of them are present in
19	suggestion that the P&D arrangements alleged to exist by	19	each case, and it generalises across the retailers in
20	the OFT increased compliance with the manufacturer P&D	20	that fashion, builds up a mosaic, if you like.
21	aspirations is just not one which is borne out.	21	We say it's pretty clear that the core pillars are
22	Our evidence also shows that the manufacturers'	22	the middle three, because manufacturers can have
23		23	whatever strategy they like, but unless it's bought into
	desired differentials were really contingent on the	23	whatever strategy they like, but unless it s bought into
24	desired differentials were really contingent on the wholesale pricing changes and not the other way around.	23 24	by the retailer then that remains a unilateral
24	wholesale pricing changes and not the other way around.	24	by the retailer then that remains a unilateral

ı	of its skeleton.	ı	work through those. I am not proposing to do that now.
2	Likewise, monitoring. You can only have a concern	2	I suppose perhaps the mini opening may be a more
3	with monitoring if you are monitoring something, and	3	appropriate time to deal with that.
4	that must be, on the OFT's case, an agreement to fix and	4	Asda has sought to engage and the OFT has resisted
5	maintain parities and differentials in the way that they	5	that. We say it's not appropriate, really for the
6	describe. So it's those three central pillars that	6	reasons I have already given, for the OFT to say: well,
7	really matter, the end ones are just looking as if they	7	we rely on the totality of the evidence, when you are
8	are holding up the edifice, but they are not really.	8	dealing with individual bilateral agreements it at least
9	The second point I want to make is and I'll try	9	has to show how you can read across from one
10	not to bang on about this too much Asda has tried to	10	relationship to another. That's the importance of the
11	deal comprehensively with the evidence put forward by	11	vertical point. As I've already said, and I won't
12	the OFT in the decision, so in our notice of appeal we	12	repeat it, it's normal. The Court of Appeal has said it
13	went through every document relating to Asda, and	13	is normal for pricing for manufacturers to have pricing
14	likewise our witnesses. You will find that, if the	14	aspirations for their own products, and you have to have
15	references would assist, in our notice of appeal. As	15	a high threshold to show that those desires overstep
16	regards Imperial, it's 144 to 155 of our notice of	16	some legal mark. It's hard to see why in principle that
17	appeal, and as regards Gallaher, it's 163 to 165 because	17	mark is overstepped simply because the desire may be by
18	there are very few Gallaher documents. At the end of	18	reference to the pricing of competing brands. Again,
19	each of our witness statements there is a document by	19	you know, it would be naive to think that anyone's
20	document review of the documents to which those	20	prices are set in a vacuum.
21	witnesses can speak.	21	I think probably enough has been said, by others, on
22	The defence doesn't engage with that review of the	22	OFT's backtracking as to the finding in the decision
23	documents, and the OFT puts forward a few new documents	23	that the manufacturer requirements were parallel and
24	that are not mentioned in the decision. In the reply we	24	symmetrical, and is now falling back on similar
25	dealt with each of those new documents, and if the	25	DR SCOTT: Sorry, are you moving on from documents?
	13		15
1	references would assist, for Imperial it's 116 to 134	1	MR FLYNN: I was shortly going to move on to the individual
2	and for Gallaher it's 135 to 141.	2	relationships and the OFT's basis for that.
3	We will probably mention some of those in the course	3	DR SCOTT: If you are coming back to that, that's
4	of the morning, but without going into too much detail.	4	MR FLYNN: Yes, yes, in fact that is all I am going to deal
	In the defence, it's worth noting just a few things.		
5	in the defence, it's worth nothing just a few things.	5	with for the rest of my time, such as that may be. As
5 6	<u> </u>	5 6	with for the rest of my time, such as that may be. As I said, on the law I don't think we have a lot now to
	Over half of those documents pre-date the infringement	5 6 7	I said, on the law I don't think we have a lot now to
6	Over half of those documents pre-date the infringement period. It's not just a technical point, it's just	6 7	I said, on the law I don't think we have a lot now to add to what Mr Brealey has said. We may in closing
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6 7 8 9 10	Over half of those documents pre-date the infringement period. It's not just a technical point, it's just surprising that that's the best evidence the OFT can muster. Certainly where the OFT says in its defence that it relies particularly on the correspondence during	6 7 8 9 10	I said, on the law I don't think we have a lot now to add to what Mr Brealey has said. We may in closing submissions, but essentially we are there. You have heard a lot about the theory of harm and so forth, and I don't wish to weary the Tribunal with that. I simply
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1	As regards Gallaher's strategy, we don't think that	1	So we say that in those circumstances the OFT has
2	the OFT has put forward any document showing that	2	a burden to discharge to show that references to
3	Gallaher had a strategy for pricing specifically	3	Gallaher's own prices, retail prices, in absolute terms
4	applying to Asda. The decision refers to an internal	4	in the correspondence are in some way implicitly
5	Gallaher document about strategy, 6.463, but there is no	5	references to some linkage with Imperial, and that
6	suggestion that that document was ever sent to Asda, and	6	linkage is only consistent with the infringement
7	that's a pre 2000 document. None of the documents	7	alleged, that there was some agreement to fix prices by
8	appear in the annex 4, which is the Gallaher/Asda annex.	8	reference to P&Ds, and not, for example, simply
9	Again, as I've said, the OFT now accepts that strategy	9	a manufacturer's interest in its own pricing not being
10	is a unilateral matter, you have to go on to show that	10	too high relative to its rivals, which would be a lawful
11	it was accepted.	11	and normal concern. We say the OFT then just has not
12	Written trading agreements. The position is pretty	12	made out the case in respect of Gallaher and Asda.
13	straightforward, as far as Asda is concerned, with	13	Bonuses, the fourth pillar. Again, this is
14	Gallaher. There was no written trading agreement	14	a defective part of the decision. The decision says at
15	containing any references to parities and differentials	15	paragraph 6.500 that there are documents relating to the
16	or attaching a schedule. The Gallaher trading agreement	16	provision of tactical bonuses from Gallaher to Asda,
17	with Asda is in annex 4 at tab 2A. It's an A tab	17	examples of which are set out in the section headed
18	because that's a document provided by Asda, it is	18	one of the sections I have just referred you to
19	exhibited to Mr Jolliff's witness statement. The OFT	19	"Contacts regarding retail prices".
20	doesn't refer to it.	20	The decision doesn't say what those documents are.
21	We say the fact that that trading agreement doesn't	21	We pointed that out in the notice. The OFT, at 187 of
22	have any reference to P&Ds in it whatsoever is	22	its defence, identifies some documents which, as I've
23	important, not only for that fact as regards pillar 2,	23	already said, we dealt with in the reply.
24	no written trading agreement, but it also affects to	24	We say those documents, by and large, concern
25	pick out Mr Saini's phrase how sinister the	25	tactical bonuses, promotional bonuses which were coming
	17		19
1	spectacles are when you come to look at the context. If	1	to an end, or in Mr Summers' terms the discount was
2	there is no overarching framework set by a contract in	2	being withdrawn so that the cost price then goes up,
3	relation to P&Ds, you can't just put your P&D spectacles	3	with the result that in the ordinary case the shelf
4	on when you come to look at the contacts.	4	price would ordinarily increase assuming Asda wishes to
5	So if we look briefly at the OFT's evidence under	5	maintain its margin., and that with only one exception
6	the third pillar, as I've already said, annex 4 is	6	those documents don't refer to ITL brands at all. The
7	a very thin file. There are only 19 documents in it.	7	only exception is the one that I think you have already
8	Six of those, I think, fall outside the infringement	8	seen, where Gallaher is asking whether Imperial would be
9	period, and that's in itself quite eloquent.	9	increasing Richmond after a Budget increase in 2001, and
10	Actually, when you look at the decision and how it's		
11		10	that's the communication of the sort which Mr Howard has
	structured, the OFT doesn't seek to advance	11	shown you, which may be a cheeky attempt by
12	a proposition that Gallaher instructed Asda to price	11 12	shown you, which may be a cheeky attempt by a manufacturer to get some inside information, but it's
13	a proposition that Gallaher instructed Asda to price Gallaher brands by reference to Imperial's, or even	11 12 13	shown you, which may be a cheeky attempt by a manufacturer to get some inside information, but it's not the infringement we are concerned with here.
13 14	a proposition that Gallaher instructed Asda to price Gallaher brands by reference to Imperial's, or even actually discussed those with Asda. The structure of	11 12 13 14	shown you, which may be a cheeky attempt by a manufacturer to get some inside information, but it's not the infringement we are concerned with here. So we say that withdrawing tactical bonus is not in
13 14 15	a proposition that Gallaher instructed Asda to price Gallaher brands by reference to Imperial's, or even actually discussed those with Asda. The structure of the decision, you will see if you run through it, and	11 12 13 14 15	shown you, which may be a cheeky attempt by a manufacturer to get some inside information, but it's not the infringement we are concerned with here. So we say that withdrawing tactical bonus is not in itself objectionable and has to show some linkage to
13 14 15 16	a proposition that Gallaher instructed Asda to price Gallaher brands by reference to Imperial's, or even actually discussed those with Asda. The structure of the decision, you will see if you run through it, and bearing in mind the three subcategories in this pillar,	11 12 13 14 15	shown you, which may be a cheeky attempt by a manufacturer to get some inside information, but it's not the infringement we are concerned with here. So we say that withdrawing tactical bonus is not in itself objectionable and has to show some linkage to affect a parity or differential with an Imperial brand
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13 14 15 16 17 18 19 20 21 22 23 24	a proposition that Gallaher instructed Asda to price Gallaher brands by reference to Imperial's, or even actually discussed those with Asda. The structure of the decision, you will see if you run through it, and bearing in mind the three subcategories in this pillar, there is no section in the Asda/Gallaher part of the decision about contacts between Gallaher and Asda regarding Asda's retail prices for Gallaher's competitors. That subheading isn't there. There is a heading about contacts concerning retail prices, but that breaks down into retail prices for Gallaher's brands and contacts regarding retail prices charged by Asda's competitors, just no reference to Imperial, and	11 12 13 14 15 16 17 18 19 20 21 22 23 24	shown you, which may be a cheeky attempt by a manufacturer to get some inside information, but it's not the infringement we are concerned with here. So we say that withdrawing tactical bonus is not in itself objectionable and has to show some linkage to affect a parity or differential with an Imperial brand in the context within which we are currently operating, and that link isn't made. The only evidence that the OFT's skeleton refers to again only concerns Gallaher changes after a manufacturer price increase without any reference to ITL brands. Just for the note, it's mentioned in footnote 129 of the OFT's skeleton, and that document is addressed by
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	so we say that the evidence shows that, you know,	'	i said, was being competitive with its thosen rivais.
2	the evidence does not show that those bonuses were given	2	In relation to trading agreements, now, here we have
3	or withdrawn in the case of Asda and Gallaher to affect	3	three. The first one is the 2001 trading agreement.
4	any P&Ds.	4	The Asda/Imperial documents are in file 14. {D14} The
5	Monitoring, again, as I've said, this is a sort of	5	2001 trading agreement is in tab A of that file, because
6	non-pillar, it's there but it's not actually holding up	6	again it's not one that the OFT refers to, there is no
7	the pediment, but again there is very little evidence	7	reference to it in the relevant paragraph of the
8	given about monitoring, and such monitoring as there is	8	decision, which is 6.399. That agreement, as you will
9	relates only to Gallaher prices. So we say the OFT's	9	see if you glance at it, makes no reference whatsoever
10	evidential case as regards Asda and Gallaher is really	10	to parities and differentials. Some of the content is,
11	wholly deficient as well as very short.	11	I think, marked as confidential, but there is no
12	Now if I might turn to Imperial again, by reference	12	reference to parities and differentials in that
13	to the same five pillars. There are a few more	13	agreement.
14	documents in the case of Imperial, but we say the case	14	I come back to my spectacles point, in the same way
15	is absolutely no stronger. Again, as far as strategy is	15	as for 2000. So for 2000 and 2001 you cannot just put
16	concerned, it's unilateral, and we say there is no	16	on your P&D spectacles when you look at the context
17	evidence that Asda bought into Imperial's strategy. Why	17	between Imperial and Asda. Half the documents, this is
18	would it? There is plenty of evidence that it doesn't.	18	file 14, more than half, concern those periods 2000 to
19	The OFT has again not responded directly to our case,	19	2001 when there is no written trading agreement making
20	Mr O'Donoghue suggested it was a bit like a game of	20	any reference to P&Ds.
21	"whack a mole", they ignore what we have and then they	21	Then there are two further trading agreements, and
22	put out another one which we will have to hit later.	22	those are in tabs 53 and 80 of that file. Maybe it's
23	This doesn't mean the OFT has lots of wonderful	23	worth just opening the first of those. If the Tribunal
24	documents that prove its case. Each one is just less	24	has that, you will see at the bottom of the first page
25	convincing than the others. Again they pre-date the	25	that the date of signature is 5 June 2002, although the
	21		23
1	date of the infringement, they are internal to ITL,	1	period said to be covered by the agreement at the top,
2	there is nothing on the face to link them to P&Ds and so	2	by the side of the "confidential" box is from
3	forth.	3	1 January 2002.
4	We have made a particular point in our pleadings	4	Now, the decision at footnote 498 said that the OFT
5	that it's not an appropriate way for the OFT to carry on	5	inferred that a pricing schedule attached in fact to the
6	in the decision to engage in what we have called mere	6	third trading agreement, the one at tab 80, also formed
7	clerical listing. You can't simply refer to documents.	7	part of the second trading agreement. The OFT has
8	We know there are documents, what we need to know is	8	accepted in its defence paragraph 76 for your note
9	what conclusion the OFT draws from them, otherwise it's	9	that that is an error on its part.
10	not discharging its burden of proof and it's not	10	The true position is that Imperial sent price
11	permitting adequate defence rights and that sort of	11	differentials said to apply from 25 June on 11 June of
12	objection obviously applies with even greater force to	12	that year, and that is the document in the next tab,
13	documents that are pulled out for the first time in	13	number 54.
14	their skeleton.	14	That schedule, as the OFT's case, sets out maximum
15	The other point on strategy, and maybe this is the	15	differentials. In most cases it says the Imperial
16	time to make it, I think I have already hinted at it,	16	brands are to be no more expensive than the specified
17	Asda of course has its own strategy, and there is no	17	Gallaher brand; in certain other parts, it says the
18	reason to think that Asda's strategy would be the same	18	pricing of the Imperial brand is X pence below the
19	as Imperial's. I've said that the relationship was not,	19	Gallaher brand. We say that is also a maximum price in
20	on our evidence, a trusting one, and it verges on	20	respect of the Imperial brand and fixes no minimum price
21	animosity at times, and you will see examples of that.	21	for the Gallaher brand.
22	Mr Mason says, essentially, "Our pricing was influenced	22	The important point as regards the OFT's case in
23	by their cost pricing and promotional funding, of course	23	respect of Asda and Imperial is that the OFT expressly
24	it had to be, but we decided our price policy and we	24	says that even though Imperial communicated maximum
25	checked it out". And the principal focus for Asda, as	25	differentials, they were in fact implemented as fixed
	22		24

1	differentials, and that's paragraph 6.404 of the	1	Asda and Imperial, and we say there is no such evidence.
2	decision.	2	Now, I am coming back to that agreement. Let me
3	So that's an important point, going to the evidence.	3	just say, just for the chronology, in relation to the
4	Sorry, madam, you are examining the agreement?	4	third agreement, which is the one at tab 80 maybe
5	THE CHAIRMAN: Well, just the document at tab 54 isn't	5	it's possible to keep a finger in the first. If you
6	worded as if it's introducing something new, it's worded	6	turn up tab 80 on the front page of it you will see that
7	as if it's a revised version of something that already	7	that agreement again if you look at the bottom was
8	exists. So is that, if we look at page 14 of tab 53,	8	signed in August 2003, so after the end of the
9	which refers to strategic pricing	9	infringement period. So we say even if the OFT said,
10	MR FLYNN: I believe the position 54 is Imperial's own	10	well, you know, it applied from 1 January, so there was
11	statement of its strategic pricing requirements, and	11	a retroactive bonus payable, that doesn't demonstrate
12	until June of that year there was no agreement with Asda	12	that anything Asda was doing before the agreement was in
13	that made any reference to such things. So he's sending	13	pursuance of or an expectation of receiving that bonus.
14	the strategic pricing requirements to fit in, as it	14	How can you show by that that Asda had agreed to
15	were, behind that agreement, as I understand it.	15	implement's Imperial's P&D strategy?
16	DR SCOTT: But if one turns to the wording of the covering	16	The 2003 agreement also has wording in it right at
17	letter in 54, it says:	17	the end making clear what our witnesses say was always
18	"I will change the relative price positions, I am	18	clear, but having had contact with the OFT, Imperial
19	therefore taking the opportunity of enclosing a revised	19	wish to make it even clearer that Asda was at all times
20	summary."	20	free to set its own retails for products in its stores.
21	I think our point is that	21	Again, 2003 agreement sets out maximum prices but
22	MR FLYNN: I understand the point. I think that	22	that's not the OFT's case, which as regards Asda is that
23	THE CHAIRMAN: It may be that we are falling into the same	23	they were implemented as fixed.
24	trap that we advised you not to fall into.	24	The point I wish to make about both those trading
25	MR FLYNN: Mr Hall and indeed all the account managers will	25	agreements, coming back to the one at tab 54, if you
	25		27
1	have had to revise their schedules. As I think was said	1	turn to the third page of it, so number 14, the sentence
2	yesterday, one of the consequences, if you like, of the	2	under the heading "Trading Agreement Package", if
3	Imperial approach was that they were constantly having	3	the Tribunal has that, there are a couple of
4	to do that, so he is going to have to be doing that for	4	confidential boxes, but it says:
5	all his accounts. He now has an agreement with Imperial	5	"Subject to Imperial Tobacco's requirements on
6	that makes reference to him, and he sends them. I think	6	[certain matters] and strategic pricing being met, ITL
7	that is the force of it.	7	will make a quarterly payment of [a certain not very
8	THE CHAIRMAN: We will no doubt hear from the relevant	8	large amount] per thousand [it should be sticks, no
9	people in due course.	9	doubt] on all cigarette purchases from ITL."
10	MR FLYNN: That of course can be put. Bear in mind	10	The point we make about that is that bonus is not in
11	Mr Jolliff's evidence is of course he was well aware of	11	any way ventilated or weighted as between those
12	their pricing desires, and he would occasionally be	12	categories of desires by Imperial.
13	given one of these schedules and he would put them in	13	I am not quite sure why the headings are
14	the bin, that's what he said.	14	confidential, but anyway, there they are. You see what
15	As to Asda having an agreement which even refers to	15	they are. You will see that that bonus is payable by
16	them, the first example is the agreement at tab 53,	16	reference to all those requirements, and that strategic
17	which is operative from June.	17	pricing aspirations is only one of those.
18	The point I was making which doesn't appear from	18	THE CHAIRMAN: Do we know whose that handwriting amendments
19	this agreement, although I do wish to go back to the	19	are, or are they contemporaneous or
20	text for a separate point, is that the OFT's case is	20	MR FLYNN: We believe it's someone at the OFT's handwriting.
21	actually, whatever the schedules said, in Asda's case	21	That I think is the same, really, throughout this file,
22	they were applied as fixed differential requirement.	22	there is an eager commentator at work.
23	So we say having the trading agreement doesn't get	23	Bear in mind that the evidence is that this bonus
24	you very far in that case, you actually have to show via	24	was simply always paid, this is the ongoing bonus which
25	the evidence that that was the arrangement as between	25	operates effectively as a cost price reduction, the
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a strategic pricing requirements were concerned. Asda's although the evidence also is that as far as the authernee was 40 per cent a best and there was although the provision in the stand there was ever the withdrawn for the non-compliance and there is no provision in this agreement, untiles some of the others, for any form of claw-back or reduction for partially for the partial saying "flux you agreed to do this, and you have a partial saying the say for the partial saying the claw or the partial saying the partial saying the say for the partial saying the partial partial saying saying saying saying saying sa	1	evidence is it was always paid without question,	1	We say the OFT is not entitled simply to read them
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7 Provision in this agreement, unlike some of the others, 8 for any form of claw-back or reduction for partially 8 significant. What you don't find in the documents is perhaps also 9 for any form of claw-back or reduction for partially 8 significant. What you don't find is something from 10 hilling those requirements. 9 Imperial saying: "But you garged to do thin, and you 10 haven't, or "I am glad to see that you have". There is 10 haven't, or "I am glad to see that you have". There is 11 reply, but to infor an agreement to fix the prices in 11 nothing like that. There is nothing to say "You are out of like with partites and differentials from this is 12 of kildre in accordance with our agreement, please 13 repose with a partites and differentials from this is 12 or kildre in accordance with our agreement, please 14 repose 14 repose 15 the manufacturer making extremely clear to the retailer with whom, as I've said, it does not have a particularly thing. I make the point now, there is nothing in these agreements about 14 have said, by reference to your own pricing policy and 15 pricing below the recommended retail price? 15 the manufacturer making extremely clear to the retailer with whom, as I've said, it does not have a particularly thing. I make the point now, there is no him in the say agreement as a with manufacturer making extremely clear to the retailer with whom, as I've said, it does not have a particularly thing. I manufacturer making extremely clear to the retailer with whom, as I've said, it does not have a particularly in the particularly thing. I manufacturer making extremely clear to the retailer with whom, as I've said, it does not have a particularly in the exploited. If they are withdrawing their with with with want to be on the hook for another with with with a tactical bonus is offered then any the particularly in the particularly in t	6		6	
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9 Imperial saying "But you agreed to do this, and you in febral in our 10 Sow essy, and we spell this out in detail in our 10 haven", or "I am glad to see that you have". There is 11 reply, but to infer an agreement to fix the prices in 1 nothing like that. There is nothing to say," You are out of kilter in accordance with our agreement, please of kilter in accordance with our agreement please of kilter in accordance with	8		8	
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1	THE CHAIRMAN: I wasn't thinking it was a point against you,	1	so for them we only see a parity between Richmond and
2	rather I was thinking it was a point that you might want	2	Dorchester. We see Sterling popping up when you have
3	to make that one can't assume that the same incentives	3	a retailer who is selling all three brands.
4	or constraints or requirements or whatever need to be	4	Now, I've said in many respects that's the starting
5	set or imposed on each retailer, simply because the	5	point. A number of the appellant retailers dispute the
6	manufacturer has an overall strategy which it would like	6	fact that they have an agreement with Gallaher, that's
7	to see implemented by each retailer, it depends on their	7	Morrisons, or that they have at least a written
8	assessment of how the retailer is going to respond.	8	agreement, that's Safeway and ITL, and you have the
9	I agree one aspect of that response may well be that	9	submission on behalf of Asda that you have just heard.
10	they know that Asda's not going to be incentivised or	10	Those qualifications apart, and I pause to say that it's
11	not going to comply with any such requirement. The	11	not entirely clear that ITL's view of the retailers that
12	differentiation between the pricing policies of the	12	it had agreements with is exactly the same as those
13	different retailers may have an effect on how the	13	retailers who contest having an ITL agreement, but
14	manufacturers' relationship with them develops.	14	anyway.
15	MR FLYNN: Yes, I think that's right, and I think one has to	15	That apart, the real dispute isn't about the
16	look at each individual relationship, and that's what's	16	existence of agreements or concerted practices, it's
17	required here, that each manufacturer/retailer pairing	17	rather about what was agreed or what was concerted.
18	has to be looked at, as it were, on its own merits.	18	That's particularly the case so far as ITL is concerned
19	Indeed, I think as you said, those who have a lower	19	because it definitely had a policy of signing up
20	price policy in the market are going to take more	20	retailers to this horizontal linking of specified
21	persuasion if they can be persuaded to go along with	21	brands, and so from ITL's perspective one of the most
22	things which are against their interest. Asda's	22	important aspects of the case is figuring out what
23	position on that is really very clear, and express on	23	exactly it was that ITL was seeking to do and did
24	the face of some of these documents.	24	achieve in relation to the retailers. So it's more
25	THE CHAIRMAN: Yes. Thank you.	25	about what was agreed or concerted rather than whether
	37		39
	31		55
1	MR FLYNN: So unless I can help further at this stage	1	or not there was an agreement or a concertation.
1 2		1 2	
	MR FLYNN: So unless I can help further at this stage		or not there was an agreement or a concertation.
2	MR FLYNN: So unless I can help further at this stage THE CHAIRMAN: No, thank you very much, Mr Flynn.	2	or not there was an agreement or a concertation. It's also right to say that one of the issues that
2	MR FLYNN: So unless I can help further at this stage THE CHAIRMAN: No, thank you very much, Mr Flynn. MR FLYNN: those are my submissions.	2	or not there was an agreement or a concertation. It's also right to say that one of the issues that we will also be looking at is the why: why was the
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1	that object infringements are not limited to those which	1	arrangements for which the methodology is much simpler.
2	experience shows to be anticompetitive. The reference	2	Much simpler than the norm.
3	is to the transcript, Day 3, page 1, line 21, down to	3	So we can put away ENS, and I'll turn now to my
4	page 2, line 3. So a large part of his later	4	fourth point about the object submissions. This
5	submissions yesterday in which he relied on the absence	5	concerns the word "capable".
6	of previous competition analysis of what I'll call P&D	6	ITL made a number of submissions directed to the use
7	requirements is, in our submission, irrelevant.	7	by the OFT in the decision of the word "capable", but in
8	Thirdly, he cited the European Night Services, or	8	our submission this rather misses the point, because
9	ENS, case as authority for the proposition that object	9	when you are analysing an arrangement in its legal and
10	infringements are obvious cases. That appears in the	10	economic context and you are asking a question about its
11	transcript, Day 3, page 4, lines 21 to 25.	11	nature, you are not directing your investigation at its
12	Now, it may be useful just to look at the passage he	12	actual effects, because that of course is the
13	cited in ENS, and that's in the authorities bundle	13	alternative effects analysis that you get in the chapter
14	number 2 at tab 31 {A2 tab 31}. So it's authorities	14	1 infringement.
15	bundle 2, tab 31, and he was looking at paragraph 136,	15	So when you are looking at nature, you are looking
16	which is on page 22 of 38.	16	at something else, and actually in short the nature of
17	If you have that page, you will see that the phrase	17	an arrangement is its capability to do something.
18	or core clause of the sentence that he was focusing on	18	At one point I thought that the submissions made on
19	was towards the bottom of the paragraph after citations	19	behalf of ITL were getting into theological areas and it
20	of cases like Delimitis and Gottrup-Klim, and it's the	20	seemed extremely familiar to anybody who has read deeply
21	phrase beginning with the word "unless" and leading to	21	into debates in the early Christian church about the
22	the citation of the Trefilunion case.	22	nature of Christ, and in our respectful submission,
23	Now, Trefilunion is a very curious case to cite,	23	these issues, which in many respects are linguistic
24	particularly paragraph 109 of the Trefilunion, if the	24	ones, ought to be put on one side. All we have, and
25	proposition being advanced is one that concerns the	25	this goes back to my first point, is a relatively simple
	41		43
1	nature of an object infringement. Because paragraph 109	1	approach. It may be onerous to apply it in reality, but
2	of Trefilunion isn't about that at all. Paragraph 109	2	the methodology is basically simple, it's that you look
3	of Trefilunion is authority for the proposition that the	3	at the arrangement and you analyse it in the light of
4	rule of reason does not apply to clear infringements of	4	its legal and economic context for the purpose of
5	competition law.	5	identifying its nature.
6	What you can say about paragraph 136 of the judgment	6	
7			
'	in FNS is that it sats out a mathodology for assassing		That leads me to my last point on object, and this
8	in ENS is that it sets out a methodology for assessing	7	is a mantra again religion seems to pervade the
8 9	agreements or arrangements that, in our jurisdiction,	7 8	is a mantra again religion seems to pervade the approach of the appellants, because we now have mantras
9	agreements or arrangements that, in our jurisdiction, are chapter 1 infringements, and it divides them into	7 8 9	is a mantra again religion seems to pervade the approach of the appellants, because we now have mantras as well, spells and incantations and this is the one
9 10	agreements or arrangements that, in our jurisdiction, are chapter 1 infringements, and it divides them into two parts. You have the generality, for which the	7 8 9 10	is a mantra again religion seems to pervade the approach of the appellants, because we now have mantras as well, spells and incantations and this is the one that the OFT abandoned an effects based case and
9 10 11	agreements or arrangements that, in our jurisdiction, are chapter 1 infringements, and it divides them into two parts. You have the generality, for which the methodology is set out in that part of the	7 8 9 10 11	is a mantra again religion seems to pervade the approach of the appellants, because we now have mantras as well, spells and incantations and this is the one that the OFT abandoned an effects based case and therefore an objects based case must be flawed.
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1	an imperfect set of information, and you have to screen	1	an anticompetitive effect resulting from the agreement?
2	out certain things, certain facts. In some instances	2	And what is your response to the points that are made by
3	it's the absence of evidence that relate to other	3	the appellants as to what threshold of likelihood of
4	matters that may be concealing the truth of what was	4	a resulting anticompetitive effect is necessary or
5	actually going on.	5	appropriate before a particular kind of restraint is
6	So the problem with an effects approach, if one	6	characterised as an object infringement?
7	limited competition law to an effects approach, it would	7	MR LASOK: Well, our submission to that is that that is
8	pose significant difficulties for those who wish to	8	an academic debate in the present case, because in the
9	enforce respect for the Competition Rules if in every	9	present case, what we are dealing with here are
10	case it was necessary to use an effects type of	10	arrangements that are, by their nature, anticompetitive.
11	analysis.	11	I am not trying to avoid the question, it simply is
12	In our submission, that's one of the reasons, one of	12	that when you look at this type of arrangement and
13	the policy reasons why one can use an object approach.	13	analyse it, as has been done both by the OFT and by
14	So in the present case, the fact that the OFT was not	14	Professor Shaffer, it's quite clear that it's
15	confident that an effects analysis would be sustainable	15	anticompetitive and that is its nature.
16	is actually neither here nor there, it's simply	16	Now, if you are asking, then, a slightly different,
17	an illustration of the problems that a body seeking to	17	rather more academic point about degrees of likelihood
18	enforce the Competition Rules faces when it is trying to	18	that may be relevant to a case that is not this case,
19	reconstruct what happened in the past.	19	our submission would simply be that when you are looking
20	In those circumstances it's perfectly legitimate for	20	at the nature of something, you must be looking at its
21	it to have recourse to the object approach, and if it	21	inherent properties, which include necessarily its
22	does that, then its decision has to be tested by	22	capabilities to do something, because whatever else is
23	reference to the criteria that concern that approach,	23	its nature?
24	the objects approach, and not by reference to what	24	If you then ask a separate question, which is the
25	amounts to nothing more than speculation about what	25	likelihood, you need in our respectful submission to be
	45		47
1	might have happened so far as the effects of the	1	a bit precise about what likelihood you are talking
2	arrangement are concerned.	2	about. For example, are you talking about a likelihood
3	We all know that there are a whole range of reasons	3	that in given circumstances something is going to
4	why the effects analysis or the effects based approach	4	happen? Because that gets you into an effects problem,
5	would be defective and that one of the most famous of	5	and I can illustrate it in this way: let's suppose you
6	course is that of the cartel in which a significant	6	have the proverbial price-fixing cartel. Now, by its
7	number of members of the cartel cheat on it.	7	nature, it is anticompetitive. Its capability
8	So in our submission, there is nothing in these	8	necessarily is to prevent, restrict or distort
9	points about object infringement, and I am going to pass	9	competition.
10	now to sorry.	10	If you said or changed the question to: what is the
11	DR SCOTT: Sorry, just on your fourth point, at 5/16 in	11	likelihood of it doing so?, you would have to take into
12	today's transcript Mr Flynn was addressing mere	12	account factors such as the propensity of particular
13	capability, and T-Mobile, in which capability is writ	13	members of the cartel to engage in cheating. That then
14	large.	14	gets you into an exercise that carries you out of
15	MR LASOK: Yes.	15	an analysis of the arrangement by reference to its legal
16	DR SCOTT: He was characterising your position as T-Mobile	16	and economic context.
17	being a step change towards mere capability. It may be	17	It is I would suppose, but I say this only on the
18	helpful if you clarify how you take T-Mobile.	18	basis of anecdotal evidence a fact of life that when
19	MR LASOK: Well, in our submission, T-Mobile is	19	you have a cartel, at some point in the career of the
20	an expression of a theme that runs through the case law	20	cartel somebody is going to start cheating, and you do
21	concerning the nature of object infringements.	21	have situations in which, over a period of time, cartels
22	THE CHAIRMAN: If this point about capability simply refers	22	simply dissolve because the degree of cheating gets too
23	to the question of what the nature of something, are you	23	much.
24	then saying that the way you use the word "capability"	24	So if you are asking the question of likelihood,
25	has nothing to do with a threshold of likelihood of	25	what you are doing is bringing into the analysis a whole
	46		48

1	load of things that, in our respectful submission, don't	1	to have been an effects case?
2	go to the question of the nature, the intrinsic nature	2	MR LASOK: I assume that the "you" in this instance is the
3	of what it is that has been done.	3	OFT?
4	DR SCOTT: Capability tends to be about "could", if we are	4	MR SUMMERS: Yes.
5	going right to way through to effect, then we would be	5	MR LASOK: Somebody will pass me up an answer to that
6	at "would", and in the middle I suppose it's "would be	6	question. If I cast my mind back through my knowledge
7	expected" as distinct from "could be expected", if you	7	of the OFT's position, I am afraid that I don't recall
8	see a spectrum of things. Are you saying that you think	8	what the OFT's position is. But if you look at it from
9	the analysis goes to "could be expected" rather than	9	the perspective of a regulator, a regulator, I would
10	"would be expected"; in other words, a slightly lower	10	hypothesise, would be perfectly happy to run an object
11	threshold?	11	and an effects case if it was able to do so. If,
12	MR LASOK: Well, if you simply ask what its nature is, you	12	however, it came to the conclusion that there was too
13	are expecting that certain consequences are going to	13	much noise and an incomplete set of evidence to run
14	follow. If you say "could" or "would", you are	14	an effects case, then it would with regret fall back on
15	beginning to get into a linguistic difference that in	15	an object case.
16	our respectful submission is a bit too refined.	16	I am sure that somebody behind me will be possibly
17	I was going to say it's a bit too refined or too	17	contacting somebody to find out what the factual
18	crude, because I suppose it reverts back to the point	18	position actually was at some time in the dim and
19	I've just made, that it's beginning to move away from	19	distant past.
20	what it is you are examining, because you are examining	20	THE CHAIRMAN: Have you gone through your five points or are
21	the arrangement in question by reference to what I have	21	we still waiting
22	called its innate properties in the context, the legal	22	MR LASOK: I have gone through my five object points and
23	and economic context, in which it is going to operate,	23	I was now going to turn to the facts.
24	and you are drawing a conclusion.	24	So, what I was going to start off with was the
25	The conclusion necessarily implies an expectation	25	manufacturers' pricing strategies and the origins of
	49		51
1	that consequences will follow as a result of the innate	1	these P&D arrangements. I think that we could actually
2	properties or the nature of the arrangement.	2	start profitably with looking at Gallaher's response to
3	But if you then start going further than that and	3	the 2005 section 26 notice, which is in bundle 3 at
4	saying, "Shall we use the word 'could', shall we use the	4	tab 17. That's the SO bundle 3. {D3}
5	word 'would'," in our respectful submission you are	5	Tab 17, and I think you have seen this before, but
6	going to when I say "you", I should be using the word	6	if you go past the covering letter and onto the first
7	"one" one is beginning to get distracted and moving	7	page of the response, and go down to paragraph 1.5, this
8	off into something else.	8	is under the heading "How did Gallaher come to have
9	As I say, in order to answer things like "could" or	9	a written parities and differentials clause?"
10	"would", you may have to start looking at things that	10	Paragraphs 1.5 and 1.6 are quite interesting, I'll
11	are extraneous to the arrangement itself and what	11	read them out:
12	exactly is the legal and economic context in which it's	12	"It seems that at some stage one head of channel
13	operating.	13	began introducing a parities and differentials
14	Again, let's take this example of the price-fixing	14	clause into written trading agreements. The driver for
15	cartel, because everybody knows that one or a number of	15	this is not clear but it seems that the thinking was
16	members of a price-fixing cartel may be cheating at one	16	that it would do no harm."
17	time or another, but you wouldn't draw from that	17	Then in the next paragraph it says:
18	conclusion the fact that a price-fixing cartel was not	18	"The general view within Gallaher, however, was that
19	by its nature anticompetitive. It might be	19	a requirement for or agreement with retailers to observe
20	unsuccessful, but it wouldn't be anticompetitive.	20	parities and differentials served little purpose (as it
21	MR SUMMERS: Mr Lasok, obviously we have read and heard	21	did no more than reflect what would be retailer practice
22	a great deal about the length of time that the	22	in any event)."
23	investigation took, and that there is a sense in the	23	Now, it's right to say that in paragraph 1.10 on the
24	reading that it was a disappointment that you couldn't	24	next page Gallaher said, and I am reading now from the
25	pursue an effects case. Would you have preferred this	25	end of the first line:
	50		52

to price Gallaher's brands too high relative to key competitor brands in any one particular outlet." They then explain why, in their view, it wasn't RPM, Reside Price Maintenance. There is a slight problem here, because in paragraphs 1.5, 1.6 and 1.10 we now have three different explanations of Gallaher's apparent thinking. One is, in 1.5, that - well, the explanation in 1.5 is that explanations of Gallaher's apparent thinking. One is, in 1.5, that - well, the explanation in 1.5 is that 10 they have no idea. 1.6 simply says what their general 11 view was, which was that it served little purpose and 12 1.10 speculates as to an intended effect and therefore 12 1.10 speculates as to an intended effect and therefore 13 1.10 speculates as to an intended effect and therefore 14 What is particularly useful, however, is 1.0, which 15 explains what the partities and differentials clause in 16 the Gallaher agreements was 70 wall see that it was 17 a requirement to maintain the differential between 18 a Gallaher brand and a competitor brand in the same 19 price segment, and they give an example, and you will 20 see that what they are talking about is fised price 21 points, ether a party or a specified differential. 22 Now, in our submission, Gallaher's admission was 23 clearly the customer of a searching review of its 24 position. For example, 1.5 and 1.6 indicate quite 25 clearly that enquires have been made internally and one 26 sold-arity that enquires have been made internally and one 27 reside of the section of the decument dealing 28 vith ingerestes. The party or a percentage in the middle you 29 bave the next section decuments, and then they amend to 29 to condition that it made lightly or without 20 see that what they are talking about is fised price 21 call infer that they not only talked to people, but also 22 looked at internal documents, and then they amend to include the party or a percentage of the training review of its 29 position. For example, 1.5 and 1.6 indicate quite 20 call that the proof only talked	1	"Its intended effect was to encourage retailers not	1	this request for information.
They then explain why, in their view, it wasn't RPM, Resale Price Maintenance. There is a slight problem here, because in The paragraphs 1.5, 1.6 and 1.10 we now have three different paragraphs 1.5, 1.6 and 1.10 we now have three different paragraphs 1.5, 1.6 and 1.10 we now have three different paragraphs 1.5, 1.6 and 1.10 we now have three different paragraphs 1.5, 1.6 and 1.10 we now have three different paragraphs 1.5, 1.6 and 1.10 we now have three different paragraphs 1.5, 1.6 and 1.10 we now have three different paragraphs 1.5, 1.6 and 1.10 we now have three different paragraphs 1.5, 1.6 and 1.10 we now have three different paragraphs 1.5, 1.6 and 1.10 we now have three different paragraphs 1.5, 1.6 and 1.10 we now have three different paragraphs 1.5, 1.6 and 1.10 we now have three different paragraphs 1.5, 1.6 and 1.10 we now have three different paragraphs 1.5, 1.6 and 1.10 we now have three different paragraphs 1.5, 1.6 and 1.10 we now have three different paragraphs 1.5, 1.6 and 1.6 paragraphs 1.5 and 1.6 paragraphs 1.5, 1.6 and 1.7 and 1.5 and 1.6 paragraphs 1.5, 1.6 and 1.7 and 1.5 and 1.6 paragraphs 1.5, 1.6 and 1.7 and 1.5 and 1.6 paragraphs 1.5, 1.6 and 1.7 and 1.5 and 1.6 paragraphs 1.5, 1.6 and 1.5 and 1.6 indicate quite positive paragraphs 1.5, 1.6 and 1.5 and 1.6 indicate quite positive paragraphs 1.5, 1.5 and 1.6 indicate quite positive presenting review of its paragraphs 1.5, 1.5 and	2	to price Gallaher's brands too high relative to key	2	MR LASOK: Quite so, but our submission is that there is no
5 Resole Price Maintenance. 6 There is a slight problem here, because in 7 paragraphs 1.5.1.6 and 1.10 we now have three different 8 explanations of Gallaher's apparent thinking. One is, 10 in 1.5, that - well, the explanation in 1.5 is that 10 they have no idea. 1.6 simply says what their general 11 view was, which was that it served little purpose and 12 1.10 specializes as to an intended effect and herefore 13 1.10 isn't entirely consistent with 1.6 and 1.6 14 What is particularly useful, however, is 1.8, which 15 explains what the partities and differentials clause in 16 the Gallaher agreements was. You will see that it was 17 a requirement to maintain the differential between 18 a Gallaher brand and a competitor brand in the same 18 a Gallaher brand and a competitor brand in the same 19 price segment, and they give an example, and you will 20 see that what they are tiles alphaler's administion was 21 clearly the uncome of a searching review of its 22 points, either a parity or a specified differential. 23 clearly the uncome of a searching review of its 24 position. For example, 1.5 and 1.6 indicate quite 25 clearly the uncome of a searching review of its 26 clearly the uncome of a searching review of its 27 continued they shall be a searching review of its 28 a conditions as to what they shall be provided by the competition of the internal beautiful or internal documents, and then they are not a condition on to what they shall be internally and one 15 confidential, all east is fine. It deals with the gallaher's administion was 16 clearly the uncome of a searching review of its 27 colored at internal documents, and then they came to 28 clearly the uncome of a searching review of its 29 conditional, and the shall be provided the people, but also 20 clearly the uncome of a searching review of its 30 a conditional, all rests if the if, declais with 31 the letter that they not only talked to people, but also 42 clearly the uncome of a searching review of its 43 are consideration, serious consideration, of its p	3	competitor brands in any one particular outlet."	3	reason to doubt the credibility of these statements.
5 Resole Price Maintenance. 6 There is a slight problem here, because in 7 paragraphs 1.5.1.6 and 1.10 we now have three different 8 explanations of Gallaher's apparent thinking. One is, 10 in 1.5, that - well, the explanation in 1.5 is that 10 they have no idea. 1.6 simply says what their general 11 view was, which was that it served little purpose and 12 1.10 specializes as to an intended effect and herefore 13 1.10 isn't entirely consistent with 1.6 and 1.6 14 What is particularly useful, however, is 1.8, which 15 explains what the partities and differentials clause in 16 the Gallaher agreements was. You will see that it was 17 a requirement to maintain the differential between 18 a Gallaher brand and a competitor brand in the same 18 a Gallaher brand and a competitor brand in the same 19 price segment, and they give an example, and you will 20 see that what they are tiles alphaler's administion was 21 clearly the uncome of a searching review of its 22 points, either a parity or a specified differential. 23 clearly the uncome of a searching review of its 24 position. For example, 1.5 and 1.6 indicate quite 25 clearly the uncome of a searching review of its 26 clearly the uncome of a searching review of its 27 continued they shall be a searching review of its 28 a conditions as to what they shall be provided by the competition of the internal beautiful or internal documents, and then they are not a condition on to what they shall be internally and one 15 confidential, all east is fine. It deals with the gallaher's administion was 16 clearly the uncome of a searching review of its 27 colored at internal documents, and then they came to 28 clearly the uncome of a searching review of its 29 conditional, and the shall be provided the people, but also 20 clearly the uncome of a searching review of its 30 a conditional, all rests if the if, declais with 31 the letter that they not only talked to people, but also 42 clearly the uncome of a searching review of its 43 are consideration, serious consideration, of its p	4	They then explain why, in their view, it wasn't RPM,	4	THE CHAIRMAN: No, and did their position develop at the
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was going to be to the investigation, but there is no 23 relative to competing brands arose out of the situation 24 reason to suppose that they thought that they were 25 anything other than one of a number of recipients of 26 announced its MPI, which came several months before	21	response, of course we don't know what was going on	21	differences/parities arose" and it says:
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	24	reason to suppose that they thought that they were	24	which occurred in 1990. In June of that year, ITL
54 56	25	anything other than one of a number of recipients of	25	announced its MPI, which came several months before
	_	54		56

1	Gallaher announced its own MPI. In that period, the	1	to produce any supporting documentation. There is no
2	on-shelf retail prices of ITL products were out of line	2	contemporary evidence that there was a pass-through
3	relative to Gallaher brands, and ITL lost a significant	3	problem at that time, and so far as I can see, the
4	amount of market share. At that time"	4	appellant retailers don't support ITL on that point.
5	I interpolate to say that seems to date it to either	5	For example, and I think from memory it's Mr Lang,
6	June of 1990 or maybe a few weeks or a couple of months	6	one of the Asda witnesses, who was mentioned this
7	later:	7	morning, paragraph 9 of his witness statement he makes
8	" ITL decided to benchmark its on-shelf retail	8	it quite clear that, at least in the case of Asda, there
9	prices against certain competitor brands to ensure that	9	would be pass-through. So we have a bit of a mystery.
10	ITL did not suffer any future similar loss of market	10	The other aspect of ITL's case is that its pricing
11	share as a result of its brands being priced	11	policy was based on relative maximum prices with the
12	uncompetitively relative to competing brands."	12	retailers being free to price below the maximum. We see
13	So the explanation given here, and this of course is	13	that in the paragraphs in the ITL reply to the
14	ITL's position in October 2003, which is the date of the	14	section 26 notice that my learned friend asked you to
15	document, as one can see from its first page, is that	15	look at a moment ago. It also appears in the witness
16	the P&Ds occurred because when ITL announced its MPI it	16	statements. However, no contemporary document appears
17	pushed up the retail prices and, since Gallaher didn't	17	to substantiate the claim that the retailers were free
18	react until several months later, there was a period in	18	to price below the P&Ds. I say there is no contemporary
19	which, as they put it, the ITL on-shelf retail prices	19	document; we do have the trading agreements, which I'll
20	were out of line relative to Gallaher. So it was	20	come to, but to anticipate slightly what I am going to
21	a problem that resulted from their MPI.	21	say about the trading agreements, when you look at the
22	Now, in bundle 13	22	trading agreements in their factual context, you can see
23	MR HOWARD: While you have that document open, you might	23	that the policy actually was that the retailer should
24	like to just read paragraphs 4.36 and 4.37.	24	price at a fixed point which reflected the parity or the
25	(Pause)	25	differential for the ITL product in question.
	57		59
1	MR LASOK: In bundle 13, we have from ITL a miscellaneous	1	Now, another oddity is this: Mr Good, in the witness
2	collection of documents dating back to 1986, which	2	statement that I referred to a moment ago, which is the
3	include trade reports. I am not going to go to them,	3	one at core bundle 3, tab 36, in paragraph 14 of that
4	but I'll just mention where they are. The trade report	4	witness statement he says that the ITL board did such
5	for June 1990 is in this bundle 13 at tab 29, and the	5	things as setting the RRP for Embassy No 1.
6	trade report for December 1990 is bundle 13 at tab 20.	6	Now, if the ITL board was involved in deciding
7	These trade reports don't refer to this incident in	7	matters apparently of detail of that nature, one would
8	June 1990.	8	have expected it to have approved a pricing differential
9	The next explanation that ITL has given of the price	9	strategy and for the nature of that strategy to be
10	differential strategy occurs in Mr Good's first witness	10	recorded. But that apparently is not the case.
11	statement. Maybe it's sufficient if I just give you the	11	It is, however, worth underlining the point that
12	reference rather than go to it. It's core bundle 3,	12	a matter of apparent detail like setting the retail
13	tab 36, {C3 tab 36} and it's paragraphs 3 to 16 of the	13	price of one particular brand at one penny less than the
14	witness statement, which gives you his entire	14	price of the competing Gallaher product, that was
15	description of the position.	15	regarded as a matter of sufficient importance to involve
16	What he says is that the pricing differential	16	the ITL board.
17			
18	strategy was included into trading agreements with	17	Mr Good says in his witness statement that that was
40	retailers at some stage in the 1990s, but he gives	18	done, and I quote from his witness statement:
19	retailers at some stage in the 1990s, but he gives a wholly inconsistent explanation of the reason for the	18 19	done, and I quote from his witness statement: " in order to encourage people to switch away
20	retailers at some stage in the 1990s, but he gives a wholly inconsistent explanation of the reason for the adoption of this strategy, because he says and this	18 19 20	done, and I quote from his witness statement: " in order to encourage people to switch away from the Gallaher product."
20 21	retailers at some stage in the 1990s, but he gives a wholly inconsistent explanation of the reason for the adoption of this strategy, because he says and this is more particularly paragraphs 7 to 8 of that witness	18 19 20 21	done, and I quote from his witness statement: " in order to encourage people to switch away from the Gallaher product." There is only one way of understanding that comment,
20 21 22	retailers at some stage in the 1990s, but he gives a wholly inconsistent explanation of the reason for the adoption of this strategy, because he says and this is more particularly paragraphs 7 to 8 of that witness statement that the mischief addressed by the strategy	18 19 20 21 22	done, and I quote from his witness statement: " in order to encourage people to switch away from the Gallaher product." There is only one way of understanding that comment, and it is that the one penny difference between the
20 21 22 23	retailers at some stage in the 1990s, but he gives a wholly inconsistent explanation of the reason for the adoption of this strategy, because he says and this is more particularly paragraphs 7 to 8 of that witness statement that the mischief addressed by the strategy was that retailers were not passing on to customers	18 19 20 21 22 23	done, and I quote from his witness statement: " in order to encourage people to switch away from the Gallaher product." There is only one way of understanding that comment, and it is that the one penny difference between the Gallaher and ITL brands in question was the policy that
20 21 22 23 24	retailers at some stage in the 1990s, but he gives a wholly inconsistent explanation of the reason for the adoption of this strategy, because he says and this is more particularly paragraphs 7 to 8 of that witness statement that the mischief addressed by the strategy was that retailers were not passing on to customers reductions made by ITL in the wholesale price.	18 19 20 21 22 23 24	done, and I quote from his witness statement: " in order to encourage people to switch away from the Gallaher product." There is only one way of understanding that comment, and it is that the one penny difference between the Gallaher and ITL brands in question was the policy that the ITL board had decided at the time of that decision,
20 21 22 23	retailers at some stage in the 1990s, but he gives a wholly inconsistent explanation of the reason for the adoption of this strategy, because he says and this is more particularly paragraphs 7 to 8 of that witness statement that the mischief addressed by the strategy was that retailers were not passing on to customers	18 19 20 21 22 23	done, and I quote from his witness statement: " in order to encourage people to switch away from the Gallaher product." There is only one way of understanding that comment, and it is that the one penny difference between the Gallaher and ITL brands in question was the policy that

1	a level of shelf prices, because if a one penny	1	MR LASOK: Thank you very much. I think what I have just
2	difference is set out only in the RRPs, and it's not	2	said isn't confidential.
3	carried through into shelf prices, it's difficult to see	3	THE CHAIRMAN: No.
4	how people would be encouraged to switch away from the	4	MR LASOK: It relates to Morrison. If you go to the
5	Gallaher product. So we have a bit of a curiosity here.	5	penultimate page the bit that I am going to read out
6	Now, there are a number of aspects of what ITL	6	is the penultimate page, by the way, is the one which
7	claims to have been its attitude towards pricing that	7	in the bottom right-hand corner at least in my copy is
8	are just assertion. For example, we heard a lot in	8	marked with a number 200, and the heading of that page
9	ITL's opening about ITL's strategic intention, if you	9	I think is not confidential, and that is "The strategy
10	like, to price below Gallaher. Certainly those who	10	for the financial year, 1 October 2001 to
11	drafted the ITL skeleton believed that, if the retail	11	30 September 2002".
12	price of Gallaher's product went up, ITL would prefer	12	In point 1 you have, in the first three lines,
13	the retail price of its product, its competing brand, to	13	something that I will not read out. But the bit that,
14	remain the same as before so that it could take	14	around about the first holepunch, I am now going to read
15	advantage of the consequential shift in demand away from	15	out is not confidential, as I understand it, at least
16	the Gallaher product and towards the competing ITL	16	I am told that it's not confidential, and it is as
17	brand. Because that's what they actually say in, for	17	follows:
18	example, paragraph 14 of the ITL skeleton.	18	" that Morrison accept Imperial's pricing
19	Now, one can well see that that is an assumption	19	strategy of reflecting current price list differentials
20	that people who are not addressing their minds to the	20	between the manufacturers' brands and that levels of
21	facts of the given case might well come to as a general	21	ongoing and tactical support are also based on absolute
22	assumption about how a company may behave in terms of	22	shelf prices."
23	where it sets its pricing. But not all companies behave	23	So here we see one of the contemporary documents
24	in that way, there may be a good reason why they behave	24	indicating the strategy of reflecting the current price
25	in a different way. So one has to ask the question:	25	list differentials between the manufacturers' brands and
	61		63
	• .		
1	what evidence is there that sheds light on the real	1	that of course is reflected in the shelf prices of the
1 2	what evidence is there that sheds light on the real nature of ITL's pricing strategy? Here we get again to	1 2	that of course is reflected in the shelf prices of the retailer.
	_		
2	nature of ITL's pricing strategy? Here we get again to	2	retailer.
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2 3 4	nature of ITL's pricing strategy? Here we get again to Mr Good, and I'll just give you the reference because I don't think we need to spend the time turning up the	2 3 4	retailer. THE CHAIRMAN: Is this document an ITL document or a Morrisons document?
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1	their shelf prices to reflect a particular price	1	I got that one right.
2	relationship and you say "You can see that relationship	2	So the first page, of course, gives you the date and
3	expressed in our RRPs" and of course the price lists	3	the period of the trading agreements, and in the third
4	will set out the RRPs as well as the other factors, but	4	paragraph on page 1 you have the reference to the
5	if you are telling them that, you are pointing their	5	payment which was subject to the following criteria, and
6	attention towards not a maximum figure but a specific	6	on page 2 in the middle of the page you have the
7	figure.	7	pricing. I think that the pricing section is not
8	When we look at the documents later on, we see that	8	confidential, so you see that it starts off by saying
9	that is indeed what they actually did.	9	that Sainsbury were accepting that ITL makes:
10	Now, the next document I was going to look at was	10	" investments in their brands based on two
11	the ITL/Sainsbury trading agreement for April 2002, but	11	fundamental criteria: shelf price relativities and the
12	I see that the time is reaching the magic hour.	12	absolute levels of those shelf prices. ITL's pricing
13	THE CHAIRMAN: Yes.	13	strategy is to replicate the differentials that exist
14	MR LASOK: For me, if I deal with ITL/Sainsbury, it will	14	naturally between our brands and those of our
15	probably take me a little bit.	15	competitors."
16	THE CHAIRMAN: Well, let's break there then. We will come	16	Then there is a cross-reference to appendix 5 for
17	back at 2 o'clock.	17	the price list differentials. Appendix 5 is, in my copy
18	I should also just mention that this afternoon we	18	at any rate, the last page of the tab. If you go to
19	need to finish absolutely no later than 4.30 because of	19	that page, you see that the differentials are expressed
20	various commitments that we have. So I am afraid even	20	as fixed, Marlboro for example is parity, and then you
21	if you are in mid-sentence, Mr Lasok, we will have to	21	have various other fixed relativities, 3 pence below,
22	pull down the shutters at that point.	22	6 pence below and so forth.
23	Thank you, we will come back at 2 o'clock.	23	In the middle of the page, as a matter of interest,
24	(1.00 pm)	24	you will see the relationship between Richmond on the
25	(The short adjournment)	25	one hand and Sterling and Dorchester on the other.
	65		67
1	(2.00 pm)	1	Richmond is to be 5 pence above Sterling, and parity
1 2	MR LASOK: Madam, I was dealing with ITL's pricing strategy,	1 2	Richmond is to be 5 pence above Sterling, and parity with Dorchester.
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2	MR LASOK: Madam, I was dealing with ITL's pricing strategy, and I was trying to make the point that the strategy was orientated around maintaining the so-called natural	2	with Dorchester.
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retail prices. 15 differentials that exist naturally between its brands 16 What I am going to do is to go back a little bit 16 and those of its competitors. 17 further up this page. Round about the second holepunch, 18 you have the reference to SSL's current shelf prices, 19 and that looks like a reference to the absolute level of 20 shelf prices which appears in the first paragraph under 21 the heading "Pricing", but also that sentence in the 22 paragraph commencing "Based on SSL's current shelf 23 differentials that exist naturally between its brands and those of its competitors. 16 What you don't see here sorry. 17 THE CHAIRMAN: Are you saying that those are made apparent 19 by the manufacturers' retail price lists? 20 MR LASOK: In this particular instance 21 THE CHAIRMAN: Or by the appendix 5? 22 MR LASOK: Here it's the appendix 5, because as Mr Thompson	13	the retailer is an instrument used by the manufacturer	13	communication by ITL to retailers of ITL's pricing
What I am going to do is to go back a little bit 16 and those of its competitors. 17 further up this page. Round about the second holepunch, 18 you have the reference to SSL's current shelf prices, 19 and that looks like a reference to the absolute level of 20 shelf prices which appears in the first paragraph under 21 the heading "Pricing", but also that sentence in the 22 paragraph commencing "Based on SSL's current shelf 23 mr LASOK: Here it's the appendix 5, because as Mr Thompson	14	so that the manufacturer can effect an alteration to	14	strategy, the strategy being to replicate the
further up this page. Round about the second holepunch, you have the reference to SSL's current shelf prices, and that looks like a reference to the absolute level of shelf prices which appears in the first paragraph under the heading "Pricing", but also that sentence in the paragraph commencing "Based on SSL's current shelf THE CHAIRMAN: Are you saying that those are made apparent by the manufacturers' retail price lists? MR LASOK: In this particular instance THE CHAIRMAN: Or by the appendix 5? THE CHAIRMAN: Or by the appendix 5, because as Mr Thompson	15	retail prices.	15	differentials that exist naturally between its brands
you have the reference to SSL's current shelf prices, and that looks like a reference to the absolute level of shelf prices which appears in the first paragraph under the heading "Pricing", but also that sentence in the paragraph commencing "Based on SSL's current shelf you have the reference to SSL's current shelf prices, by the CHAIRMAN: Are you saying that those are made apparent by the manufacturers' retail price lists? MR LASOK: In this particular instance THE CHAIRMAN: Or by the appendix 5? MR LASOK: Here it's the appendix 5, because as Mr Thompson	16	What I am going to do is to go back a little bit	16	and those of its competitors.
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paragraph commencing "Based on SSL's current shelf 22 MR LASOK: Here it's the appendix 5, because as Mr Thompson	20	shelf prices which appears in the first paragraph under	20	MR LASOK: In this particular instance
	21	the heading "Pricing", but also that sentence in the	21	THE CHAIRMAN: Or by the appendix 5?
23 prices", we have another thing mentioned, and that is: 23 submitted yesterday, the style of the ITL agreements	22	paragraph commencing "Based on SSL's current shelf	22	MR LASOK: Here it's the appendix 5, because as Mr Thompson
	23	prices", we have another thing mentioned, and that is:	23	submitted yesterday, the style of the ITL agreements
24 "The achievement of the price list differentials 24 tended to be to append to the agreements a schedule	24	"The achievement of the price list differentials	24	tended to be to append to the agreements a schedule
25 detailed in appendix 5." 25 setting out the parities and differentials. So in	25		25	
		70		72

1	contrast to, for example, I think it was the	1	Now, this idea that the pricing strategy was focused
2	Gallaher/Co-op agreement which directed the reader's	2	on the maintenance or replication of these differentials
3	attention directly to the RRPs, here the retailer's	3	is not only borne out by the contemporary exchanges that
4	attention is directed to appendix 5.	4	took place, and which we will come to, but it is after
5	DR SCOTT: And as a matter of fact, do we know whether these	5	all what follows from other things like the ITL board's
6	do in practice replicate the RRP differentials?	6	decision regarding the relationship between Embassy No 1
7	MR LASOK: I haven't checked every single one of them, but	7	and the competing brand which I mentioned before lunch.
8	the ones that I have checked do reflect the RRPs. For	8	Because if you had the ITL board deciding that the
9	example, the Richmond/Dorchester/Sterling triad was	9	difference between Embassy No 1 and the relevant
10	reflected in the RRPs, or was derived from the RRPs.	10	Gallaher brand shall be 1 pence, Embassy 1 pence below,
11	There is evidence in relation to some of the	11	and if it is done, as Mr Good says, in order to
12	manufacturers and again it concerns ITL that when	12	influence the decisions of buyers, that's to say the
13	RRPs changed it did send round a schedule which altered,	13	consumers, the retail purchasers, the ordinary and
14	that replaced the preceding schedule, and the intention	14	natural inference is that what is going to happen is
15	was to reflect the RRPs as they stood at the time when	15	that the ITL personnel are going to set about ensuring
16	the amended schedule was sent round.	16	that retailers keep that price relationship, the price
17	For example, from memory, that occurred in something	17	relationship that the board has decided. So the
18	like June 2002, which is one of the incidents, I think,	18	ordinary and natural conclusion to be drawn from the
19	that is the subject of some discussion in the pleadings	19	material that we have is that we are going to see the
20	and probably we will come to, because that's	20	retailers being signed up by ITL to give effect to this
21	an illustration of ITL sending round a replacement	21	relationship of these pricing relativities that ITL had
22	schedule or a replacement instruction which effectively	22	decided at some point in time was the right way to go
23	countermanded the previous differential that had	23	ahead.
24	featured here attached to some of these agreements,	24	Again, pursuing these submissions concerning ITL's
25	because Gallaher had moved its RRPs upwards, but at that	25	pricing strategy, I want to look at another aspect of
	73		75
1	stage ITL did not want to follow immediately.	1	it, which is the suggestion that the purpose of the
2	I was about to say that one of the oddities about,	2	strategy was to reduce prices, be competitive on price
3	at least so far as ITL's case is concerned, is one	3	with Gallaher.
4	doesn't find in these agreements a description of ITL's	4	Now, the fact is that ITL welcomed opportunities to
5	pricing strategy that bears any resemblance to the	5	increase prices. For example, if you go to annex 17,
6	description that has been given by ITL to the Tribunal.	6	tab 68, {D17 tab 68} this is in the Morrisons file, and
7	Now, on the face of it, on the face of documents	7	it's an email from ITL, Mr Matthews, to Mr Eastwood, in
8	like this, where the strategy is described and in	8	the subject line you see that it's a message for
9	particular it's described for the benefit of retailers	9	a Paul Giles about Richmond pricing. Just the figures
10	by reference to the replication or the maintenance of	10	are confidential.
11	these differentials, ITL must have regarded it as being	11	THE CHAIRMAN: A message for Paul.
12	in its commercial interest to maintain differentials	12	MR LASOK: From Paul Matthews to Mr Eastwood of Morrison.
13	and, on the face of it, would wish the retail price of	13	It's actually for Paul Giles, and it starts off:
14	its brands to increase commensurately, for example, with	14	"Paul, as per yesterday's conversation. It looks
15	an increase in the retail price of the linked Gallaher	15	like there is going to be some upward movement at the
16	brand, because that is the ordinary and natural reading	16	bottom end of the market: at last!!"
17	of the words used in these agreements, these	17	Then there is a request to Morrison to increase the
18	communications whereby ITL informs the retailer of its	18	price of Richmond from October 14. Now, there is
19	intentions and in these agreements we have of course the	19	a suggestion from another document that the move was
20	retailer signing the agreement and committing itself to	20	deferred to 21 October, at least in the case of Asda.
21	the agreement.	21	I ought to interpolate here to say that in all these
22	The clear intention, we submit, on a fair reading of	22	files we don't have complete sets of documents, and in
23	these documents, is that the retailer committed itself	23	some files we have some documents that this is
24	to the implementation of the pricing strategy	24	an example, the Asda file we have a document where there
25	communicated to it by ITL.	25	is a similar communication to Asda about increasing the
	//		II.

1	price of Richmond. But it then seems that there is	ļ	5p, and Richmond and Dorchester at parity."
2	a later email that defers the price increase from	2	Then the next page, which is tab 66, is a 4 October
3	14 October to 21 October, and we don't have a similar	3	communication, a fax on the face of it, from Imperial to
4	communication in the Morrisons file.	4	Safeway, and this confirmed discussion with Safeway
5	But the point here is this is ITL taking advantage	5	regarding pricing, and it says:
6	of an opportunity that it perceived to increase prices.	6	"Richmond Kingsize/Superkings will move up
7	This dates to October 2002, but it's the point in time	7	[will move up] 5 pence to its natural position of
8	when ITL secured a 10 to 11 pence rise in the price of	8	£3.59/£3.63"
9	its Richmond brand and the related Gallaher brand across	9	I interpolate to say that that is the difference in
10	the market, not just in one retailer, and it did it in	10	price between Richmond Kingsize and Richmond Superkings.
11	two stages, taking effect in September and October.	11	Then I read on:
12	So for example, if you put away 17 and go to	12	" from 14 October and the tactical bonusing will
13	THE CHAIRMAN: What does that mean: "which will mean	13	discontinue from this point."
14	a [something] pence per thousand reduction"? Oh, "in	14	That was the next stage of the move. Overall, in
15	our contribution".	15	the period of a few weeks, ITL was engineering
16	MR LASOK: Yes, that's a reduction in bonus.	16	a significant increase in the price of those brands.
17	So if you go to annex 28, this is Safeway, and you	17	You can see, however, in particular from 28/65, ITL's
18	go to tab 65, {D28 tab 65} this is actually August 2002,	18	concern is as much with maintaining the relativity
19	and here we have Imperial writing to Safeway about	19	between its brand and the two Gallaher brands with which
20	an MPI taking place on 2 September, and the writer	20	its brand was linked, the two Gallaher brands being
21	highlights some of the main changes and implications.	21	Dorchester at parity and Sterling 5 pence below. So
22	If you go to paragraph 9, that says and I think this	22	that's why in 28/65, the first document in this annex
23	is not confidential:	23	I took you to, they don't mind if the price goes higher,
24	"The individual brand price changes are shown on the	24	as long as the differential is observed.
25	price list but please note the following"	25	But in our submission that knocks a serious hole
	77		79
,		4	
1	You then have a reference to Embassy and Regal going	1	below the waterline in a case that is being advanced on
2	up 7 pence and there is a reference to the change in the	2	the basis that ITL is an inveterate price cutter which
3	differential vis-a-vis Benson & Hedges. Richmond	3	wants always to be below Gallaher, because that, in our
4	Superkings go up 6 pence, and in the next line, Lambert	4	submission, was not ITL's pricing strategy. Gallaher of
5	& Butler, JPS and Richmond Kingsize go up 4 pence. No	5	course was moving up at the same time. And as the
6	change in GV, which is Golden Virginia. Then it says:	6	letter states, I think this is 28/65, the whole market
7	"At the MPI we wish to move the market up on	7	was going up.
8	Richmond brands and bring greater profitability to this	8	The idea that ITL was concerned only to keep its
9	end of the market. Therefore on 2 September please	9	prices at competitive levels vis-a-vis Gallaher simply
10	increase Richmond brands by 4 pence for Kingsize and	10	isn't borne out by the documents, another example of
11	6 pence for Superkings. We would encourage you to	11	which is in annex 20 at tab 9, {D20 tab 9} and if you
12	follow on Sterling and Dorchester and as a guideline	12 13	have tab 9, the bit that I wanted to draw your attention
13	across the trade, anticipate shelf prices as		to is just beyond midway down the page, and it's under
14 15	follows"	14 15	the heading "Somerfield". This letter is addressed to
15 16	They then anticipate a price for Sterling, which is	16	Somerfield stores, but you can see it concerns the two,
16 17	of course 5 pence below the anticipated price for Richmond and Dorchester, which are at parity. Then	17	as it were, manifestations or fascias, as I believe they
17 10		18	are called, of the Somerfield group, which was Somerfield and Kwik Save. Somerfield and Kwik Save were
18 10	there is a reference to the tilt stores. Sterling and	19	
19 20	Dorchester of course are Gallaher brands. The tilt	20	pitched at different sectors of the market. In relation
20	stores is the reference to the fact that Safeway had	21	to Somerfield it says:
21 22	a tiered pricing system and there were some stores that	22	"I note that you have reduced the selling prices for Cafe Creme and Small Classic to £2.52 from 1 November.
22 23	were more expensive than others. After the reference to tilt stores, we have this:	23	Our strategy on miniature cigars is normally to match
23 24	"You may also price higher than shown above but the	23 24	Hamlet Miniatures which appear to be unchanged at
2 4 25	differentials should be the same, ie Sterling is minus	25	£2.62."
	78	25	80
	10		00

Confidential

1	So that was a reminder to Somerfield that to conform	1	That carries with it the implication that ITL would
2	to ITL's strategy, they had to secure parity with	2	not resist the role of assisting in persuading Supercigs
3	Hamlet Miniatures. Again, the verb is "match", "match	3	to move up. But again, although that's a document that
4	Hamlet Miniatures". So the communication to the	4	is concerned with competition between retailers, it
5	retailer is not expressed in terms of "You must not go	5	shows once again that ITL is not an inveterate price
6	higher than". The instruction or the communication to	6	cutter. ITL does not have that as its policy.
7	the retailer is to ensure that the prices match.	7	The last document in connection with this subject
8	This is a situation in which effectively the	8	that I want to look at is 17/6, that's annex 17
9	Gallaher brand is more expensive, but instead of saying	9	sorry, it's 17/16, annex 17, tab 16. {D17 tab 16}
10	"That is good news, keep on the good work, this is	10	This particular document, which I think we have seen
11	consistent with our pricing strategy to be lower than	11	before, can be associated in the documentation with
12	Gallaher", we see an altogether different message being	12	a Gallaher move with effect from 29 October 2000, but in
13	sent to the retailer.	13	order to make the connection you would have to do
14	DR SCOTT: This, as I understand it, is the copy taken from	14	a cross-reference to annex 14. It's really if you go to
15	Imperial's files, judging by the annotation "James" at	15	annex 14, tab 9 and 10, you will see it starting off.
16	the top right.	16	If you actually wanted the entire sequence from the
17	MR LASOK: Yes.	17	Gallaher initiative down to this letter, which is dated
18	DR SCOTT: Which also reflects not in fact increasing JPS	18	15 November, so far as one can piece it together from
19	and multipack, but it should have.	19	the documents that we have, the sequence runs something
20	MR LASOK: But they should have done, yes, and the note goes	20	like: annex 14, tab 9; annex 14, tab 10; annex 26,
21	on:	21	tab 11; annex 28, tab 21; annex 8, tab 5; and then you
22	" and have	22	get to annex 17, tab 16.
23	THE CHAIRMAN: Where are you?	23	Then this document, 17, tab 16, is 15 November 2000
24	MR LASOK: That's I am terribly sorry.	24	from Imperial to Morrison, and in the second paragraph
25	DR SCOTT: I was deliberately not going on. Anyway, there	25	by the first holepunch it says:
	81		83
1	is something in a box.	1	"You are probably aware that the broad marketplace
2	MR LASOK: I was going to move from there to another	2	has moved from £3.29/£3.30."
3	document also in annex 20, but in my version I have two	3	I interpolate to say that that again refers to the
4	lever-arch files and it's in the second one, because	4	difference between Kingsize and Superkings, and I resume
5	it's 20/70. This is, tab 70, in fact two emails. As we	5	reading:
6	are all used to, the first email is the last. It starts	6	" to £3.34/£3.35 on Dorchester Kingsize and
7	off, just below the first holepunch, and it refers to	7	Dorchester Superkings and you may remember from my
8	the acquisition by Tesco of Supercigs.	8	presentation on the Richmond repositioning (and launch
9	The email is from a Martin Thomas of Somerfield, and	9	of Richmond Superkings) that our strategy is parity with
10	it goes to Mr Alan Hutcheon at Rothmans, Chris Halford	10	Dorchester. In light of this, we are moving Richmond
11	of Gallaher and Graham Hall, and he was an ITL man, and	11	Kingsize and Richmond Superkings up to £3.34/£3.35. In
12	the subject was, as you can see from the "Subject" line:	12	order to maintain your cash margin position the bonus
13	"Supercigs versus Kwik Save pricing."	13	levels at [a certain level] should be as follows."
14	The query raised by Somerfield was about the	14	Then at the end of the letter, the recipient is
15	breakdown of the Supercigs pricing structure, the query	15	asked to let Imperial know when Somerfield can move the
16	being whether or not the Kwik Save/Supercigs tier was	16	shelf prices, and Imperial will then issue a new
17	still relevant.	17	schedule of costs.
18	The answer comes back from Mr Hall of Imperial at	18	The schedule in tab 17 has the new prices. I think
19	the top of the page, and he refers about what's going on	19	this is one of the communications that is said in the
20	in the Supercigs estate and the fact that they were	20	ITL witness evidence to be written in commercial
21	running a deep discount tier to compete with Kwik Save	21	shorthand. The background perhaps ought to be
22	but then says:	22	explained. This is November 2000. What had happened
23	"If there were a will to end this battle on the part	23	was that earlier in 2000 both Gallaher and ITL had
24	of Kwik Save, I am sure that Supercigs could be	24	a policy of parity between Richmond and Mayfair, and
25	persuaded to move up in price."	25	then in I think it was the autumn of 2000, ITL
	82		84

1	repositioned Richmond and introduced at that point the	1	its parity with Dorchester, because that was what its
2	parity with Dorchester. So this is reflecting the	2	strategy was.
3	repositioning of Richmond with Dorchester instead of	3	DR SCOTT: If we go to the very helpful table that we have
4	Mayfair. But you see again the tone of the	4	which tells us the MPIs, what we discover is that the
5	communication with the retailer and of course the	5	Gallaher MPI in August of that year left Dorchester
6	retailer in our submission would read this just as we	6	Kingsize and Dorchester Superkings unchanged, and that's
7	read it, because it's written in ordinary English, and	7	followed by the ITL MPI a few days, which leaves
8	in our submission again what we see is that ITL's	8	Richmond unchanged. So here we see the wholesale price
9	strategy, its pricing policy, is not as it has submitted	9	was unchanged, though there appears to be a bonus change
10	to the Tribunal, it is rather instead a policy that is	10	taking place behind the scenes.
11	focused on maintaining, in this instance, a parity with	11	MR LASOK: Yes.
12	a selected Gallaher brand.	12	So in our submission the upshot is that the
13	THE CHAIRMAN: So when they say "We are moving Richmond	13	contemporary documents are inconsistent with the picture
14	Kingsize and Richmond Superkings up to 3.34/3.35", the	14	painted by ITL in its pleadings and in its opening.
15	3.34/3.35, that is the MRP, not the wholesale price?	15	It's worth emphasising that the infringing agreements as
16	MR LASOK: That's the shelf price.	16	construed by the appellants didn't constrain in any way
17	THE CHAIRMAN: That's the shelf price.	17	price increases. The P&D requirements were really
18	MR LASOK: If you go to tab 17, and this in fact is a letter	18	incapable of encouraging retailers not to price above
19	that attaches a new schedule of costs, bonuses and	19	a certain level, and they weren't directed at that. As
20	margins which was effective from Monday,	20	we can see from these documents dealing with movements
21	15 January 2001, and it records that it supersedes the	21	upwards, and for example it's 28/65 where they say "We
22	last schedule which ran from 4 December 2000. We don't	22	want you to move the price upwards to this level, you
23	have the last schedule, but if you go to the next page	23	can go higher as long as you maintain the parity or the
24	and look at the middle of the page, you have	24	differential", I can't remember what we said in that
25	I understand that the whole of this page is	25	letter.
	85		87
1	confidential What you actually see in	1	
1 2	confidential. What you actually see is	1	So the structure of these arrangements was such that
3	THE CHAIRMAN: Actually I think the column that we are	2	they weren't directed at encouraging retailers not to
	interested in isn't, which is the selling price column.	3	price above a certain level. What they secured was
4	MR LASOK: Yes. It's the second from the right.	4	confidence that there would be parallelism in price
5 6	THE CHAIRMAN: Yes.		
n	MD I ACOIZ V I the C The language C C	5	movements as between the linked brands in accordance
	MR LASOK: You have the figures. The larger figures are for	6	with the desires of the manufacturers, and confidence
7	100s, but what we are looking at is the figures for 20s.	6 7	with the desires of the manufacturers, and confidence that by and large the retailers wouldn't go off-message.
7 8	100s, but what we are looking at is the figures for 20s. THE CHAIRMAN: Yes. That's where you get the	6 7 8	with the desires of the manufacturers, and confidence that by and large the retailers wouldn't go off-message. Now, obviously there is the phenomenon of poor shelf
7 8 9	100s, but what we are looking at is the figures for 20s. THE CHAIRMAN: Yes. That's where you get the MR HOWARD: I think if you go back to tab 16 it actually has	6 7 8 9	with the desires of the manufacturers, and confidence that by and large the retailers wouldn't go off-message. Now, obviously there is the phenomenon of poor shelf price controls, but essentially, in our submission, what
7 8 9 10	100s, but what we are looking at is the figures for 20s. THE CHAIRMAN: Yes. That's where you get the MR HOWARD: I think if you go back to tab 16 it actually has very clearly on it what the new and old shelf prices	6 7 8 9 10	with the desires of the manufacturers, and confidence that by and large the retailers wouldn't go off-message. Now, obviously there is the phenomenon of poor shelf price controls, but essentially, in our submission, what we see in these exchanges is the manufacturers relating
7 8 9 10 11	100s, but what we are looking at is the figures for 20s. THE CHAIRMAN: Yes. That's where you get the MR HOWARD: I think if you go back to tab 16 it actually has very clearly on it what the new and old shelf prices are, and you can actually see the adjustment in the	6 7 8 9 10 11	with the desires of the manufacturers, and confidence that by and large the retailers wouldn't go off-message. Now, obviously there is the phenomenon of poor shelf price controls, but essentially, in our submission, what we see in these exchanges is the manufacturers relating with the retailers, building up a trading relationship
7 8 9 10 11 12	100s, but what we are looking at is the figures for 20s. THE CHAIRMAN: Yes. That's where you get the MR HOWARD: I think if you go back to tab 16 it actually has very clearly on it what the new and old shelf prices are, and you can actually see the adjustment in the tactical bonus, that's what actually set out.	6 7 8 9 10 11	with the desires of the manufacturers, and confidence that by and large the retailers wouldn't go off-message. Now, obviously there is the phenomenon of poor shelf price controls, but essentially, in our submission, what we see in these exchanges is the manufacturers relating with the retailers, building up a trading relationship under which the retailers subscribed to the parity and
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1	just a common sense conclusion. The evidence is that	1	brand at £3.71, that would send you a signal because it
2	the P&Ds were derived from the published RRPs. Whether	2	looks a bit odd that both would be priced in exactly the
3	they were expressed by direct reference to the RRPs,	3	same way. In other words, the relativity matches the
4	such as in the Gallaher/Co-op agreement, or whether, as	4	RRP.
5	it were, they were derived indirectly, as in the ITL	5	So really it wouldn't take you too long to figure
6	agreements where you have a strategic pricing	6	out what was going on, and that presupposes that you
7	requirement attached to the agreement and updated	7	have no other sources of information. The reality is
8	periodically doesn't really matter, because that	8	that the evidence suggests that there were other sources
9	document was itself derived from the RRPs.	9	of information. For example, if you go to annex
10	But the upshot was that when you bear in mind the	10	THE CHAIRMAN: What are you saying that they would infer
11	serious effort that both Gallaher and ITL put into the	11	from that, if they saw that the RRP for two brands was
12	monitoring of actual shelf prices, it wouldn't take them	12	4, and the one retailer was selling both those competing
13	too long to figure out what was going on, even if they	13	brands at £3.71, could you spell out a bit more what you
14	had no other information. When I put it in that way,	14	say the signal being sent by that is?
15	and relating to monitoring, I do bear in mind the highly	15	MR LASOK: Why £3.71 for both of them?
16	sophisticated analysis that has been carried out by the	16	THE CHAIRMAN: Well, you have asked the question rather than
17	appellants' experts and also by Mr Walker in relation to	17	answering it
18	the adherence evidence that exists. But we must bear in	18	MR LASOK: It's a rhetorical question.
19	mind that at the material time the manufacturers were	19	THE CHAIRMAN: So tell me what you think the answer is. Are
20	not employing these experts to go around monitoring	20	you saying that the wholesale price must be the same and
21	shelf prices. They used a different method of	21	they are applying the same margin to it, or
22	monitoring the shelf prices, and that method in the	22	MR LASOK: No. I don't think you can infer anything
23	material that we have gave them results that they felt	23	THE CHAIRMAN: Well, that's why I am asking what you infer
24	confident in accepting because they feature in such	24	from that.
25	things as the ITL reports on their trading relationship	25	MR LASOK: In our submission, on the basis of that
	89		91
1	with a particular retailer in which very often there is	1	information, you wouldn't be able to infer what the
2	a line or a paragraph that talks about levels of	2	actual wholesale price was. What you are observing is
3	adherence.	3	the fact that one brand has a particular price, it
4	Also, we have the evidence of payments that are made	4	doesn't obviously relate to the £4 RRP, because in my
5	pursuant to these trading agreements. From the	5	example it's £3.71, which is 29 pence off the RRP. But
6	contemporary evidence we don't see the kind of	6	the significant thing is that, curiously enough, both
7	non-adherence that is suggested by the experts, and that	7	brands are at the same odd price. Odd in the sense that
8	probably reflects the fact that at the material time the	8	there is no particular reason, if you have no
9	experts were not being used. They had been used for	9	information other than the shelf prices, why either of
10	forensic purposes, for the purposes of this hearing. At	10	them should be at £3.71 as opposed to £3.72 or £3.73 or
11	the material time, the manufacturers had people who went	11	£3.74 or, for that matter, £3.70. But you find both of
12	around the stores and actually monitored, and they	12	them at the same price.
13	relied on the reports that these people provided. So at	13	THE CHAIRMAN: But I would infer from that that the retailer
14	the material time, it appears that the manufacturers had	14	must have decided that they are going to price at
15	information in which they placed confidence.	15	29 pence off the RRP, or that they are actually buying
16	The reason why it wouldn't take too long to figure	16	the products at the same price and they have put
17	out what was going on, even if you had no information at	17	whatever percentage margin on, same for the two brands,
18	all apart from the information that you derived from	18	and they are then arriving at a retail price. I still
19	monitoring shelf prices is that if, for example, you had	19	don't think you have spelled out what you say is the
20	two brands, an ITL brand or a Gallaher brand, and the	20	inference that one would draw from seeing that pricing
21	RRP was the same, let's say £4, and you looked around	21	pattern.
22	what a particular retailer was doing, and you saw that	22	$\boldsymbol{MR}\boldsymbol{LASOK:}$ There is no particular reason why the two brands
23	a particular retailer was selling the ITL brand at,	23	ought to be priced at the same.
24	let's say, £3.71, but you then observed that the	24	THE CHAIRMAN: What are you inferring then?
25	retailer, the same retailer was selling the Gallaher	25	MR LASOK: What you do is you look and say "that's
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1	interesting".	1	a coincidence and what you would do is you would keep an
2	THE CHAIRMAN: Yes.	2	eye on the situation.
3	MR LASOK: It's curious.	3	THE CHAIRMAN: Yes, it's not a coincidence, but why can't it
4	THE CHAIRMAN: It's curious and interesting, and what do we	4	be either of those two other
5	learn from it?	5	MR LASOK: The thing is it could be a coincidence, but it
6	MR LASOK: Well, what you then do is you say, "I will keep	6	would be a bit of an odd coincidence that it happens to
7	a look on this and see what happens", and if you see	7	be the same odd price.
8	that when changes take place, you have the same pattern	8	THE CHAIRMAN: Yes, it's clearly not a coincidence,
9	replicating itself, you could draw an inference.	9	Mr Lasok, clearly prices don't arise by coincidence.
10	THE CHAIRMAN: Which is?	10	MR LASOK: So you infer this is not a coincidence
11	MR LASOK: Which is that the two brands are being tracked.	11	THE CHAIRMAN: Yes, so you infer something.
12	By whom is the question. Is it being done by the	12	MR LASOK: And then you say to yourself: if it's not
13	retailer or is it being done by the manufacturer?	13	a coincidence, it must be something.
14	That's a question that you would then ask.	14	THE CHAIRMAN: Yes.
15	THE CHAIRMAN: I see.	15	MR LASOK: And you keep your eye on what is going on, and
16	MR LASOK: The thing is that what I have done is I have	16	then you arrive at a conclusion. The thing is keeping
17	taken an extreme instance of a situation in which the	17	an eye on what is going on, this is where we move from
18	only information in the entire world that you have is	18	a theoretical construct that I advance, throw out in the
19	that the recommended retail prices of the two brands is	19	course of argument, to what would actually happen in the
20	the same, the second piece of information is that the	20	real world, because in the real world probably the
21	shelf price for each of those brands is not the	21	manufacturer we will say it is a hypothetical
22	recommended retail price but some other price, and the	22	manufacturer for obvious reasons simply rings up the
23	third piece of information is that for both of those	23	hypothetical retailer and says "What's going on?" and
24	brands it happens to be the same shelf price.	24	they get an answer, probably.
25	THE CHAIRMAN: So you would say that you infer from that	25	DR SCOTT: Mr Howard, on Day 1, transcript 40, lines 1 to
	93		95
1	that somebody must be linking the price of those two?	1	10, gave us an idea of what he thought ITL might infer.
1	that somebody must be linking the price of those two? MR LASOK: No, because my inference is that there is	1 2	10, gave us an idea of what he thought ITL might infer. He says, he is talking about manufacturers.
2	MR LASOK: No, because my inference is that there is	2	He says, he is talking about manufacturers.
2	MR LASOK: No, because my inference is that there is something that you need to keep an eye on, because it	2	He says, he is talking about manufacturers. Manufacturers:
2 3 4	MR LASOK: No, because my inference is that there is something that you need to keep an eye on, because it looks too good to be true, too much of a coincidence	2 3 4	He says, he is talking about manufacturers. Manufacturers: " are not precisely the same, one may operate in
2 3 4 5	MR LASOK: No, because my inference is that there is something that you need to keep an eye on, because it looks too good to be true, too much of a coincidence that they are the same. So what you would do is you	2 3 4 5	He says, he is talking about manufacturers. Manufacturers: " are not precisely the same, one may operate in a more efficient way than the other, but they will know
2 3 4 5	MR LASOK: No, because my inference is that there is something that you need to keep an eye on, because it looks too good to be true, too much of a coincidence that they are the same. So what you would do is you would	2 3 4 5 6	He says, he is talking about manufacturers. Manufacturers: " are not precisely the same, one may operate in a more efficient way than the other, but they will know just from studying public documents a fair amount about
2 3 4 5 6 7	MR LASOK: No, because my inference is that there is something that you need to keep an eye on, because it looks too good to be true, too much of a coincidence that they are the same. So what you would do is you would THE CHAIRMAN: "You" being who in this instance?	2 3 4 5 6 7	He says, he is talking about manufacturers. Manufacturers: " are not precisely the same, one may operate in a more efficient way than the other, but they will know just from studying public documents a fair amount about each other, so that and will also know from the
2 3 4 5 6 7 8	MR LASOK: No, because my inference is that there is something that you need to keep an eye on, because it looks too good to be true, too much of a coincidence that they are the same. So what you would do is you would THE CHAIRMAN: "You" being who in this instance? MR LASOK: If you were the other manufacturer.	2 3 4 5 6 7 8	He says, he is talking about manufacturers. Manufacturers: " are not precisely the same, one may operate in a more efficient way than the other, but they will know just from studying public documents a fair amount about each other, so that and will also know from the public documents what the margins are that they are each
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2 3 4 5 6 7 8 9	MR LASOK: No, because my inference is that there is something that you need to keep an eye on, because it looks too good to be true, too much of a coincidence that they are the same. So what you would do is you would THE CHAIRMAN: "You" being who in this instance? MR LASOK: If you were the other manufacturer. THE CHAIRMAN: Right. MR LASOK: So the reality is that it wouldn't work like this	2 3 4 5 6 7 8 9	He says, he is talking about manufacturers. Manufacturers: " are not precisely the same, one may operate in a more efficient way than the other, but they will know just from studying public documents a fair amount about each other, so that and will also know from the public documents what the margins are that they are each seeking to earn. Then you know what the RRP is. "From knowledge of the way in which the industry operates, I would suggest it is not actually terribly complicated to infer what the likely wholesale price
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2 3 4 5 6 7 8 9 10 11	MR LASOK: No, because my inference is that there is something that you need to keep an eye on, because it looks too good to be true, too much of a coincidence that they are the same. So what you would do is you would THE CHAIRMAN: "You" being who in this instance? MR LASOK: If you were the other manufacturer. THE CHAIRMAN: Right. MR LASOK: So the reality is that it wouldn't work like this in the real world because THE CHAIRMAN: Well, you set up this example, Mr Lasok, and I'm still trying to understand what signal is being sent, what alarm bells are being rung by somebody,	2 3 4 5 6 7 8 9 10 11	He says, he is talking about manufacturers. Manufacturers: " are not precisely the same, one may operate in a more efficient way than the other, but they will know just from studying public documents a fair amount about each other, so that and will also know from the public documents what the margins are that they are each seeking to earn. Then you know what the RRP is. "From knowledge of the way in which the industry operates, I would suggest it is not actually terribly complicated to infer what the likely wholesale price
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that's not be ordence. He has problem, then hown't be because that's not be ordence. He evidence to that the is Mr Goodall, he didn't know. Mr Goodall, he didn't know. THE CHAIRMANE. But how we got to this was your discussing the manufacturers' knowledge of each others' P&D requirements. MR LANGE Ves. THE CHAIRMANE. So, you seem to be saying that from a compartison of the actual selling price of competing to a comparation of the actual selling price of competing. THE CHAIRMANE. So, you seem to be saying that from a comparation of the actual selling price of competing. THE CHAIRMANE So, you seem to be saying that from a comparation of the actual selling price of competing. THE CHAIRMANE So, you seem to be saying that from a comparation of the actual selling price of competing. THE CHAIRMANE So, you seem to be saying that from a comparation of the actual selling price of competing. THE CHAIRMANE So, you seem to be saying that from a comparation of the actual selling price of competing. THE CHAIRMANE So, you seem to be saying that from a comparation of the actual selling price of competing. The chairmane selling the manufacturers' P&Ds are likely to the said of what the other manufacturers' P&Ds are likely to the said of what the other manufacturers' P&Ds are likely to the said of what the other manufacturers' P&Ds are likely to the chairmane selling the said of what the other manufacturers' P&Ds are likely to the chairmane selling the said of what the other manufacturers' P&Ds are likely to the CHAIRMANE So, you seem the said of the said of what the other manufacturers' P&Ds are likely to the CHAIRMANE So, you seem the said of the said of what the other manufacturers' P&Ds are likely to the CHAIRMANE So, you seem that it is not seen that the said of what th	1	you make.	1	to get into the parallel and symmetrical aspect of the
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requirements. 8 MR LASOR: Yes. 8 mR LASOR: Yes. 8 then if those were the only facts that you knew, then if those were the only facts that you knew, then if those were the only facts that you knew, then if those were the only facts that you knew, then if those were the only facts that you knew, then if the acomparison of the actual selling price of competing on you do in a dictional facts, well, of course the opposition, as I put it, has got a P&D requirement. 10 acomparison of the actual selling price of competing of opposition, as I put it, has got a P&D requirement. 11 brauds in a retailer, the manufacturer anget a good of the idea of what the other manufacturers? P&Ds are likely to idea of what the other manufacturers? P&Ds are likely to idea of what the other manufacturers? P&Ds are likely to idea of what the other manufacturers? P&Ds are likely to idea of what the other manufacturers? P&D and any an inference. 12 IN MR LASOR: Yes, I am not talking about wholesale prices. 13 MR LASOR: I'm asying that if you perceive a pattern in the RRPs, or evidence that does indicate that there was knowledge by one manufacturer of the other manufacturers? P&D a partity or differential pricing strategy. 13 aparity or differential pricing strategy. 14 aparity or differential pricing strategy. 15 THE CHAIRMAN: Prosumably only five are not running a P&D of partity or differential pricing strategy. 16 THE CHAIRMAN: Prosumably only five are not running a P&D of partity or differential pricing strategy. 17 THE CHAIRMAN: Prosumably only five are not running a P&D of partity or expert the other manufacturers? P&D strategies. The first one it watered to turn to dates to measuring a P&D of partity or differential pricing strategy. 18 you can draw a conclusion that the opposition is running a P&D of partity or differential pricing strategy. 19 Interest of the other manufacturers? P&D of partity of partity or differential pricing strategy. 10 Interest of partity or differential pricing strategy. 11 Interest of partity	5	THE CHAIRMAN: But how we got to this was your discussing	5	strategies. I was pointing out that, in a hypothetical
8	6	the manufacturers' knowledge of each others' P&D	6	case, if you were observing parallelism at shelf price
THE CHARMAN: So you seem to be saying that from 9 wouldn't take you too long to figure out that the opposition as I put it, has got a P&D requirement. a comparison of the actual selling price of competing 10 opposition, as I put it, has got a P&D requirement. berands in a retailer, the manufacturer can get a good 11 If you add in additional facts, well of course the analysis changes. But that was not my starting point. be What the other manufacturer's P&Ds are likely to 12 analysis changes. But that was not my starting point. MR LASOK: Yes. I am not talking about wholesale prices. 14 which you have a limited number of facts from which you can draw an inference. MR LASOK: I may not talking about wholesale prices. 15 which you have a limited number of facts from which you can draw a conclusion that the opposition is running 18 sold prices that replicates the pattern in the RRPs, 17 evidence that does indicate that there was knowledge by one manufacturer of the other manufacturer's P&D strategies. The first one I wanted to turn to date to strategies. The first one I wanted to turn to date to strategies. The first one I wanted to turn to date to t	7	requirements.	7	level that reflected what was going on at RRP level,
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11 bronds in a retailer, the manufacturer can get a good 12 idea of what the other manufacturers? P&Ds are likely to 13 be. 14 MR LASOK: Yes. I am not talking about wholesale prices. 15 THE CHAIRMAN: No, no. 16 MR LASOK: The saying that jury perceive a pattern in 17 shelf prices that replicates the pattern in the RRPs, 18 you can draw a conclusion that the opposition is running 19 a party or differential pricing strategy. 19 us can draw a conclusion that the opposition is running 20 a party or differential pricing strategy. 20 THE CHAIRMAN: Presumably only if you are not running a P&D 21 in relation to that paired brand, because if you are 22 running a P&D brand requires them to have party for 23 that, then that would explain why there is parity, so 24 that, then that would explain why there is parity, so 25 that you wouldn't be able to infer anything about 26 whether the other manufacturer's aboi imposing parity 27 you are drawn and the production of the party for price increases, and he wants Wes's immediate thoughts. 28 MR LASOK: That depends on the timing of price movements, 39 because if, for example you -1et's take Richmond and 4 Dorchester, I'you are Gallaher and you say Tell you 4 Pilesae find the updated price increase in RRP 5 what we will do, we will try this one, we will increase 5 the price of Dorchester' and then you discover that 6 the price change is, then you can infer that it's not 7 Richmond goes up as well, or it doesn't matter, whatever 8 the price change is, then you can infer that it's not 9 just you who has a Richmond/Dorchester parity, but it's 9 where Feeney's reply, and I would only 20 also TL has it as well, because they are moving in 10 also TL has it as well, because they are moving in 11 are challenged them both to move in conjunction, 12 alm not saying that - 14 The CHAIRMAN: I thought your case was that the one 15 also TL has it as well, because they are moving in 16 also TL has it as well, because they are moving in 17 All manufacturers were pursuing the price list 18 different	9	THE CHAIRMAN: So you seem to be saying that from	9	wouldn't take you too long to figure out that the
11 If you add in additional facts, well, of course the idea of what the other manufacturers' P&Ds are likely to 12 analysis changes. But that was not my starting point was a rather more signification of the company o	10	a comparison of the actual selling price of competing	10	opposition, as I put it, has got a P&D requirement.
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be. 13 My starting point was a rather more simplistic one in which you have a limited number of facts from which you was a rather more simplistic one in draw and inference. 14 Now, what I wanted to turn to was the documentary evidence that does indicate that there was knowledge by one an analyst and the start does indicate that there was knowledge by one an analyst and the start of the other manufacturers is a fact and the start of the start of the start of the start of the price increases, and he wants Wes's immediate thoughts that you wouldn't be able to infer anything about that you wouldn't be able to infer anything about the price increase, and he wants Wes's immediate thoughts. 14 MR LASOK: That depends on the timing of price movements, a price increase, and he wants Wes's immediate thoughts. 15 MR LASOK: That depends on the timing of price movements, a preceding page, he says: 16 That of the want we will not be subjected the price increase in RRP recommendations, ef	12	idea of what the other manufacturers' P&Ds are likely to	12	-
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	24	both have, the OFT's position is that that's	24	If you are looking at the second half of tab 32,
98 100	25			
	20	an aggravating feature. But at the moment I didn't want	25	it's a similar communication with Mr Barry sending

1	pricing proposals for comments, and he that's to say	1	attaching a new ITL price list, effective from
2	Mr Feeny says in paragraph 1:	2	2 September, and she attaches an amended price
3	"I know you are keen to move prices up in order to	3	requirement sheet and asks whether Mr Barry has any
4	optimise margin. However, the Gallaher agreement is for	4	queries.
5	price list parities and differentials to be maintained."	5	Then if you look above that, Mr Barry forwards this
6	Then there is what appears to be a numbered	6	to Wes, asking him to check the proposed price points
7	paragraph 2, although in my copy the number has	7	and provide any feedback. If you go to the previous
8	disappeared, and Mr Feeny says:	8	page, if you take it again in reverse order and look at
9	"I note you are proposing to increase some ITL	9	the email at the bottom of the page, you have an email
10	prices even though they are not having an MPR yet.	10	from Wes Feeney on 9 August thanking Shell for the
11	I would think their agreement also stipulates parities	11	assistance.
12	and differentials to be maintained and with this in mind	12	No, I think actually this is an internal Gallaher
13	I have moved their prices in the attached as well as	13	email.
14	mine. Breda", that is a reference to Breda Canavan, who	14	THE CHAIRMAN: Yes, Wes is delegating the task, I think, to
15	was Mr Feeny's equivalent on the Imperial side, and	15	Trevor.
16	I start reading again:	16	MR LASOK: Yes. Then at the top of the page you have Trevor
17	" will be on the phone, I would think, if the	17	to Daryl Barry, copied to Wes Feeney, and the first
18	above is not maintained."	18	attachment is the Imperial price, SEP 2002, which is the
19	Now, on the face of it, Mr Feeny must have had	19	attachment. In fact, the first two attachments, the
20	a fair idea of what ITL's parity and differential	20	second one being the price requirements, August 2002,
21	strategy was in order to move the ITL prices. Now, if	21	are the two attachments which are referred to in text at
22	you go to the corresponding ITL bundle for Shell, which	22	the end of the first email in the middle of the
23	is annex 19, and go to tab 50, {D19 tab 50} tab 50 is	23	following page.
24	the follow-on email from actually it was	24	That ties in with tab 57. Tab 57 is an ITL
25	Breda Hughes.	25	document. It's the national accounts business
	101		103
	101		100
1	DR SCOTT: She is the same lady, she changes her name	1	development plan for Shell. If you go to the fourth
1	DR SCOTT: She is the same lady, she changes her name several times.	1 2	development plan for Shell. If you go to the fourth page, it's the first full paragraph on the fourth
2	several times.	2	page, it's the first full paragraph on the fourth
2	several times. MR LASOK: So it is Breda Hughes and here she is sending	2	page, it's the first full paragraph on the fourth page which I think is not confidential and it
2 3 4	several times. MR LASOK: So it is Breda Hughes and here she is sending an email with a price file to Daryl Barry, and she says,	2 3 4	page, it's the first full paragraph on the fourth page which I think is not confidential and it simply describes Shell's arrangements and says:
2 3 4 5	several times. MR LASOK: So it is Breda Hughes and here she is sending an email with a price file to Daryl Barry, and she says, in the first line of her email:	2 3 4 5	page, it's the first full paragraph on the fourth page which I think is not confidential and it simply describes Shell's arrangements and says: "Under the previous category manager, the price file
2 3 4 5 6	several times. MR LASOK: So it is Breda Hughes and here she is sending an email with a price file to Daryl Barry, and she says, in the first line of her email: "As per our telephone conversation this morning,	2 3 4 5 6	page, it's the first full paragraph on the fourth page which I think is not confidential and it simply describes Shell's arrangements and says: "Under the previous category manager, the price file was in a state of disrepair with many differentials out
2 3 4 5 6 7	several times. MR LASOK: So it is Breda Hughes and here she is sending an email with a price file to Daryl Barry, and she says, in the first line of her email: "As per our telephone conversation this morning, I agree with Wes' recommendations for the price files."	2 3 4 5 6 7	page, it's the first full paragraph on the fourth page which I think is not confidential and it simply describes Shell's arrangements and says: "Under the previous category manager, the price file was in a state of disrepair with many differentials out of line. Under the new category manager and with the
2 3 4 5 6 7 8	several times. MR LASOK: So it is Breda Hughes and here she is sending an email with a price file to Daryl Barry, and she says, in the first line of her email: "As per our telephone conversation this morning, I agree with Wes' recommendations for the price files." There is a reference here in the middle of the	2 3 4 5 6 7 8	page, it's the first full paragraph on the fourth page which I think is not confidential and it simply describes Shell's arrangements and says: "Under the previous category manager, the price file was in a state of disrepair with many differentials out of line. Under the new category manager and with the aid of both Gallaher and ITL this has been resolved and
2 3 4 5 6 7 8 9	several times. MR LASOK: So it is Breda Hughes and here she is sending an email with a price file to Daryl Barry, and she says, in the first line of her email: "As per our telephone conversation this morning, I agree with Wes' recommendations for the price files." There is a reference here in the middle of the page to maintaining the manufacturers' price	2 3 4 5 6 7 8 9	page, it's the first full paragraph on the fourth page which I think is not confidential and it simply describes Shell's arrangements and says: "Under the previous category manager, the price file was in a state of disrepair with many differentials out of line. Under the new category manager and with the aid of both Gallaher and ITL this has been resolved and in the main differentials between manufacturers'
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1	string. In this histance, the first email is on the		bottom right-hand torner.
2	second page at the top. It's a message from Graham Hall	2	If you went to 208, or to 116, you have a fair
3	of Imperial to Liz Smith of Somerfield, in which he	3	chance of getting to the page that I would like to go
4	says:	4	to.
5	"Reference our telephone conversation in which you	5	DR SCOTT: Somebody has severely redacted the black and
6	said that Gallaher pipe tobacco prices are correct and	6	white version.
7	that they are maintaining your margin. It would be	7	MR LASOK: Yes. I don't know how that this document got
8	helpful if you could let me have your current margins on	8	into the bundle relatively late in the day, but I don't
9	a couple of lines in both Somerfield and Kwik Save.	9	know who did the redaction or why.
10	I will then endeavour to come up with a package to match	10	The page that I wanted to go to is not redacted.
11	their margins."	11	I was going to page 208. In my copy I have a 208 in the
12	The response at the bottom of the preceding page	12	bottom left-hand corner, and a 116 in the bottom
13	from Liz Smith was to say that she was providing as much	13	right-hand corner. This appears to be probably a slide
14	information as possible, and then she says at the end of	14	which says:
15	the first paragraph of her email:	15	"Sterling: Next steps."
16	"I am not in a position to give you the margins, but	16	In the second and third bullets, it says:
17	should you feel that you are in a position to match and	17	"Imperial, for their own ends, have pegged their
18	maintain margins, then that would obviously be seen as	18	Richmond price in multiple grosses to 5 pence above
19	a positive."	19	Sterling. Clearly this removes, in the short-term, the
20	So he didn't get the information on margins that he	20	opportunity to proactively engineer margin enhancement
21	requested, and he comes back, just above the first	21	for both Dorchester and Sterling.
22	holepunch and the figures here are confidential	22	"The key task is to cajole the price of Richmond
23	but essentially he offers to reduce selling prices to	23	upwards, allowing enhancement of both Gallaher brands."
24	give margins of a specified sort, and asks how they	24	At that time it was absolutely correct that the ITL
25	stacked up.	25	policy was that Richmond should be 5 pence above
	105		107
1	What's interesting is that in the middle of the page	1	Sterling. Now, we don't know how Gallaher found this
2	he says:	2	without, but we know that it did. In fact, it certainly
3	"Whilst I appreciate the frustration you are feeling	3	knew that earlier in the year, because there is another
4	generally on pricing, our aim is merely to see our	4	document floating around in this annex which also refers
5	products competitively priced against our competitors'	5	to the fact that they knew that that was ITL's policy.
6	(ie maintaining our published price list	6	The last document on this topic that I would like to
7	differentials)."	7	turn to is annex 15, tab 11. This dates to
8	So that's just an illustration that, certainly at	8	January 2002. It's an internal ITL document.
9	that stage, there is no indication that ITL was in	9	Now, in my copy I have pagination in the bottom
10	a position to work out what margins were, because if it	10	right-hand corner which starts at 204. This is
11	had been in that happy position it wouldn't have needed	11	a document that concerns obviously CWS Retail and CRTG.
12	to make an enquiry of Somerfield.	12	If you could go to page 211, you see at the top of
13	The next document is in annex 3, and if you go to	13	the page under the heading "General" a passage that goes
14	tab 7A, you should have there a Gallaher document. It's	14	as follows:
15	"Key Issues Review" dated to 4 June 2001. If you go to,	15	"I expect CWS Retail to challenge the strategy
16	now on my copy	16	pricing differences during this year. They believe that
17	THE CHAIRMAN: Just wait one moment. The transcript seems	17	the manufacturers are restricting promotion and activity
18	to have stopped. (Pause). Just tell me again what we	18	by demanding strategic differentials. This will affect
19	are looking at.	19	all manufacturers over the coming year."
20	MR LASOK: It's 7A, a Gallaher document, and a key issues	20	Now, obviously CWS Retail had an idea about what the
21	review dated to 4 June 2001.	21	manufacturers were up to, in the plural, because it was
22	My copy appears to have two series of page numbers	22	dealing with the manufacturers. But this is an instance
23	on it. I was going to say "if you look at the	23	in which ITL is making the comment that CWS's
24	pagination in the bottom right-hand corner", but I am	24	anticipated challenge would affect all the manufacturers
25	now looking at a page which has two page numbers in the	25	over the coming year, and by necessary implication this
	106		108

2 strategic differentials, as well as TL. 1 would like mow to pass to a different topic, which 4 is the evidence concerning the existence of the 5 infringing agreements in relation to each of the 6 infringing agreements in relation to each of the 7 what I am going to do is to make some general 8 submissions before toking first at the written trading 9 agreements and then the contemporaneous exchanges 9 diverse the manufacturers and the relations. 10 between the manufacturers and the relations. 11 By way of introductory observation, the OFT case 12 is that the written trading agreements provide 13 a starting point for the investigation and the analysis 14 of the facts. They provided a framework for the engoing 15 commercial relationship between the manufacturer and the 16 retaliser in question. That of ongoing commercial 17 relationship was worked out over time by the parties in 18 away that was minufactured and cach retalier 19 we don't expect to see necessarily that the same pattern 10 of exchanges between each manufacturer and the creation of the particular manufacturer and the creation of the particular into the particular behavior of the particular behavior of the particular of the particular manufacturer and the creation of the particular into the particular behavior of the particular manufacturer and the particular of the particular of the particular and the particular of the particular and the particular of the particula	1	indicates that ITL knew that other manufacturers had	1	In that connection, Shell relied on on Day 2
is the evidence concerning the existence of the fininging agreements in relation to each of the manufactures and each of the retailers. What I am going to do is to make some general manufacturers and cach of the relations. What I am going to do is to make some general manufacturers and the rotations before booking first at the written trading agreements before booking first at the written trading agreements before booking first at the written trading agreements and then the contemporaneous exchanges agreement and the retail of in introductory observation, the OFT's case that the written trading agreements provide a starting point for the investigation and the analysis of the facts. They provided a framework for the ongoing of the facts. They provided a framework for the ongoing of the facts. They provided a framework for the ongoing of the facts. They provided a framework for the ongoing of the facts. They provided a framework for the ongoing of the facts. They provided a framework for the ongoing of the facts. They provided a framework for the ongoing of the facts. They provided a framework for the ongoing of the facts. They provided a framework for the ongoing of the facts. They provided a framework for the ongoing of the facts. They provided a framework for the ongoing of the facts. They provided a framework for the ongoing of the facts. They provided a framework for the ongoing of the facts. They provided a framework for the ongoing commercial to exclusing the was a substantially as a substantially suitable. So we don't need the substantial to excluse the provision of the particular relationships struck up a call to excluse the part	2	strategic differentials, as well as ITL.	2	an entire agreement clause in the RBA, and when the
significance concerning the existence of the infinitinging agreements in relation to each of the chailers. Matal am going to do is to make some general of manufacturers and each of the retailers. What I am going to do is to make some general of mind hundreds of years of the English haw of contract as submissions before booking that at the written trading agreements before booking that at the written trading agreements and then the contemporaneous exchanges of the between the manufacturers and the retailers. 10 between the manufacturers and the retailers. 11 By way of introductory observation, the OFT's case of the state of the contemporaneous exchanges of the state of the state of the contemporaneous exchanges of the state of the st	3	I would like now to pass to a different topic, which	3	phrase "entire agreement" hit the soundwaves,
ministraturers and each of the retailers. Note that growments in relation to each of the mainfacturers and each of the retailers. Note that growing in go do is to make some general as submissions before looking first at the written trading agreements and then the contemporaneous exchanges agreement and then the contemporaneous exchanges between the manufacturers and the retailers. 10 irrelevant. An entire agreement because they anticipate that they were stick into a written agreement because they anticipate that they may that a written agreement because they anticipate that they may that a some stage be a dispate anticipate that they may that as some stage be a dispate over the terms of the contract, there might be legal or of the facts. They provided a framework for the engoing of our flower that longering commercial relationship between the manufacturer and the contract, and the entire agreement clause is there to contract, and the entire agreement clause is there to contract, and the entire agreement clause is there to contract, and the entire agreement clause is there to contract, and the analysis of a breach of contract and the contract of the contract	4	is the evidence concerning the existence of the	4	I certainly had a sort of sensation in which I felt that
Manufacturers and each of the retailers. Manufacturers and each of the retailers. Manufacturers and tool is to make some general Manufacturers and the old is to make some general submissions before looking first at the written trading submissions before looking first at the written trading supmissions before looking first at the written trading supmissions before looking first at the written trading supmissions before looking first at the written trading agreements and then the contemporaneous exchanges But, in our submission, this is completely irrelevant. An entire agreement clause is something that lawyers stick into a written agreement because they and ancient cases on what are dispute and ancient cases on what are dispute that lawyers stick into a written agreement clause is something that lawyers stick into a written agreement clause is something that lawyers stick into a written agreement clause is something that lawyers stick into a written agreement clause is something that lawyers stick into a written agreement clause is something that lawyers stick into a written agreement clause is something that lawyers stick into a written agreement clause is something that lawyers stick into a written agreement clause is something that lawyers stick into a written agreement clause is there to contract, and the entire agreement clause is there to enable one to look at the terms of the agreement and enfectively nothing else in order to resolve a legal dispute. Pure that you we don't soper to see excessing that the same pattern of effectively nothing else in order to resolve a legal dispute. But the problem about an entire agreement clause, in or submission, it shat it is not the kind of thing that or effectively nothing else in order to resolve a legal dispute. But the problem about an entire agreement and effectively nothing else in order to resolve a legal dispute. But the problem about an entire agreement and effectively nothing else in order to resolve a legal dispute. I	5		5	my eyes were swivelling in a rather alarming way, if
8 submissions before looking first at the written trading 9 agreements and then the contemporaseous exchanges 10 between the manufacturers and the retailers. 11 By way of introductory observation, the OFT's case 12 is that the written trading agreements provide 13 a starting point for the investigation and the analysis 14 of the fact. They provided a framework for the ongoing 15 commercial relationship between the manufacturer and the ratio of the fact. They provided a framework for the ongoing 16 relationship was worked out over time by the parties in 17 relationship was worked out over time by the parties in 18 a way that was mutually suitable. So we don't need- 19 we don't expect to see necessarily that the same pattern 20 of exchanges between each manufacturer and each retailer 21 is going to be exactly the same across the board. How 22 it was worked out over time was something that was 23 a reflection of the particular relationships struck up 24 between the particular manufacturer and the particular 25 retailer. 26 109 111 17 What does happen, however, is that we say, at any 27 retailer, and the extremance of the contract, there might be legal of sippute. 28 109 111 19 What does happen, however, is that we say, at any 29 rate the trading agreement and the particular relationships struck up 20 of caching the same across the board. How 21 it was worked out over time was something that was 22 they are working through a commercial plusiness 23 a reflection of the particular relationships struck up 24 between the particular manufacturer and the particular relationship struck up 25 trate the trading agreements were not simply 26 add in fact contain provisions of commercial 27 trate the trading agreement she were one simply 28 agreement she provision for the payment of 39 the money. As the Problem has seen from the other 40 did in fact contain provisions of commercial 41 agreements were not simply things that gathered dust in 42 the particular openings, when they refer to some of these 43 trading	6	manufacturers and each of the retailers.	6	
submissions before looking first at the written trading agreements and then the contemporaneous exchanges 9 But, in our submission, this is completely interest and then the contemporaneous exchanges 10 irrelevant. An entire agreement clause is something that lawyors stick into a written agreement because they anticipate that the written trading agreements provide 12 anticipate that there might at some stage be ad signal 44 of the facts. They provided a framework for the ongoing 14 proceedings involving allegations of a broach of contract, and the entire agreement clause is there to retailer in question. That ongoing commercial 16 enable one to look at the terms of the agreement and effectively nothing allegations of a broach of retailer in question. That ongoing commercial 16 enable one to look at the terms of the agreement and effectively nothing also in order to resolve a legal dispute. 10 of exchanges between each manufacturer and cach retailer 18 going to be exactly the same across the board. How 20 it was worked out over time was something that was 21 they are worked out over time was something that was 22 areflection of the particular relationships struck up 23 relationship with another company or another partnership elevation of the particular relationships struck up 24 between the particular relationships struck up 25 submission, it's irrelevant for present purposes. 10 pay 12 to 12 t	7	What I am going to do is to make some general	7	mind hundreds of years of the English law of contract
gerements and then the contemporaneous exchanges between the manufacturers and the retailers. By way of introductory observation, the OFT's case that the written trading agreements provide a starting point from the investigation and the analysis of the facts. They provided a framework for the ongoing of the facts. They provided a framework for the ongoing commercial relationship between the manufacturer and the retailer in question. That ongoing commercial retailer in question. That ongoing commercial relationship between the manufacturer and the retailer in question. That ongoing commercial relationship was worked out over time by the parties in way that was mutually suitable. So we durf need- of exchanges between each nanufacturer and each retailer go of exchanges between each nanufacturer and each retailer go of exchanges between each nanufacturer and each retailer go of exchanges between each nanufacturer and each retailer go of exchanges between each nanufacturer and each retailer go of exchanges between each nanufacturer and the particular retailorship with another company or another partnership of exchanges hetween each nanufacturer and the particular retailorship with another company or another partnership they are working through a commercial business a reflection of the particular relationships struck up Toly What does happen, however, is thatwe say, at any rate the trading agreements were not simply significance such as the provision for money is there in appellants' openings, when they refer to some of these rading agreements were not simply things that gathered dust in the written trading agreements, he provision for money is there in and paid and they expect to get it. So these trading agreements were not simply things that gathered dust in the written trading agreement, and it's to he determined the written trading agreement, and it's to he determined the contemporaneous documentary exchanges between the for inscribed in stone. Lay "purportedly legally binding agreement work on the payme	8	submissions before looking first at the written trading	8	
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, 1		whether or not an agreement or concerted practice		conduct of one sort or another.
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		110		112

1	to the OFT's decision to say that, for example, there is	1	coupled with, could be an incentive or it could be
2	no written contract which contains a clause that binds	2	a penalty, doesn't matter.
3	the retailer to do X. At the risk of overelaborating	3	But, in our submission, for the purposes of the
4	the point, I will give an illustration as follows: let's	4	chapter 1 prohibition, all these situations are the
5	suppose that you have got a manufacturer and it has	5	same, because in each of these situations you see
6	a trading relationship with three retailers, X, Y and Z.	6	exactly the same phenomenon, and that is that the
7	With X it's got a written contract that binds X to	7	retailer, X, Y and Z and I will use a colloquial
8	follow the manufacturers' parity and differential	8	phrase signs up to, accepts or goes along with,
9	requirements. I am not looking at the anticompetitive	9	however you put it, the P&D requirements of the
10	nature of the parity and differential requirements, I'm	10	manufacturer. In our submission, that's enough.
11	looking at the idea of an agreement or concerted	11	So, for example, in the context of
12	practice for the purposes of a chapter 1 prohibition,	12	THE CHAIRMAN: I thought that what Mr Howard was agreeing to
13	and the question of what is or is not a restriction on	13	when I raised this was that it's one of those contracts,
14	the retailer.	14	like the Carlill v Carbolic Smoke Ball Company case,
15	So it's got a written agreement, a written clause,	15	that you don't have to inhale from the smoke ball but,
16	that binds X to price in accordance with the P&D	16	if you do and you catch flu, then you can sue the
17	requirement, and let's say that there is a penalty for	17	sellers of the smoke ball for the £1,000 that they say
18	non-compliance. It doesn't matter what it is. It could	18	they have put into a bank account as to provide
19	be the withdrawal of a bonus, it could be some other	19	an incentive for people to buy and use the smoke ball;
20	penalty, it could be that X's hands are chopped off. It	20	so it was an unilateral contract or something. This is
21	doesn't matter.	21	going back some time when I studied this.
22	Now let's take a second situation, and this is the	22	It's a contract whereby there is no obligation on X
23	trading relationship with Y. Let's suppose that the	23	to do the thing, but Y agrees that if X does do that
24	trading relationship with Y is a bit closer to the	24	thing, then Y will pay X a certain amount of money.
25	relationship between ITL and Sainsbury's at the outset	25	So where does that come on your spectrum?
	113		115
1	of the infringement period, because the agreement that	1	MR LASOK: It doesn't because Carlilly Carbolic Smoke Ball
1	of the infringement period, because the agreement that	1 2	MR LASOK: It doesn't, because Carlill v Carbolic Smoke Ball Company isn't often cited in competition cases
2	you will have seen, which takes the form basically of	2	Company isn't often cited in competition cases.
2	you will have seen, which takes the form basically of slides, has in it a slide that says "This is not	2	Company isn't often cited in competition cases. The point essentially is that you look at the
2 3 4	you will have seen, which takes the form basically of slides, has in it a slide that says "This is not a legally binding agreement".	2 3 4	Company isn't often cited in competition cases. The point essentially is that you look at the evidence in the round and you ask yourself the question:
2 3 4 5	you will have seen, which takes the form basically of slides, has in it a slide that says "This is not a legally binding agreement". So let's suppose that we have something between the	2 3 4 5	Company isn't often cited in competition cases. The point essentially is that you look at the evidence in the round and you ask yourself the question: does the evidence indicate that what has happened is
2 3 4 5 6	you will have seen, which takes the form basically of slides, has in it a slide that says "This is not a legally binding agreement". So let's suppose that we have something between the manufacturer and Y that is expressed as not being	2 3 4 5 6	Company isn't often cited in competition cases. The point essentially is that you look at the evidence in the round and you ask yourself the question: does the evidence indicate that what has happened is that, in this particular instance, the retailer has
2 3 4 5 6 7	you will have seen, which takes the form basically of slides, has in it a slide that says "This is not a legally binding agreement". So let's suppose that we have something between the manufacturer and Y that is expressed as not being a legally binding agreement, and it simply says "Y	2 3 4 5 6 7	Company isn't often cited in competition cases. The point essentially is that you look at the evidence in the round and you ask yourself the question: does the evidence indicate that what has happened is that, in this particular instance, the retailer has agreed or concerted something, and if so what?
2 3 4 5 6 7 8	you will have seen, which takes the form basically of slides, has in it a slide that says "This is not a legally binding agreement". So let's suppose that we have something between the manufacturer and Y that is expressed as not being a legally binding agreement, and it simply says "Y promises, without being under any obligation, to	2 3 4 5 6 7 8	Company isn't often cited in competition cases. The point essentially is that you look at the evidence in the round and you ask yourself the question: does the evidence indicate that what has happened is that, in this particular instance, the retailer has agreed or concerted something, and if so what? So in the case of Carlill v Carbolic Smoke Ball
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1	X, Y and Z, and let's focus on Z for a minute, the point	1	is that the bombarding of X with emails asking X to make
2	about Z is Z has never signed up to any agreement at all	2	a price movement to keep in line with the P&D
3	in any written terms, it's not even a Carlill v Carbolic	3	requirements can simply be explained as the manufacturer
4	Smoke Ball Company case.	4	working out the trading relationship with X, for which
5	The point is that by conduct we see that Z in my	5	there can be any number of reasons. For example, the
6	illustration has accepted that its behaviour will be in	6	manufacturer distrusts X; the manufacturer thinks X is
7	a particular way.	7	lackadaisical; the manufacturer therefore believes that
8	DR SCOTT: Will you be taking us to instances where monies	8	X needs to be egged on. The manufacturer knows that its
9	appear to have been paid without there being trading	9	fallback position is that it has the agreement. What it
10	agreements?	10	wants is performance, and that's why you get the
11	MR LASOK: I'll just have to check that, because in my	11	communication building up. But that's mechanism, and it
12	recollection I can't remember now, because I think	12	doesn't detract from the fact that there was
13	that the ones that I there are always tactical	13	an agreement.
14	bonuses. I think that the general pattern is that where	14	Equally, if you have no agreement but you still have
15	you see a payment for parity, which is of course one of	15	the bombarding, then you have still got an arrangement
16	the phrases that crops up in the documents, it's usually	16	that falls within the chapter 1 prohibition. It may, in
17	associated with a provision in the written trading	17	that instance, be perhaps better described as
18	agreement. I can't remember offhand of a situation in	18	a concerted practice rather than an agreement, but there
19	which there is no written trading agreement and no	19	are academics who will discuss what the true description
20	suggestion that there ever was a written trading	20	to be attached to the conduct is. We don't need to
21	agreement, and yet you still have a payment for parity.	21	worry about that. The thing is, it's what's going on.
22	I can't remember, but I wouldn't trust my memory on that	22	The what is going on is tested by the interchanges
23	one.	23	between the undertakings themselves. That's to say
24	So the upshot, in our submission, is that it's	24	between the ITL, NAM, the national account manager,
25	important to draw a distinction between the question of	25	whatever he is called, and the buyer, the tobacco buyer
	117		119
1	what has been agreed or concerted and what is the	1	in the retailer. These are the people that we have to
2	mechanism by which the agreement or concertation is put	2	focus on in order to determine whether or not there is
3	into operation.	3	an agreement or concertation. It may not necessarily
4	Generally speaking, when we look at the question	4	have to be the buyer because there could be other people
5	what has been agreed or concerted, we have to look at	5	at a superior managerial level, but we are talking about
6	the totality of the evidence, but sometimes the totality	6	the contacts between the undertakings.
7	of the the mechanism shouldn't confuse us as to	7	There are undoubtedly performance issues which have
8	whether or not there is an agreement or concerted	8	surfaced in the debate about adherence, and which I'll
9	practice, or what it is.	9	come to in due course, but the performance issues
10	I'll give you an example of that. Again, looking at	10	operate at a lower level, and it was well known by the
11	it entirely from a theoretical perspective, let's	11	parties that the multistore operations had poor or
12	suppose you have a situation in which I have used the	12	variable shelf controls, so that there was
13	example of X, Y and Z, when we look at the facts, we see	13	an understanding that the performance of an arrangement
14	that there is a written contract, and let's suppose that	14	might not be 100 per cent guaranteed. In fact, in some
15	it is inscribed in stone and it is a contract between	15	of the agreements there was reference to things like
16	the manufacturer and X, but when we look at the	16	90 per cent performance in, for example, selected
17	evolution of the trading relationships between the	17	stores.
18	manufacturer and X, we see that there are constant	18	But performance is not the relevant question when
19	communications.	19	you are investigating the issue as to whether or not
20	The manufacturer bombards X with requests to move	20	there was an agreement or concerted practice of the sort
21	his prices. Do we infer from that that this agreement,	21	found in the decision, because there we have to look at
22	which was actually inscribed in stone, was non-existent	22	the interchange between the undertakings themselves.
23	or irrelevant, when we have all this bombarding going	23	DR SCOTT: Surely bombardment sounds unilateral, whereas
24	on? In my submission you can't assume that the	24	agreement and concerted practice involves a conjunction
25	agreement was ignored, and one of the reasons for that	25	of wills.
	118		120

1	MR LASOK: It depends what the result of the bombardment	1	THE CHAIRMAN: Right. Well, if that's a convenient point,
2	was. If you have a bombardment and the retailer was	2	then we will break there for the evening, thank you very
3	batting it away and saying "Get lost", that's	3	much, and we will recommence at 10 o'clock tomorrow
4	a completely different kettle of fish.	4	morning.
5	In this particular case, we have got in some	5	(4.15 pm)
6	instances bombardments and they are bombardments of this	6	(The court adjourned until 10.00 am on
7	sort, for example, it is "Move the price of Richmond	7	Wednesday, 28 September 2011)
8	from X to Y", and then after a while you get another	8	
9	email which says "Move the price of Richmond from Y to	9	
10	Z". It's not "Now you must move the price from X to Z";	10	
11	it's "Move it from Y to Z", and there is nothing in the	11	
12	documentation in which the retailer says "Hold on	12	
13	a minute, you have it wrong, I never moved to Y".	13	
14	We do, however, see instances in which that kind of	14	
15	thing happens. I was going to come to one of them in	15	
16	the context of a discussion about the nature of the	16	
17	trading agreements, because we do have situations in	17	
18	which the retailer is, as it were, getting it wrong, and	18	
19	there we need to know when the manufacturer is	19	
20	pointing out the error and asking the retailer to mend	20	
21	its ways, you need to know what the error was, and what	21	
22	the reaction of the retailer is.	22	
23	But we can clearly identify instances in which the	23	
24	error is a failure to respect a parity or	24	
25	a differential.	25	
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1	So, for example, there is one of these letters	1	INDEX
2	I think it's in annex 28 in which it's spattered with	2	PAGE
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