IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30 September 2011

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

CO-OPERATIVE GROUP LIMITED

Appellant

– v –

OFFICE OF FAIR TRADING

Respondent

WM MORRISON SUPERMARKET PLC

Appellant

– v –

OFFICE OF FAIR TRADING

Respondent

(1) SAFEWAY STORES LIMITED
(2) SAFEWAY LIMITED

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

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

Appellants

– v –

OFFICE OF FAIR TRADING

Respondent

Transcribed using LiveNote by Opus 2 International
1 Bell Yard, London, WC2A 2JR
Tel: +44 (0)20 3008 5900
info@opus2international.com

HEARING (DAY 6)

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

APPEARANCES

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

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

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

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

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

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

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

Mr Batty, there is sufficient time, but I anticipate there will not be, so we may finish slightly early today and have Mr Goodall on Thursday morning. Although that means in theory we are behind on the timetable, I think everybody concerned with the Co-op matter, which is what comes next on Thursday, Friday and the following Monday, it's believed that three days is excessive, but we have a bit of slack there so that we will not fall behind.
THE CHAIRMAN: Thank you very much.
MR HOWARD: The other point I wanted to raise, I think there has been a direction that the witness statements should stand as evidence-in-chief, and it's not anticipated that we would be eliciting evidence-in-chief, but I would like to ask Mr Good a couple of questions which arise out of some points that were made by the OFT. It's simply to clarify something, so could I have leave to do that, please?
THE CHAIRMAN: Yes, certainly.
MR HOWARD: I am grateful. So I will call Mr Good.

MR GEOFFREY GOOD (sworn)

Examination-in-chief by MR HOWARD

MR HOWARD: Mr Good, firstly, for the record, could you please tell us your full name and address.
A. Geoffrey Good, [redacted] Bath.
Q. Thank you. Could you be given core bundle, volume 3,

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

decision. Could you turn in that to tab 19, you have to go, it's slightly confusing, first to tab 9 and then behind tab 9 you will see firstly there is A to F, and then there is 10 to 19. Do you have that?
A. I have found 19.
Q. Right. If you turn to tab 19, you should have a document which is "Report on Trade Cigarettes, May 1989"?
A. Yes.
THE CHAIRMAN: Wait a minute.
MR SUMMERS: Mr Howard, may I ask a general question before you start?
MR HOWARD: Of course.
MR SUMMERS: Will you be handing out an organogram of some sort which will show the relationship of those who are giving evidence to the, for instance, ITL board so we have some sense of how they all fit into the ITL management structure?
MR HOWARD: We can certainly do that.
MR SUMMERS: It would be very helpful, yes.
MR HOWARD: I don't think we have that to hand but we will do that before Tuesday morning, supply it to you on Monday.
Perhaps just in relation to this point, before we look at this document, perhaps you could amplify

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

witnesses. The witness has already told us --
THE CHAIRMAN: I think we heard the witness's answer. Do you have any follow-up questions to that, Mr Lasok?
MR LASOK: Not on this document.
THE CHAIRMAN: Let's move on to another document.
MR LASOK: We need to bear in mind -- and I will direct this at you, Mr Good -- I fully accept that you don't have any knowledge of what happened after 1996, because you weren't around at the time, the reason for referring you to that document was because you said that you expected that the pattern of behaviour would have continued. I suppose I can shortcircuit this and say, well, on what basis do you assert that the pattern of behaviour never changed, is that knowledge or just a belief that you had?
A. An expectation, I think.
Q. An expectation, but you have no reason for believing that that was actually the case?
A. No, but I could -- that correspondence didn't surprise me.
THE CHAIRMAN: That exchange of emails in 2001, now you have seen it, does that lead you to revise the expectation that you expressed in your witness statement? Does it lead you to say "Oh, well, from that, it seems I may have been wrong in thinking that that is the way that

things carried on after I was no longer involved"?
A. No, I think in my witness statement I was expressing normal business, when there were no price changes, either duty or manufacturers' price rises, that's what I would expect, and if we got a slight advantage, that was great. But when there wasn't manufacturers' price increase -- and this was quite significant to everyone -- we had an ongoing relationship with the trade and we thought it was an oversight and that they had missed that particular packet and we wanted to put that right, because we had business relationships with them.
THE CHAIRMAN: Would this be fair: that would be your interpretation of this is so it wouldn't cause you to conclude that maybe you were wrong in what you said --
A. No, I think if that had happened on my watch, I would not have been unhappy and I would not have been surprised.
MR LASOK: Could you look at annex 17, then.
A. Same book?
Q. I am not sure, I don't think that -- were you not looking at 14?
A. I was looking at 14.
Q. Or was it 18, I think. I would like to go to 17, so it's in a different volume.

A. Sorry, 18, did you say?
Q. Yes, 18.
A. Yeah.
Q. Sorry, 17, I do apologise, it's annex 17, tab 9. {D17/9} This should be a letter dated 26 September 2000. It's tab 9.
A. Ah, sorry, I was on 18.
THE CHAIRMAN: Annex 17.
MR LASOK: Annex 17, tab 9.
A. It's 26 September, yes?
Q. 26 September 2000.
A. Yes.
Q. It's a letter.
A. A long letter.
Q. It's from Mr Paul Matthews, who was the national account manager for Morrison. You have a heading on the first page of the letter which says "Pricing Movements L&B/JPS Brands" and he says:

"I understand that Mayfair brands are moving up from next Monday, 2 October 2000. I believe this is a general increase in the multiple retailers. As discussed, could you increase the shelf price of L&B and JPS brands from £3.60 to £3.65 from that date."

Isn't that also an indication that --
MR HOWARD: Sorry, if you are going to ask a witness to look

at a document he has never seen, he must have a chance to read the document properly. Mr Lasok can see, as we all can, the next sentence is of some significance in relation to this.
A. Yes, I was about to raise that.
MR LASOK: Yes, well, read the page, if you would like.
A. I am perfectly happy to stay within that paragraph, I think. Our counsel is correct, I was not directly involved but I think I can understand what has happened is that Gallaher's probably had a short-term promotion to lower the price of Mayfair, and it was coming to an end, and we had probably matched that, and so we were then saying we will take away the retro bonuses on our brand because our short-term promotion is now going to end as well.
Q. Well, the topic that I am trying to address is the statement in your paragraph 19 that the ITL view was to say nothing about low prices of the ITL product and take advantage of the situation. Why did you raise this, then? I am sorry, I fully accept that you can't really talk about the background.
A. I can talk about the principle, yes. My statement was about ongoing business. Now, there were a lot of times when there were short-term promotional activities where one of the manufacturers would go to one of the

retailers, or sometimes all of the retailers, and say "We want to bring a price down by 2, 3, 4p, and here is some money to achieve that". We were then faced with a series of choices, once we found that out. Sometimes we would only find out if it was actually a change on the shelf, sometimes the buyer would tell us, because he was trying to get money out of us often. So we would hear that a brand -- an opposition brand -- was going to go down for maybe a month.

So the first thing we did was: was it real? If a buyer was telling us, he could have been winding us up, so often we might wait until the following week when we could actually see it on the shelf, so it was happening. We had then to decide whether we had the resources, the money to match that. Sometimes we didn't. If it was towards the end of our financial year and we had profit targets, then we sometimes said we will not immediately react. But we might go back a month later in the new financial year when we had more money.

So that was the first thing we did. Then when we said yes, we will react, we will match their move, we would go to the retailer and negotiate a similar reduction. It wasn't in truth a very difficult negotiation because the retailer would say "You can come

down 2p if you give us 2p", and so that would often be matched.

When that period month came to an end, then Gallaher would go up and then we would go up. Sometimes we might be a week apart so we would go up a week later. There are always periods of short-term promotion, reaction, not always but often reaction, and then we would go back up again.

So the counsel I think is suggesting that we never put prices up, or rarely, but we did all the time at the end of a --

THE CHAIRMAN: He is not suggesting that, Mr Good, what he is suggesting is the same as with the last document that this seems to be an instance where you were -- ITL, not you -- drawing to the attention of the Morrisons buyer the fact that the price of ITL brand had not followed up the price of the Gallaher brand, or didn't look as if it was going to; whereas in your statement you said your understanding was that, if there was a widening of the differential in your favour, then you wouldn't draw that to the buyer's attention or the retailer's attention, because that was to your advantage.

A. I'm guessing this was the end of a short-term promotion. The first paragraph says that "I understand that Mayfair brands are moving up next week", in effect, so --

THE CHAIRMAN: So that was the end of the Gallaher promotion, you were saying, "We will then end our promotion and so the price should move up"?

A. Yes. I'm guessing, but I think an educated guess.

MR LASOK: I fully accept that, because you weren't around after 1996, this is a bit of a guess, but I'll put it to you again, that the plain wording here shows that this is an instance in which the prices were lower, they were at £3.60, and what Imperial was doing was asking Morrison to increase the price as a result of a move in Mayfair, the consequence of that would be the removal of the additional retro bonus, is wasn't the other way around?

A. No, I don't think it is, I think they -- I assume -- had reduced their price down and then taken their bonuses off, so Mayfair was going up, and so we were taking our bonuses off and our price would go up. We could have made a decision at the time to say "No, we will go on a bit longer and we will have a new differential", but we didn't.

Q. It's expressed, though, as you read it, isn't it?

A. Which bit?

Q. The paragraph beginning "As discussed"?

A. Yeah. I am not sure the point you are making.

Q. It's expressed as "Could you increase the shelf price",

and then in the next sentence it says "This will be" --

A. Yeah. Well, sorry, that's maybe the way he wrote it.

Q. It's certainly the way he wrote it, but if I put it that you can't say whether or not he should have written it in a different way?

A. He could have written it that "From next Monday we are going to reduce our retro bonuses and if you wish to maintain your margins, you will have to go up by 5p". He could have written it, and probably should have written it, that way.

THE CHAIRMAN: Why does he say anything about the shelf price? Why doesn't he just say "This is to let you know we are stopping our additional retro bonus next week"?

A. Again, I am having to guess, but I would assume that that was the old price, 3.65, so in effect end of promotion you are going to go back to where you were. Now, again, it would be up to Morrisons, they chose their prices, they could say "No, we don't wish to do that, we want to go £3.66 or" --

THE CHAIRMAN: Why would the ITL person say anything about the shelf price at all in that circumstance? Wouldn't you want rather to hope that they would decide not to put their price up and that the differential would then widen?

A. That is possible, but no, I think it was ongoing business, maintaining the relationship that you will have the margin that you had before if you go up by that amount, because a month had gone by and maybe the buyer wasn't aware -- well, he would be aware of where the price was. It was just being helpful, I think.

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

A. No.

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

A. You said 29.

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

A. 12 July 2000?

Q. 12 July 2000?

A. I have that one now.

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

(Pause)

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

A. Yes.

Q. If you look six pages in --

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

THE CHAIRMAN: Is this going to the same point?

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

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

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

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

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

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

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

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

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

MR HOWARD: Can I assist you maybe --

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

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

THE CHAIRMAN: Yes.

MR HOWARD: I think it's quite important to clarify a couple of things, firstly what my learned friend just said about the witness statement is simply untrue, it is not the case that Mr Good has commented on documents to which he was not a party, and my objection would be rather hollow if, for instance, he had commented on this document. Secondly, it's rather surprising that my friend says he didn't understand the position, because it says in paragraph 2 of the witness statement, which I am sure he has read, or certainly should have done, that he had responsibility for NAMs, national account customers in 1990 and in 1996 he was appointed as the cigar marketing director and then he became the managing director of the cigar division:

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

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

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

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

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

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

A. Yes.

THE CHAIRMAN: But in relation to --

A. 90 to 96.

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

A. No.

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

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

THE CHAIRMAN: Right.

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

discussing was recommendations on the RRPs of cigars. I -- giving the strategy, I was certainly not involved in the slightest in day-to-day execution in national accounts.

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

A. No.

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

A. No, no.

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

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

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

A. Thank you.

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

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

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

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

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

A. I'll stay here.

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

MR HOWARD: No.

THE CHAIRMAN: Thank you.

(11.50 am)

(A short break)

(12 noon)

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

A. 12 July 2000?

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

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

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

can give evidence about it, that looks like a situation in which Imperial did contact a retailer and raise with them the fact that the ITL price was too low?
A. I can't comment on the detail of it, I am afraid, but I read that and I wasn't sure in some cases whether there were movements up or down. The top line, Regal to go to 20.45, I didn't -- I assume it was downwards.
Q. To be quite frank, that's why I took you to the third one down, because it looks a bit unambiguous.
A. True. It's unfair for me to comment on the detail. I would prefer you to ask Mr Culham.
Q. That's a perfectly fair response. Thank you very much. Now, you can put that document away. If you go back to your first witness statement --
DR SCOTT: Sorry, just to be clear, Mr Lasok, what Mr Good has referred to in his witness statement is the fact that -- and this is paragraph 18:

"Recognised retailers employed different pricing strategies in the tobacco category compared to other stores and even within their store network would also change their prices frequently. Taking that into account, relative price targets were a more practical means of incentivising them to pass on the price reductions."

What you seem to be saying here is that this

recognises particular situations of the Day & Nite stores, and that what is being maintained here is differentials.

Now, Mr Good, am I understanding that right, that this is tuned to Day & Nite stores, that you are looking to ensure that the differentials are right as an Imperial group and that this doesn't surprise you in terms of a communication in relation to maintaining differentials?
A. No, I don't think that's fair, I don't think it did surprise me, but I couldn't tell some of those movements whether they were --
DR SCOTT: Whether they were up or down, no, but it looks like the maintenance of differential, whether they were up or down.
A. Yes.
DR SCOTT: Thank you.
MR SUMMERS: Mr Good, when this letter was written, you were in cigars; is that right?
A. Yes.
MR SUMMERS: Was Classic a cigar?
A. Yes, it was and is.
MR SUMMERS: So this would be one of your prices --
A. Yes.
MR SUMMERS: -- which was being dealt with in this letter?

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

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

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

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

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

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

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

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

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

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

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

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

something like 3.2 or something like that, and if you look at the November figure, it's 2-point something.
A. 2.6.
Q. Then finally, tab 35, which is the trade report for January 1990, if we look at the third page, at least in my copy it's the third page, and again I am assuming that these figures are not confidential, we have as usual Embassy at the top, B&H Kingsize is the fifth one down, and Regal Kingsize is the seventh one down. If we look at the pre and post MPI RRPs, there is a 2p differential in favour of Regal. Then if we look at what appears to be the December figure for multiples, the differential is 2.6p in favour of Regal.
A. Mm.
Q. Now, I did that because the pattern that we are observing in relation to B&H and Regal is not the same as that for Embassy and B&H, yet you applied your policy, as I understand it, in relation to both of these relationships?
A. Yes.
Q. Why did you do that?
A. Well, first of all, these are average researched prices, but obviously the average was in our favour, but there would be some outlets which were not, as you said yourself earlier, on average there are ... so there

would be some that were maybe only be a penny differential and some that may be 3. So we had to address the problems that were wrong.
The second reason, which is a little harder to explain, is that Regal was a very regional brand, it basically sold in the north of England and Scotland and Wales, in Midlands and Southern England it was a very poor seller. But in the areas where it was selling well, it was big brand. So the retail trade were more conscious of getting Regal right than they were Embassy.
So we had less of a problem, but we still had some problems in some outlets which we wanted to address.
Q. I am going to put to you this: what you say happened was that a national policy was adopted and applied to retailers and all sorts, we will focus on multiples for the moment, it was applied to all multiples, irrespective of whether they were passing through the benefit of lower wholesale prices or not.
A. Mm.
Q. And it was applied across a range of brands, not all brands, but a range of brands, irrespective of whether or not the problem that you had identified existed in relation to that particular ITL brand. Do you agree with me?
A. Yes, but the scale of the problem varied.

MR LASOK: Well, I have no further questions.
Questioned by THE TRIBUNAL
THE CHAIRMAN: There is just one point: in your first appeal witness statement at tab 37, paragraph 14, you say in the second sentence there:
"An individual retailer might change its tobacco retail prices weekly to respond to competitive action by other retailers or as a result of increased or decreased funding from Gallaher and the other manufacturers."
So there you seem to be referring to changes in the retail prices that were independent of any changes in the wholesale prices, certainly in respect of the first example, responding to competitive action by other retailers. This again relates to your time in charge of national accounts?
A. Yes, it does.
THE CHAIRMAN: So that relates to the period 90 to 96?
A. Yes. Would you like me to expand a little on that?
THE CHAIRMAN: Yes.
A. Basically sometimes a retailer would reduce its price, either on its own or with some help from on our terms an opposition company, and so Benson & Hedges may go down. We at that time did not necessarily know why it had gone down, but it had gone down. So we then had the opportunity to react or not, but it was a very

competitive marketplace, not just us and Gallaher, but also amongst the retailers. There were retailers like Morrisons and Asda and Kwik Save which were very low in price. There was Tesco trying to beat Sainsbury's to be number one retailer, so they were competing, and there was a company called Victoria Wine which had a policy of being a penny below whoever was nearest to them physically in their outlets.
So there was a lot going on, and so sometimes -- and we didn't even necessarily understand it -- prices were changing within the retail trade, nothing to do with us.
THE CHAIRMAN: Yes, thank you.
DR SCOTT: Just one question to confirm my understanding of your perspective. Tobacco as a whole is relatively inelastic, in other words --
A. As a whole?
DR SCOTT: As a whole, yes.
A. I might dispute that, only in the sense that over -- you can see the period I was talking about, prices were £1.50, they are now £7. So I think they are sensitive as a whole to duty rises and to some extent manufacturer price rises but they have become more expensive and the market has declined.
DR SCOTT: But in paragraphs 27 to 33 of tab 36, you talk about the role of differential provisions in encouraging

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

end of paragraph 6 of your first witness statement, and at the end of paragraph 12, you refer to the competitive prices compared to brands of rival manufacturers, despite the fact that they had lower RRPs and were being offered to the retailers at low cost prices. Then at the end of 12:

"... despite the fact that Embassy No 1 had a lower RRP and a lower cost price."

There you do seem to be saying there are two factors, the lower RRP and a lower cost price, but as I understand your evidence today, you didn't know what the overall cost price was other than the best terms, I think was the phrase you used, in the price list?
A. So by lower cost price at the end of 12, I meant the best terms, so we were starting from a lower position. Now, again we did not know what Gallahers were offering, and so we could have had a high net price but it was up to the national account manager to negotiate a lower price using as little money as possible.
THE CHAIRMAN: Any re-examination, Mr Howard?
MR HOWARD: Yes, just a few questions, if I may.

Re-examination by MR HOWARD

MR HOWARD: Mr Good, I just want to ask you, which is I think following on from some of those questions, about the policy that you were seeking to introduce with the

differentials and how you intended that to work and be implemented by the national account managers. Okay? I am looking obviously at the period of your involvement, 1990 to 1996.

I want you to explain to us this: take various different situations, let's take the first one, Imperial has a strategy of Embassy being priced at, you put it I think at least 1p below Benson & Hedges?
A. Mm.
Q. You leave your national account manager to go and provide for that. Now, assume during the course of the year Imperial decides to have a manufacturing price increase whereby it puts up the price of Embassy and other brands by 4p, for the sake of argument. Now, in that situation, how was this policy to operate? What was the requirement or expectation that you had of the retailer where you put up --
MR LASOK: Can I just interrupt? That's not a relevant question, because the witness can only give evidence as to the period 1990 to 1996.
MR HOWARD: That's what I said.
MR LASOK: And we are looking at the period of the infringement, and the problem with the period of the infringement is that this is characterised by documents which may be of a different character from the ones that

were prevailing in 1990 to 1996.
THE CHAIRMAN: Well, on the basis that we are just at the moment looking at what was Mr Good's understanding when he introduced these agreements, which may or may not have been altered as the arrangements evolved between then and the period that we are interested in, it would be interesting to hear his answer to that, but I understand the point you make.

So we are looking at when you introduced the policy.
MR HOWARD: Yes.
A. Perhaps I could answer by example.
MR HOWARD: Let me start again, then it will just be entirely clear. We are dealing with the period of your involvement, I think I made that clear. So you have the P&D differential, whatever one wants to call it, whereby Embassy is to be at least 1p or let's say it is 1p, it doesn't matter for the sake of what I am asking, differential with Benson & Hedges. So the first example I want you to consider is: you decide that the costs increases are affecting you, and therefore there is going to be across the board increase of your cigarettes, which affects Embassy by going up 4p per packet.

On the policy that you had, what would, if anything, be the expectation of what, or requirement, whichever

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

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

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

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

the question is: once the differential policy is established, if you put your price up, was there an expectation on Imperial's part that the retailer had to move the price of the Gallaher brand if you put up your price?

A. Again, certainly not, no.

Q. Right. As far as you were aware, in the period that you were involved in this, 1990 to 1996, did anything occur, as far as you know, whereby in the course of the dealing Imperial was requiring or expressing an expectation of the retailers that they must put up the price of Gallaher's product because you were putting up your price?

A. No. No, we acted independently with the retailer, we were trying to achieve our prices, we never even discussed Gallaher pricing, nothing to do with us.

Q. Now, conversely, if Gallaher, when you set this policy, had a price increase so that Benson & Hedges RRP went up or the price went up for some other reason, because they had put up the wholesale price, did you have any expectation, as far as you were concerned, of what the retailers were then to do in relation to the Imperial brand, if the Gallaher price went up?

A. So just to make it clear, in the example I gave earlier, Benson & Hedges 1.50, No 1, 1.49 on the shelf, you are

saying maybe Benson & Hedges went up to £1.54. What would we do?

Q. Did you have any expectation of what the retailer was to do?

A. Our expectation was that the retailer would not change our prices because nothing had changed, so we would have, in that example, a 5p advantage for a while.

Q. Right. Conversely, if you put the price of an Imperial product down, so you had a price promotion on Embassy, so it was at 1.49 -- as I understand it a price promotion works pretty simply, you were telling us earlier this morning, you want the price to come down 2p to the consumer so you pay the retailer literally 2p a pack?

A. Mm.

Q. So you have a price promotion of that type with Embassy, reducing the price to 1.47, they were previously selling Benson & Hedges at 1.51, what do you expect them to do with Benson & Hedges where you have put down the price of Embassy?

A. I expect them to go through the process that we went through. First, confirming that that was the situation, then they would have I assume an internal debate as to whether they were going to react, and then if they chose to, they would go to the retailer and give them 2p and

bring their price -- but that was up to them.

Q. I think you misunderstood me. That's Gallaher, what you anticipate Gallaher will do. But I am asking you, assume Gallaher doesn't do anything --

A. Yes.

Q. -- what did you expect the retailer to do with the price of Benson & Hedges? You have reduced the price of Embassy from 1.49 to 1.47, what did you expect or require the retailer to do to the Benson & Hedges brand as a result of what you had done with yours?

A. Again, nothing. That was entirely up to the relationship between the retailer and Gallaher. Our expectation or hope, if you like, was that we would have a widened advantage for a while, and hopefully gain some more market share.

Q. What if it goes the other way, what if Gallaher, they are at 1.51 for Benson & Hedges and you are at 1.49 for Embassy, Gallaher decide "We don't like this very much so we are going to have a 4p promotion per pack of Benson & Hedges" and they pay the retailers that so that the retailers start to price at 1.47?

A. Yes.

Q. Did you have any requirement of the retailers as to what they were to do in that event to the Embassy brand?

A. I think our only requirement was the opportunity to

react if we wanted to. So I mean, they didn't have to tell us because we could see it often on-shelf, but I would say our hope was at least that we would then have a negotiation, if we chose to, to bring our price down.

Q. I see, and how would you seek to bring the price down?

A. By giving them money, essentially.

MR HOWARD: Right. Okay. I think that's all I wanted to ask.

Further questioned by THE TRIBUNAL

MR SUMMERS: Just to help me round up my understanding of your particular responsibilities. When you were in charge, up until 1996, were you in charge of the pricing for both cigarettes and cigars?

A. Yes. Yes, all the product categories, there was roll-your-own tobacco and pipe tobacco.

MR SUMMERS: When you became head of cigars --

A. No.

MR SUMMERS: -- did you make changes to the policy or was just a straight continuation of the same policy?

A. No, my earlier example, Classic was launched to be at price parity with Hamlet, and it stayed all the time I was involved in cigars, we didn't change the pricing position in the slightest.

MR SUMMERS: Thank you.

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

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

brands had come down as well.
MR HOWARD: Could I just ask a question arising out of that?

Further re-examination by MR HOWARD

MR HOWARD: Just to pick up the Chairman's question as to what the purpose was, my questions were of course directed to the situation which the OFT has been focusing on where there are price changes after you. Can you just explain to us, at the beginning, as it were, at the time at which, if we take whatever the date is when the RRP gets set at the beginning of the year, and then for the year you enter into these agreements with the retailers, what is it achieving at that stage? What are you seeking to achieve at that stage when you enter into the agreement vis-a-vis the pricing, can you explain that?
A. At that stage it was to get the underlying position correct.
Q. Sorry, what do you mean by the underlying position correct?
A. Well, excluding manufacturers' price rises and Budget -- price upset in the market, and it often was in January by your example, so if it was a quietish period and there were no real price changes, that was what we were trying to establish, that our brands were at the right price or below.

MR HOWARD: Thank you.
THE CHAIRMAN: Yes, thank you very much, Mr Good, that's been very helpful.
A. Thank you.
THE CHAIRMAN: I think that's probably a good point to break. We will come back at 2 o'clock. I can release you from the witness box at least for the moment.
A. Thank you.

(The witness withdrew)

(1.00 pm)

(The short adjournment)

(2.00 pm)

MR HOWARD: If we may, we will now call Mr Batty.

MR ROGER BATTY (sworn)

Examination-in-chief by MR HOWARD

MR HOWARD: Mr Batty, could you be given core bundle, volume 3, and go to tab 33, {C3/33} which should be the copy of your witness statement for the purposes of the hearing. It's dated 11 June 2010. Could you confirm that is your statement and that it is true?
A. Yes, I confirm that.
MR HOWARD: Thank you.

Cross-examination by MR LASOK

MR LASOK: Mr Batty, when did you last read your statement?
A. Variously over the last two or three days.

Q. Could you go to page 37, please. If you have 37, could you just read through the first five lines at the top of the page, and then read paragraphs 5.25 to 5.26. I am not asking you to read it out loud, just read it to yourself so you have it in the forefront of your mind.
A. Can I clarify, from 5.23?
Q. It's from the first page on the top of page 37, it is the bit beginning "Although Shell agreed", then it's 5.25 and 5.26.
A. Okay. (Pause).
Q. With those passages in mind, could you turn to tab 35 in core bundle 3. {C3/35} You have there the first appeal witness statement of Mr Culham. It's the same bundle with the witness statement in it. Tab 35, do you have that?
A. Yes.
Q. Is that Mr Culham's first appeal witness statement?
A. First appeal witness statement, yes.
Q. Could you turn to page 10 of that witness statement. Do you have page 10?
A. Yeah.
Q. If you look at paragraph 47, and go to the fifth line, do you have that?
A. Yeah.
Q. Could you read from the words "Although Shell agreed" to the end of paragraph 48, please.
(Pause)
A. Yes.
Q. Now, the passages that I have asked you to look at in your witness statement and the passages that I have asked you to look at in Mr Culham's witness statement are virtually identical word for word. There is a difference, because if you have Mr Culham, and you go to the top of page 11, and you look at the second line -- do you have that?
A. Yeah.
Q. He says:
"I believe that this presentation sets out ..."
If you compare that with your paragraph 526, it doesn't say "I believe". Now, this is not a trick question, but did Mr Culham get his paragraphs 47 and 48 from you, or did you get your bits from him?
A. I've no idea.
Q. I am sorry?
A. I don't know. Certainly I compiled my witness statement independently of Mr Culham compiling his witness statement.
Q. So you sort of, by coincidence, hit upon exactly the same words?
A. I don't know how it's happened, but that appears to be the case.
Q. And you wrote your statement yourself?
A. In conjunction with Ashursts, yes.
Q. Did they suggest any wording to go into your witness statement?
A. I couldn't remember specifically about this section, I mean, it was as part of a conversation pertaining to the various documents that were being shown to me and raised with me.
Q. Well, I did want to ask you one thing about your paragraph 5.23. Now, I asked you to read a bit, this is at the top of page 37, and if you look at that part, you talk about Shell having agreed to run a PMP promotion, and then you say that it refused to agree to another one, and you give a reason. I'll just read out the bit:
"... on the basis that its retailer franchisees had objected to the effect of lower prices in the outlets which had attracted customers away from other tobacco products which were not being promoted and had higher prices and margins."
Do you remember where that came from?
A. Well, I can remember the incident with Shell, even though it's quite some time ago, because I think we felt that we had had a major success in persuading Shell to be involved in that type of activity, because we were very concerned with the pricing of Shell. But where that precise wording came from in the statement, from my memory I guess.
Q. So this is just your memory of what the reason was?
A. Mm.
Q. Okay. I wonder whether you could turn back in your statement to --
THE CHAIRMAN: Just wait one moment. (Pause). Yes, sorry, Mr Lasok.
MR LASOK: I wonder whether you could turn back in your statement to page 17. If you look at paragraph 3.12, again could you just read that to yourself, please.
(Pause)
Now, the trading agreement in question which you exhibit as exhibit 9 is also to be found in the SO annex 16 at tab 7 {D16/7}
Do you have the trading agreement?
A. The First Quench --
Q. It should be in the --
A. Dated 26 November.
Q. That's right. If you look towards the bottom of the page, there is a bit in bold which says "Note". Do you have that? It says:
"1. ITL pricing strategy to be adhered to on all brands."

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

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

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

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

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

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

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

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

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

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

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

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

Q. If the promotion was coming to the end, are we talking about an Amber Leaf promotion or a Drum promotion?
A. Well, that I can't tell from this correspondence, it could be either, that we responded to something that Amber Leaf had done or we have done something that Amber Leaf responded to.
Q. The true position, therefore, is that whether this relates to a promotion is pure speculation on your part?
A. Yes, I think it is pure speculation, but with the evidence that I've got, without digging deeper into this particular instance, but to me the way that we tended to operate as a national account team, this was just the general type of everyday activity that was taking place. There were promotions going on with different retailers at different times across a raft of our products, and this was probably one of many.
Q. Could you turn to tab 23, please, {D20/23} and could you read that. This is not something that you were copied in on, but it also relates to the Drum and Amber Leaf pricing issue.
(Pause)
A. Yeah.
Q. Does that shed any light?
A. Well, not really. I think the only people that might remember the precise details of what was happening at

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

you see? I think you can read, for present purposes, just down to the heading "Planograms, Kwik Save" and not past it.
(Pause)
Now, I would suggest to you that this is completely inconsistent with the evidence that you have given in your witness statement and orally today that ITL was unconcerned where a retailer was selling ITL products at shelf prices lower than the relevant specified differential?
A. Well, I would disagree. Without knowing the precise infinite details behind this, there is obviously some further factor in here, because there is mention of Drum being, having a 10p differential against Golden Virginia, which is another Imperial brand, and I do remember that part of our own brand strategy was to have that differential in place, and it looks to me as though, in response to an Amber Leaf promotion, we have reduced the price of Drum. We are trying to get the Drum price back to the strategic brand position we require against another of our own brands, Golden Virginia.
I think if I can just make the point, further on in that correspondence, the two or three paragraphs underneath the Amber Leaf and Drum, as you can see there

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

done something about it?
A. Unless there was something involved with this that I am not aware of in reading this correspondence here. I don't see the full story here, and that's what I find difficult in trying to reach a conclusion and an interpretation on what is going on. All I can say is that we didn't act in a way that counsel is suggesting, where we instructed retailers, for no apparent reason other than this strategy situation, to put prices up. It was usually connected with a short-term tactical promotion and bonus that we were paying a retailer.
Q. Could you turn to the next tab, tab 25. {D20/25} There are effectively three emails here, but if you look at the second one, which is in small print, it starts off "original message" and then it says underneath "from Nick Law, sent 6 November 2001, 14.02." Do you have that one?
A. Yeah.
Q. That was an email to Mr Hall, and you were copied in on that email. Could you possibly read that email, again you don't have to go past the heading "Planograms" just below the second holepunch.
(Pause)
A. Yes.
Q. This is an instance in which ITL gets reassurance that

Amber Leaf and Drum are going to be brought into line. In this instance the reassurance derives from the fact that Somerfield has reduced the Gallaher price. That's what it says, isn't it?
A. Yes, Amber Leaf has been reduced down to the Drum price.
Q. And that's how that particular problem was resolved?
A. Looks like it, because there is further mention of the other products that were in previous correspondence.
Q. Yes, and I put it to you again that this is simply the culmination of an episode in which Imperial were seeking to get parity for Drum with Amber Leaf, irrespective of the absolute price level?
A. Well, I think it was achieved, but in a way that we probably weren't expecting, in that the competitor reduced their price down to match ours.
THE CHAIRMAN: Well, it seems that that was what happened for the 25 gram, but for the 50 gram, the end of that first bullet point says:
"Steve wishes to increase Drum to match Amber Leaf at 8.29."
At tab 24 is the Amber Leaf price for the 50 grams, whereas the Drum at 50 grams was £8.09.
A. But I think, madam, that that actually puts the three packings in the right sort of pricing perspective.
THE CHAIRMAN: Yes, but --

A. There is an equilibrium there --
THE CHAIRMAN: -- it seems that the problem was resolved by Amber Leaf 25 grams coming down to the Drum price, and the Drum 50 grams going up to meet the Amber Leaf price.
A. That's what it looks like, yes.
DR SCOTT: What seems to be going on, and this reflects the previous witness, is that you have periods of turbulence that occur, followed by attempts to get things back to your pricing strategy, and because there is more than one player, a certain amount of dance goes on, and then eventually you seem to get back to something that looks like your pricing strategy.
Does that characterise the situation --
A. I think it does.
DR SCOTT: -- correctly?
A. The turbulence I think is the competitive nature of what we were doing. The retailers were competing with one another, we were certainly competing with Gallaher, with Rothmans, with BAT, at the same time, and retailers, you know, take this example for instance, Somerfield were I think going through their own turmoil at the same time. And dare I say it, I remember the buyer at Somerfield at this time, [redacted] I think adding to the confusion here is

the introduction of Nick Law, who was a young trainee that joined us, who was working sort of in conjunction with Mr Hall, Graham Hall, and so you get a fairly complex situation developing. But I reiterate, we weren't, you know, wedded to the adherence to the strategy differences in the way that I think counsel is suggesting.
MR LASOK: But what we see here in this resolution is what you expected to see through the operation of the trading agreements?
A. If they then reflected the differentials, probably so. But these were prices that the retailer was making their own minds up that they were going to price those products at in their retail outlets.
Q. Yes, I don't think anybody disputes the fact that the retailers were entitled to fix absolute prices. The issue is about the pricing relativities.
Let's go to another one, annex 29, so you can put away this annex.
DR SCOTT: Mr Lasok, can I just ask a question to put things in perspective?
Mr Batty, you were involved throughout this period?
A. Yes, I was. I succeeded Mr Goodall.
DR SCOTT: Yes, and we have had a very helpful schedule prepared of the chronology of Budget announcements and

manufacturers' price increases. The impression that we get from that was that there were these steps up, usually two, sometimes more, per year. So that the underlying price trend was going up as tax and inflation went up and that the reductions that took place were promotional reductions and reactions to promotional reductions. Does that properly characterise your understanding?

A. It does, and I mean, Imperial Tobacco as a company tended to be reactive to what the competition were doing. Bearing in mind where we had started out, sort of in the early 1990s, with 33, 34 per cent of the market, and Gallaher's much further ahead than us, this activity of tracking everything that they did and making sure our brands were always competitive was the strategy that we followed and we had to think very carefully about when to do things and when not to do things.

DR SCOTT: That's helpful, thank you.

THE CHAIRMAN: I think one of the other witnesses comments that when there was a Budget increase, an MPI would follow fairly shortly thereafter to reinstate the retailer's margins which had been reduced by the passing on of the Budget increase. Even though the margin may in absolute terms have remained the same, the arithmetical result of adding on the Budget increase was

that the margin was reduced as a percentage, and that was what the second MPI, if I can call it like that, was aimed at reinstating.

Is that your recollection of how that worked?

A. Yes, that was I think part of the rationale for having the price increase when we did, after a Budget, because you quite rightly say that although the cash margin stayed the same with the tax increase, the percentage margin fell, and unfortunately retailers were wedded to percentage margins, not to the cash that pays the bill. So that was what we were trying, as part of a manufacturers' increase, to address, as well as a strategic requirement for us to make profit for the shareholders.

MR LASOK: Could we turn to annex 29, please. Do you happen to have that one? {D29/19}.

A. Yeah.

Q. And to tab 19. This is a letter dated 12 July 2000. Could you read the first page of the letter down to but not including the heading at the bottom "Advertising & Units", please.

(Pause)

I don't think you need read the rest of the letter, but if you would prefer to do so, please go ahead.

A. I am just making sure I understand the context of the

letter.

Q. So this letter looks as though Mr Culham, who is the national account manager for T&S Stores, is pointing out to T&S differential errors in the branches, and he is asking T&S to arrange the correction of those errors. They involve such things as, if you look at the third item down in the list of errors, you have a reference to Classic Twin --

A. Yeah.

Q. -- which was at 5.44, and he wants T&S to change the price to 5.54, equal to Hamlet. This too, I put it to you, is an example of ITL's actual behaviour at the time?

A. Well, I think this letter refers to the amalgamation of a retailer called Day & Nite, that were a small convenience chain that T&S acquired sometime in 2000, and quite often in these instances, where a bigger retailer took over a smaller retailer, we would be asked to give what was the best of whatever terms were available to the retailer that was making the acquisition. I think this is part of that process, where the Imperial national account manager, Ken Culham, was trying to get the Day & Nite business into line with the price of our products in the T&S retail outlets. The item in question, the Classic Twin at 5.44 and

changing to 5.54, Mr Culham would also have probably a pretty good understanding of the margin that T&S were wanting to make on any particular line, and I think he would have alarm bells ringing to see Classic Twin at 10p below the Hamlet 10, particularly when you note, I think in the second main paragraph of this letter, the second sentence, it says:

"There are currently no special short-term tactical bonuses on Day & Nite sales volumes."

Now, whether this coincided with a time when we had been promoting the Classic Twin pack, I don't know, but I am tying those two things together, and to me, the national account manager is, if you like, looking after his own future with this customer by pointing out what could possibly be a damaging error in terms of margin and profit on that particular product line. Again, not wanting to be hit at some stage in the future for some compensation for having a low price.

Q. Well, the letter refers to differential errors, and if we look at the trading agreement with T&S, which is at tab 11, {D29/11} the price requirements are on the sixth page. I don't know what pagination you have, but in my copy there is a sort of stamped page 32 in the bottom right.

A. Yes. With much of the information redacted.

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

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

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

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

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

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

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

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

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

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

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

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

was reported to ITL by Asda, and your advice is, and I'll quote again as follows:

"... he has confirmed that we should follow Gallaher's lead on this by moving Richmond Superkings 20s up to £3.47 one week after Dorchester Superkings move up. The strategy thereafter (where Sterling is stocked) is that Richmond should be 5p [above] cf Sterling and at parity with Dorchester.

"Roger requests that you take appropriate action with your accounts please."

Is this one of your examples of vigorous low pricing strategies?

A. I think it's probably as a consequence of the vigorous low pricing, intense price led competition in the market that I refer to here, because this is, I believe, the consequence of the activity that created this new sector in the market, the ultra low price sector, which, if my memory is correct, Gallahers were the first company to enter the ultra low price sector, and we were quite late by comparison in entering it as Imperial's chief executive was concerned with the impact on profitability in the company by getting into this particular sector.

But when we did enter it, we entered it with a brand called Richmond in a Kingsize version, and we then attacked I think it was Mayfair initially with Richmond,

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

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

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

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

just round the corner, I can't be absolutely certain of that, but one of the things that we might be cognisant of at that point is there could well be a Budget increase on the product, and if we were thinking of increasing the shelf price of a product, then we might find ourselves with a bit of a double whammy with a Budget increase and a tax increase at the same time.

Q. I am particularly interested in the passage in Mr Hall's email where he's effectively, as I read it, reporting your strategy, and the strategy, I'll read it again:

"The strategy thereafter (where Sterling is stocked) is that Richmond should be 5p above Sterling and at parity with Dorchester."

That's the strategy.

A. Yeah.

Q. That was your strategy?

A. Yeah.

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

A. Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

there was slight variations in the make-up of the blend of tobacco. But that was, as far as I know, the Richmond blend was the Richmond blend from day one.

MR LASOK: Right, we can close 28 and could you take up annex 16, please. {D16/10} Could you go to tab 10, please. Just a short bit here. The only bit I am interested in is the paragraph immediately before the numbered paragraph 5. It's the one that says -- I hope this is not confidential -- it says:

"I also note that Amber Leaf will move up to 1.99 from the date of the Gallaher MPI. Drum will match Amber Leaf and I will set out the new bonus in the retro payment."

Is that too an example of vigorous low pricing strategies at work?

A. I don't know because I don't know what the recommended price of Amber Leaf was at that particular time.

Q. The policy was parity with Drum. Sorry, parity between Drum and Amber Leaf.

A. Yes, I understand that. But to me 1.99 sounds like a good price point, and it would be attractive to consumers.

Q. You say:

"Drum will match Amber Leaf."

It's not you; ITL says.

A. I mean, that was our declared strategy, to have --

Q. To match?

A. -- Drum at the same price or less than Amber Leaf.

Q. No, to match?

A. Same price or less, no more expensive than.

Q. If it was the same price or less, why is it "Drum will match Amber Leaf and I will set out the new bonus in the retro payment"?

A. I think in this case this is just the terminology that the national account manager, George Byas, used as part of his, if you like, commercial shorthand slang, a quick way to get to the point in here. If it had been written by a lawyer, it would have been very different, I am sure. These are salesmen that are writing these, and I just don't think that the emphasis that you are adding to match is the emphasis that he would have put on, he wouldn't have put any emphasis on that, the emphasis for him was more to do with the 1.99, I think.

Q. Are you saying that the word "match" is a technical term in the trade?

A. No.

Q. It has its ordinary and natural meaning, doesn't it?

A. Yes.

Q. So what's the longhand version of this?

A. Can't be certain but my guess would be that it's that

there will be a reduction in bonus -- it says there, doesn't it "I will set out the new bonus in the retro payment", so he is reducing the bonus behind it and the price is going up to 1.99, which is a great shelf price.

Q. I would like to focus on the first phrase:

"Drum will match Amber Leaf."

I think you have said that's commercial shorthand?

A. I didn't say commercial shorthand, I said shorthand.

Q. Okay. What's the longhand version?

A. To be the same price as or less, if you are looking at the sort of strategic price requirements that feature in these things.

Q. But it already was less?

A. Yes, but I think that from a sort of product management point of view, if I was out there doing this job and I had an opportunity to sell a product at 1.99 and reduce my bonus, ie the cost of me selling it, I would do that. It's just convenient that that product is there at that price and he has put "match". It's just a word he has chosen out of the blue, I think, to express what he wants from this position. I wouldn't read anything significant or sinister in the use of the word "match".

Q. Why didn't he say "Drum will poison Amber Leaf", that's a word that he plucked out of the blue?

A. I don't know, I can't answer.

Q. Why did he choose "match"? It's ordinary English, isn't it?

A. Yes, it is, that's it, it's ordinary English. And going --

Q. The recipient of this letter --

A. Sorry?

Q. The recipient of this letter, on what basis are we supposed to believe that the recipient of this letter would have interpreted it in the longhand way that you have suggested?

A. I don't know, I can't even begin to guess how Michael Williams would have interpreted that, what he would have thought when he read that.

Q. Maybe he would have thought that "match" meant "match"?

A. Maybe.

Q. Pretty likely, isn't it?

A. Maybe.

Q. Particularly when he is being told that Drum is going to match Amber Leaf?

A. I think the point is that Michael Williams at Thresher, if he chose to sell at a price other than 1.99, if he sold it at less than 1.99 he would probably get the retro bonus that George Byas had calculated in here, if he sold it for £2 or above he would not get the retro

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

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

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

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

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

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

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

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

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

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

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

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

documents any suggestion that the understanding between ITL and the retailers was that the retailer could price below, and these were just maxima?

A. Well, I think if you go back to the strategic pricing requirements, which is probably not the best title in the world for that particular document, but you will see that the majority of them talk about "at least" or "no more expensive than", and those sorts of pieces of phraseology, which quite clearly convey to the retailer reading that that they have flexibility to price at whatever level they want --

Q. Even when the retailer is being bombarded with communications that don't use that kind of language at all?

A. Well, it's there in the documentation that a retailer would have, because I think quite honestly a lot of the reason we are here today is to do with those strategic pricing requirements and the differentials, isn't it, and they were attached to the trading agreements and a retailer would understand, I hope, from that that they had the flexibility, and from my experience retailers looked at it and said, "Hmm, okay" and then made their own minds up.

Q. I am simply putting it to you that's not the way it worked, what actually happened was that ITL communicated

to the retailers using the kind of language that we have seen in these documents, and imparted to the retailers the clear view that, from ITL's perspective, the retailer was to respect parities and differentials, and Imperial did not communicate in such a way as to indicate to the retailers that there was scope for the retailer to price at any level that distorted or failed to respect the parities and differentials?

A. Well, I mean, it was my understanding that retailers were quite clearly capable and able and did make their own minds up about what price they were going to apply to our products on their shelves in their retail outlets, and to even suggest that, you know, there was this -- Imperial Tobacco were a puppeteer pulling the strings of retailers and retailers were doing just as we asked couldn't be further from the truth. I mean, life as a national account manager dealing with the retailers was not a particularly easy life. There were hard negotiations, hard bargaining, it was more akin to tug-of-war than playing with a puppet. You know, there was a bit of give and take, and there was tension from both sides. We knew what the retailer was wanting to do, they knew what we were wanting to do, we didn't know all the time what our competitor was doing, what they were up to, you could see things in the marketplace, but

we had no idea of what their longer term strategy was and what their view was against the things that we were doing. But ultimately between us and the retailer, you negotiated an outcome.

DR SCOTT: But if I am a retailer, Mr Batty, and you make it very clear to me what your strategic pricing requirements are, and you come to me with a trading agreement which annexes those strategic pricing requirements and you offer me a bonus in terms of accepting adherence to those strategic pricing requirements, what do you think I am to understand by your approach?

A. Well, in a very cold clinical way I can understand that comment, but the reality was there were two people involved in a dialogue, and there was a much greater and broader understanding of both sides' positions, and it was quite clear, I think, that in a lot of instances, if you like, the letter of the law with the strategic pricing differentials were broken but we didn't impose penalties for that. We were encouraging the retailers to sell our products at competitive prices and to win market share, and during the period of this whole investigation we won a lot of market share. Now, I don't believe we would have won market share by being uncompetitive.

DR SCOTT: If we stick with the background to this in terms of the difference between demand for tobacco overall, which we understand from the evidence to be relatively inelastic, the suggestion is that you introduced the concept of parities and differentials because you recognised the significance of those differentials -- and you talked about this earlier on -- in terms of consumers actually making that decision between brands, and what we heard was that what mattered, there was that differential, because the consumers weren't terribly good at remembering the absolute prices when you questioned them in the market research, so that it's fairly logical and I think we see this in your witness statement in 2.24, 2.40, and 3.28, that parities and differentials were a good idea from the point of view of winning market share, for that very reason of consumer behaviour.

So that it's quite logical for you to come to a retailer with the approach with which you came to a retailer, not suggesting any control over absolute pricing, because that really didn't matter. The difficulty when we come to the documentation is it actually quite a lot of references we have seen to very specific pricing.

Now, what you seem to be saying to us is this:

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

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

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

corrected.

A. Hopefully, yeah. Yes.

DR SCOTT: Thank you.

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

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

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

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

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

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

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

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

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

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

THE CHAIRMAN: Are you envisaging calling Mr Goodall then,

or you might --

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

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

THE CHAIRMAN: Thank you very much. We will meet again at as close as possible to 10.15 on Tuesday morning.

(4.50 pm)

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

INDEX