IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1407/1/12/21, 1411/1/12/21-1414/1/12/21:

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 22nd November-Friday 23rd December 2022

Before:
The Honourable Mr Justice Marcus Smith
Professor Simon Holmes
Professor Robin Mason
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Appellants

(1) ALLERGAN PLC ("Allergan")

(2) ADVANZ PHARMA CORP. LIMITED & O'RS ("Advanz")

(3) CINVEN CAPITAL MANAGEMENT (V) GENERAL PARTNER LIMITED & O'Rs ("Cinven") (4)

(4) AUDEN McKENZIE (PHARMA DIVISION) LIMITED ("Auden/Actavis")

(5) INTAS PHARMACEUTICALS LIMITED & O'RS ("Intas")

AND

Respondents

COMPETITION AND MARKETS AUTHORITY ("The CMA")

A P P E A R AN C E S

Mark Brealey KC (On behalf of Advanz)

Daniel Jowell KC & Tim Johnston (On behalf of Allergan PLC)

Sarah Ford KC & Charlotte Thomas (On behalf of Auden/Actavis)

Robert O'Donoghue KC & Emma Mockford (On behalf of Cinven)

Robert Palmer KC, Laura Elizabeth John & Jack Williams (On behalf of Intas)

Marie Demetriou KC, Josh Holmes KC, Tristan Jones, Nikolaus Grubeck, Michael Armitage, Professor David Bailey & Daisy Mackersie (On behalf of the CMA)

Thursday, 15 December 2022

(10.30 am)

Closing submissions by MR JOWELL (continued)

THE PRESIDENT: Mr Jowell, good morning.

MR JOWELL: Good morning, Mr Chairman, members of the Tribunal. I would like to start now to address you in relation to the third issue, which is the hold-separate period. If I could start with what the context and purpose of the hold-separate period was.

You will recall that on 29 May 2015 Actavis buys Auden McKenzie and with it AM Pharma, and that is the date when the CMA's Decision finds that the infringement starts as far as Allergan is concerned. But then less than two months after that on 26 July 2015 Allergan agreed to sell its entire generics business to Teva, and that included those UK subsidiaries selling generics.

For the Teva contract to complete, Allergan and Teva required merger clearance from the European Commission and as a condition of permitting merger clearance the Commission insisted, as it often does, that the parties should divest part of the business.

So that particular part of the business could go to Teva temporarily but then had to be spun off to a third party. The idea of that divestment was so that it would subsequently operate as a competitor to Teva, and

potentially also to Allergan as well.

To that end, the divestment business is meant to be maintained as a separate competitive entity and also to be kept wholly separate from the businesses operated by the parties.

If I could show you the Commission's notice on remedies which sets out the general purpose of such hold separates in relation to divestment businesses. If we could go, please, to {M/62/1}. If we could go to page 6 of that {M/62/6}. You will see there paragraph 22:

"Where a proposed concentration threatens to significantly impede effective competition the most effective way to maintain effective competition, apart from prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture by the merging parties."

Then you see in 23:

"The divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and that is divested as a going concern. For the business to be viable, it may also be necessary to include actives which are related to markets where the Commission did not identify competition concerns if this

is required to create an effective competitor in the affected markets."

Then if we could go down to paragraph 28, please {M/62/7}. You will see:

"In the description of the business, the parties also have to set out the arrangements for the supply of products and services by them to the divested business or by the divested business to them. Such on-going relationships of the divested business may be necessary to maintain the full economic viability and competitiveness of the divested business for a transitional basis. The Commission will only accept such arrangements if they do not affect the independence of the divested business from the parties."

So the essence of it is that the divested business has to be independent, and independent from the outset.

If we could go forward, please, to page 23 of this document {M/62/23}. You will see at paragraph 108:

"It is the parties' responsibility to reduce to the minimum any possible risk of loss of competitive potential of the business to be divested resulting from the uncertainties inherent in the transfer of a business. Up to the transfer of the business to the purchaser, the Commission will require the parties to offer commitments to maintain the independence, economic

viability, marketability and competitiveness of the business. Only such commitments will allow the Commission to conclude with the requisite degree of certainty that the divestiture of the business will be implemented in the way as proposed by the parties in the commitments.

Generally, these commitments should be designed to keep the business separate from the business retained by the parties, and to ensure that it is managed as a distinct and saleable business in its best interest, with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the business retained by the parties."

So we see a consistent emphasis there on both two things really, the independence of the business and the fact that it must remain a competitive and viable entity, and that is what the Commission is aiming at here.

Then if we read on:

"The parties will be required to ensure that all assets of the business are maintained, pursuant to good business practice and in the ordinary course of business, and that no acts which might have a significant adverse impact on the business are carried out. This relates in particular to the maintenance of

fixed assets, know how or commercial information of a confidential or proprietary nature, the customer base and the technical and commercial competence of the employees. Furthermore, the parties must maintain the business in the same conditions as before the concentration, in particular provide sufficient resources, such as capital or a line of credit, on the basis and continuation of existing business plans, the same administrative and management functions, or other factors relevant for maintaining competition in the specific sector. The commitments also have to foresee that the parties should take all reasonable steps, including appropriate incentive schemes, to encourage all key personnel to remain with the business, and that the parties may not solicit or move any personnel to their remaining businesses."

So what they are saying is, we must make sure that the businesses do not do something to undermine the divestment business, to stifle it in the meantime.

Then it goes on, paragraph 111:

"The parties should further hold the business separate from its retained business and ensure that the key personnel of the business to be divested do not have any involvement in the retained businesses and vice versa."

So people going to the divested business are not allowed to effectively have continued involvement in the retained businesses.

"If the business to be divested is in corporate form and a strict separation of the corporate structure appears necessary, the parties' rights as shareholders, in particular the voting rights, should be exercised by the monitoring trustee which should also have the power to replace the board members appointed on behalf of the parties."

So just pausing there, that is rather important because it says if this is a separate corporate entity then you are not even allowed to be on the board of this company. It is the monitoring trustee that then has to step in and act as the board of the company.

That tells you, really, who is meant to be running this company. The monitoring trustee is ultimately to effectively take the shoes of the owner.

Then it says:

"In relation to information, the parties must ring-fence the business to be divested and take all necessary measures to ensure that the parties do not obtain any business secrets or other confidential information. Any documents or information confidential to the business obtained by the parties before adoption

of the decision have to be returned to the business or destroyed."

So that is again saying two things. It is saying first of all that you are not allowed any confidential business on an ongoing basis, but also if you have it you have to destroy it.

Then in 112 you see:

"The parties are further generally required to appoint a hold-separate manager with the necessary expertise, who will be responsible for the management of the business and the implementation of the hold-separate and ring-fencing obligations. The hold-separate manager should act under the supervision of the monitoring trustee who may issue instructions to the hold-separate manager."

So it is the monitoring trustee who has the power to issue instructions, and:

"The commitments have to provide that the appointment should take place immediately after the adoption of the decision and even before the parties may close the notified concentration. Whereas the parties can appoint the hold-separate manager on their own, the commitments have to foresee that the monitoring trustee is able to remove the hold-separate manager, if s/he does not act in line with the commitments or endangers

their timely and proper implementation."

So the monitoring trustee can remove the hold-separate manager if they think they are not doing their job properly.

Then finally, if we could go, please, to page 24 of this {M/62/24}. If we could go down to paragraph 118, and we see:

"The monitoring trustee will carry out its tasks under the supervision of the Commission and is to be considered the Commission's 'eyes and ears'. It shall be the guardian that the business is managed and kept properly on a stand-alone basis in the interim period. The Commission may therefore give any orders and instructions to the monitoring trustee in order to ensure compliance with the commitments, and the trustee may propose to the parties any measures it considers necessary for carrying out its tasks. The parties, however, may not issue any instructions to the trustee without approval by the Commission."

So very, very clear that parties cannot give instructions to the monitoring trustee. The monitoring trustee takes its instructions from the European Commission and the European Commission alone.

Now, if we then go to the commitments themselves which were signed on 4 March 2016 and entered into force

on 10 March 2016. They are in {IR-H/986/1}, and they very much follow the template envisaged by the notice. There are two, possibly three key provisions. Let me start with paragraph 37 which is on page 9, please {IR-H/986/9}. We see in paragraph 37 -- we are not concerned with Teva here. If we start with Allergan in the middle of the first line:

"... Allergan commits from the Effective Date until Completion, to keep the ... Divestment Businesses separate from the business(es) it is retaining and to ensure that unless explicitly permitted under these Commitments: (i) management and staff of the business(es) retained by the Parties have no involvement in the ... Divestment Businesses;"

So its staff are not permitted any involvement in the business.

"(ii) the Key Personnel of the ... Divestment Businesses have no involvement in any business retained by the Parties ..."

So people who go to the divestment business cannot have any involvement in the business from which they originate:

"... and do not report to any individual outside the ... Divestment Businesses."

So it is meant to be completely sealed that way.

Then 38:

"Teva shall until Closing, and Allergan shall until Completion, assist the Monitoring Trustee in ensuring that each part of the ... Divestment Businesses is managed as a distinct and saleable entity or entities separate from the businesses which the Parties are retaining. Immediately after the Effective Date, the Parties shall appoint the ... Hold-Separate Manager. The ... Hold-Separate Manager shall manage the Divestment Businesses independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by the Parties. The [UK] Hold-Separate Manager shall closely cooperate with and report to the Monitoring Trustee and, if applicable, the Divestiture Trustee."

That is in due course:

"The Commission may, after having heard the Parties, require the Parties to replace the Hold-Separate Manager."

So it is absolutely clear that they are to manage it independently and in the best interest of the business and independently, specifically, of the businesses retained by the parties.

So we say, if you ask the question that the case law poses and you say, well, let us assume that the business is run along the lines of these commitments, would that business be operating independently, autonomously of Allergan and Teva? The answer is unequivocally yes. That is what these say. If you ask similarly, the other way it is put in the case law that you have seen, well, could Allergan give instructions to the divestment business that the divestment business would habitually obey? The answer is unequivocally no. It would be clearly breaching the commitments if it sought to give instructions to the divestment business.

Then if you go forward to paragraph 40, also on page 9 of this, we see that the independence is actually reinforced by very strong ring-fencing of information.

So you see:

"The Parties shall implement ... all necessary measures to ensure that they do not, after the Effective Date, obtain any Confidential Information relating to the Divestment Businesses and that any such Confidential Information obtained by them before the Effective Date will be eliminated and not be used. This includes measures vis à vis the Parties' appointees on the supervisory board and/or board of directors of the Divestment Businesses. In particular, the participation

of the Divestment Businesses in any central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Businesses. The Parties may obtain or keep information relating to the Divestment Businesses which is reasonably necessary for the divestiture of the Divestment Businesses or the disclosure of which to the Parties is required by law."

So it is not only a case that the divestment business is run independently, but Allergan is not meant to have access to business confidential information and has to destroy the existing business confidential information it has.

The purpose of that is to ensure that the parties are not only obliged but effectively disabled from exercising control over the business, because obviously if you do not have access to the confidential information of the business it is not going to be possible to give sensible directions as to how it is run.

Now, it is also important to look at paragraph 36, which I think is the commitment that the CMA seek to rely on. That is on page 8 {IR-H/986/8}. We see here:

"... Allergan shall from the Effective Date until Completion, preserve or procure the preservation of the

economic viability, marketability and competitiveness of the Divestment Businesses, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Businesses. In particular, the Parties undertake:

(a) not to carry out any action that might have a significant adverse impact on the value, management or competitiveness of the Divestment Businesses or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Businesses."

So just pausing there, that is a prohibition on Allergan from doing anything to alter the commercial strategy of the investment business. So it cannot change, it is not entitled to change the commercial strategy of the divestment business.

Then (b):

"[It must] make available, or procure to make available, sufficient resources for the development of the Divestment Businesses, on the basis and continuation of the existing business plans;"

Now, this, I think, is the principal provision that the CMA rely on, but you can see that when you look at it in context it is not saying, thou shalt run the

business along the lines of the existing business plans without any deviation, hesitation or whatsoever and regardless of business conditions. It is looking at things very differently. What it is saying is that Allergan has to provide resources that are on the assumption of existing business plans. So it is, as you saw from the Commission's notice, it is looking at things like, well, you have to provide credit, you have to provide any facilities on the assumption that existing business plans will continue. But it is not obliging the divestment business itself to slavishly follow those existing business plans.

Then if one goes forward to page 19 {IR-H/986/19} -- forgive me, I think that may be a wrong reference. No, I think that is the wrong reference. No, forgive me, that simply shows you there when it enters into force, and it is signed on 4 March 2016.

Now, we see from that that the hold-separate manager is obliged to run the business in its own best interests and entirely independently from Allergan, subject only to the supervision of the monitoring trustee.

If one goes then to the monitoring trustee's report, if I can show you that, it is at {C1/3/1}. If one goes to page 19 {C1/3/19}, one sees this is the hold-separate obligation and ring-fencing. If we go over the page,

please {C1/3/20}, you can see there how the monitoring trustee summarises the commitments, or paragraph 37 of the commitments. We see:

"... Allergan commits from the Effective Date until Completion, to keep the ... Divestment Businesses separate from the business(es) it is retaining. Furthermore, as per paragraph 38 ... the parties shall appoint an HSM who shall manage the ... Businesses independently and in the best interest of the business and with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by the Parties. In addition, as per paragraph 40 ... the Parties shall implement or procure to implement, all necessary measures to ensure that they do not, after the Effective Date, obtain any confidential information relating to the Divestment Businesses and that any such confidential information obtained by them before the Effective Date will be eliminated and not be used."

So that is a very good summary of the commitments. If one goes forward we then see a section relating to the hold-separate manager, [redacted]. I do not think there is any secret about that, although it is redacted in this version. If you look down you see there that:

[redacted], Senior Vice President and

President UK and Ireland, was appointed as HSM for the ... Divestment Businesses. [She] works for over 25 years in the pharmaceutical industry including generics, prescription and OTC brands. She has a proven track record of exceeding market growth and building a sustainable business model. More in particular, she developed a business plan and the strategy for the UK Actavis (now UK Allergan generics) business, which became the market leader in 2015 following a sustained period of growth. In addition, [she] was responsible for the launch of a commercial organization in Ireland ..."

So what they are looking at is, is this a qualified person to run this business in an independent way?

We then see that the monitoring trustee has no concerns that the remuneration structure agreed by the trustee was sufficient to be seen to be competitive and incentivising her to perform her task in a suitable manner. That is important because you see at the bottom it deems the incentive scheme to be competitive, because what they want is for her to be incentivised to run this business in a way that is going to be a separate competitive entity in the future.

Then if one goes forward to page 22, please {C1/3/22}. It goes on to discuss, if we can just see

the whole page, we see at the bottom we see it says, "Divestment Businesses/Remaining Allergan Organisation", and it starts to discuss what links remain between the divestment business and Allergan and which it considers are necessary to ensure that the business remains viable.

If you go forward to page 24, please {C1/3/24}, you will see there it starts, "Ring-Fencing". You see "Protection of Sensitive Information". It identifies confidential competitive sensitive information that needs to be protected including, you will see in the table there, pricing, discounts and rebates.

So what they are trying to do is identify where within the broader Allergan organisation do you find stored competitive information about pricing and so on that might be relevant, that concerns the divestment business. They are trying to find out, well, who might still have access to it. What is being done here is steps are being taken to restrict any access and effectively ring-fence the IT, so that you have a clean team that then has to sign non-disclosure agreements.

If you then go forward to page 26 {C1/3/26}. You see there, there is a review of the viability of the business. If you go to page 28, please {C1/3/28} you will see it looks at the income statement of the

commercial UK activities. Perhaps if we could just see the full page, please. You will see the second paragraph there. This is the UK business:

"The UK part contains a commercial function as well as a manufacturing function ..."

As you see:

"The financials for March 2016 were provided to the Trustee with two comparisons: the performance in the corresponding period in 2015 as well as the budget for the current period. However, the Trustee's analysis is solely based on ..."

And so on.

So they are looking at the budgets and the financials, and then you will see under "UK -- Commercial" you see it says:

"Table 5 contains a summary of the income statement of the commercial UK activities of the ... Divestment Businesses."

Then unfortunately it is removed. It is redacted because it is not meant to be provided, precisely because it is confidential information.

Now, in a way it is a pity that we cannot see what that says, the commercial income statement, because one can infer that it would have recorded some information about financial performance including the profitability

of the UK business and the UK generics business.

I would just observe en passant that one of the rather ironic aspects of this Decision is that it seems that in the hold-separate period of this six months the monitoring trustee, which as you have seen is effectively an arm of the European Commission, the eyes and ears of the European Commission, had access to and monitored financial information of the UK divestment business very much at the same -- probably, I would assume, probably at the very same sort of level of detail that Allergan had been monitoring it in the previous six months -- information, perhaps, we do not know for sure, but potentially at least, about the profitability of hydrocortisone sales.

Yet the Commission's monitoring trustee did not spot any abuse of a dominant position by the divestment business and naturally enough the CMA has not sought to hold the monitoring trustee or the European Commission responsible for the infringement.

PROFESSOR MASON: Just while you take your sip of water, could I just ask for whom and what purpose was this report provided?

MR JOWELL: So, one has the hold-separate manager, who is [redacted], who manages the business independently and she reports to the monitoring trustee, which is this arm

and ear of the European Commission. The monitoring trustee is ensuring that she is running it in a way that respects the commitments, and effectively it is auditing on behalf of the European Commission that it is indeed being run independently and indeed it is not being stifled in any way by the businesses.

PROFESSOR MASON: Therefore the purpose of the report was to establish exactly that --

MR JOWELL: Yes, it is.

PROFESSOR MASON: -- rather than to check any other details?

MR JOWELL: It is an overall -- it is to ensure that it is being run properly and viably, and I think in that context no different from Allergan's role really, which was also to ensure that it was being run properly and viably pending its sale to Teva, which was agreed in July.

PROFESSOR MASON: Okay, thank you.

MR JOWELL: Yet it is remarkable that it is said that during this period where it is under the supervision of the European Commission it was still apparently, according to the CMA's Decision, committing an abuse of dominance.

PROFESSOR HOLMES: Your comment a moment ago prompts me to bring forward a question I was going to ask later on: you referred to the CMA not seeking to hold the monitoring trustee liable. Of course it is not a matter

that is before us for that very reason, but would it be a corollary of your argument that Allergan did not have decisive influence and that the monitoring trustee had decisive influence, that that is an avenue that might have been open to the CMA, that the monitoring trustee could be potentially liable?

MR JOWELL: Yes, it would be. I mean, they were the ones who could give instructions.

PROFESSOR HOLMES: Thank you.

MR JOWELL: We would say it is rather extraordinary to say that somebody like Mr Stewart sitting in New Jersey is being held to a standard that is not apparently applied to the monitoring trustee.

Now, coming back, if I may, to the CMA's case on all of this. The CMA's case says, well, the business in this period was run along the lines of the existing business plan and the existing budget which was set in the prior business, and they say it was meant to be business as usual. One sees that if one looks in this document back to page 18, please {C1/3/18}. They rely on the large paragraph in the middle, which says:

"The trustee understands from the hold-separate manager ... that she has sent an email to all employees in the UK and Ireland informing them about the existence and the impact of the Commitments ... At the same day,

a managers and leaders briefing took place based on the context of the aforementioned email. This information has been cascaded by the managers and leaders to their team members. One of the main elements of these meetings was to ensure that the employees of the Divestment Businesses remain focused on the execution of the 2016 plan."

If you go forward to page 31 in this document, please {C1/3/31}, you can see there that:

"The Trustee understands from the HSM that all employees were informed that the key element when it comes to viability of the Divestment Businesses is to achieve results which are in line with (or even higher than) the budget."

Now, that is what the Decision, or the CMA, I think, rely upon, the fact that it was following the pre-existing business plans, pre-existing budget.

Now, the case law tells us that in determining the question of whether there is decisive influence the Tribunal must consider the overall organisational, economic and legal links between the divestment business on the one hand and the parent company, Allergan on the other, and the Tribunal must ask itself whether at the relevant time that divestment business was being run independently or whether it was taking instructions or

habituated to take instructions from the parent.

We say that nothing in the fact that it happens to be run along existing business lines tells you anything about answering that question. It is not in dispute on this appeal but that the obligations in the hold-separate commitments were properly and faithfully respected by both Allergan and by [redacted] as hold-separate manager.

Just for your reference, you can see that in the agreed list of issues which is at {IR-L1A/32/8} at paragraph 17(f). I do not think we need to -- but it is not in dispute.

That, in our submission, is really the beginning and the end of it. Once one has consideration to the contents of the commitments and once it is accepted that they were complied with, then the presumption of decisive influence is rebutted and the position is actually extremely simple and extremely clear.

It is just a very clear example of what Advocate General Kokott described in the footnote to her opinion which I showed you yesterday, which is it is a situation in which the parent company is prevented for legal reasons from fully exercising its 100% control over the subsidiary. That is this case.

So how then does the Decision reach the contrary

conclusion? I think in the Decision there was reliance on various snippets from three European Court of Justice Authorities, the *Del Monte* case, the *Parker-Hannifin* case and the Goldman Sachs case.

Now, those three cases were all decided on very different facts and I do not think, I will be corrected if I am wrong, that the CMA really continues to rest its case on those authorities. They are not analogous to the present position. There was nothing in any of those cases that was equivalent to or even similar to the commitments that we have in this case.

We have dealt with those authorities in some detail in our written submissions, and unless you want me to I do not plan in opening at least or closing, initial closing, to rehash them, to rehash what we say in detail. For your reference it is paragraphs 88-108 of our notice of application, paragraph 62 of our reply and paragraph 107 of our Closing Submissions.

Of course, if the CMA want to come back on those cases then I can deal with it in reply I am sure.

THE PRESIDENT: Just to check, how much time do you have for reply?

MR JOWELL: I have one hour, I believe.

THE PRESIDENT: The reason I raise it is because on almost

all points one has a very clear understanding of where the battle lines lie. This is an area where I have just been going through the CMA's Closing, and it does not separate out Allergan's position. Entirely understandably, the submissions are general in relation to the various appellants, although there are clearly specific references to Allergan's position. But it does seem looking at, for instance, the CMA's Closing paragraph 407 that the decisive influence test is largely accepted in your terms. There may be minor differences, but I cannot see anything big there.

Equally, there is not a full-frontal attack on your point that there was a hold-separate arrangement for this entity.

So I am inferring that the line of attack is simply that although that hold-separate structure was put in place, there was nevertheless sufficient control or contact between the entities so as to prevent the negation of the decisive influence presumption, where one owns ...

MR JOWELL: Yes, I think to be fair to the CMA, I think they have two strands to their argument. The first is really [redacted] and they say -- well, they do not quite put it this way but they get very close to saying, well, she was an Allergan person, effectively, and she was

involved in the business previously and she was employed by Allergan and so on.

I will show you that in a moment. The other strand, I think, is perhaps their main point, is that what they say is, well, they put in place the business plan previously and so when she then takes on effectively the ball continues rolling in the same direction, because there is an obligation, they suggest, to continue, on the hold-separate manager, to continue with the pre-existing business plan.

I should address you briefly just on those, if I may, on those two specific points.

THE PRESIDENT: That would help.

MR JOWELL: Yes. I hope I am not mischaracterising their case, but I think that is their two main strands that they rely on.

THE PRESIDENT: I am signaling to the CMA here rather than to you, but I confess that I have some difficulty in seeing how the characterisation of [redacted] as the route by which one captures for penalty purposes Allergan, I mean, if she was actually involved in the infringements such that one could say she had been negligent or intentional in these matters, which I do not think is being said, then I might be pressing you harder. But that is not, I think, the allegation.

MR JOWELL: No, well, it is very interesting. [redacted] was not actually even interviewed by the CMA, so I do not think they are in a position to say -- certainly not as regards the alleged agreement, they cannot say that she was involved in that.

Perhaps we can look at the Decision and what is said about her. If one goes to {IR-A/12/889}. I am always a little hesitant to go to the Decision -- no, up it comes. 9.182, you see:

"[redacted] (Senior Vice President and Regional President UK and Ireland ...) -- who, as explained above, had been responsible for decisions on pricing and commercial operations for the generics business prior to the Hold-Separate Period, reporting to Allergan's [Lars Ramdanborne] -- was appointed as the Hold-Separate Manager by an amendment to her employment contract ..."

They say:

"[redacted] would have been well-acquainted with the existing business plans, given her role to date prior to being appointed as Hold-Separate Manager. She was also well acquainted with Allergan's, AM Pharma's and Accord-UK's strategy in relation to hydrocortisone tablets, the orphan designation and competition. For example, prior to Allergan's acquisition of AM Pharma she was involved in negotiating the earn-out clause on

hydrocortisone tablets ... and after that acquisition she monitored the potential for competitor entry and its potential impact on the business. As explained above, Allergan referred to her in submissions to the CMA as 'the UK country manager for Allergan'."

THE PRESIDENT: Mr Jowell, is actually the problem that we are both nibbling at actually Ms Ford's point, you recall the debate that we had about how one decides the continuation of a naughty intention in the context of sham agreements, it was there, but essentially one has, let us say, I think three theories of liability, all of which are difficult.

There is Ms Ford's contention, which is that when you are talking about a naughty intention or indeed, one might say, negligence one looks at the person and you need to have an ability, where that person leaves, to characterise someone else as having the naughty intention, and maybe the same is true of negligence, but you look at it ad hominem.

Now, that is Ms Ford's contention. What I was pushing back on is the other extreme, which was that you have a corporate state of mind, whether that is again intentional or reckless or negligent, you might apply the same approach, but once you have a human actor who has the relevant intention and you can attribute it to

the corporate body, then it carries on and unless you change that decision it carries on.

Now, Ms Ford says that is unfair because you may not know that the corporation has this intention because there is no human actor who is in the corporation to report on the naughtiness. But that is another theory.

The middle ground is to say that there is a duty to enquire, to investigate, and that if you fail to look at something which you should have looked at then you get hit with the consequences, and that is sort of the middle ground which perhaps addresses both the concerns that one has articulated. Which is right, I do not know. But is it the case that this theory of liability informs the question of how one captures entities like Allergan where -- what they are saying is there is some sort of nexus between the infringements and an entity who is simply buying the infringer. You are saying look, there is a complete seal, a complete segmentation --

MR JOWELL: Yes.

THE PRESIDENT: -- and that is the point you are making about the commitments and the hold-separate arrangements.

MR JOWELL: Yes.

THE PRESIDENT: [redacted] role -- well, her relevance

surely depends upon what the answer is to imposition of liability as a matter of theory. I mean, for instance, if you could say that [redacted] was the successor to the dishonest intention of the predecessor to the sham agreement, take that as an example, and she knew what was going on and was then employed by you directly or indirectly, well, then maybe you are off to the races. But that is not being alleged.

MR JOWELL: No.

THE PRESIDENT: If one is talking about attribution of corporate naughtiness, state of mind, well, maybe that is enough and maybe you need to address a little bit on that.

MR JOWELL: Let me address you on that, because I think what is critical really -- I am not going to seek to address you, at least at this juncture, on the general issues you have raised. Obviously those are ones which the Tribunal will have to wrestle with. I may come back to them. But I think just on this specific point about this particular period the critical point here is that, yes, [redacted] previously was an Actavis UK director, absolutely, and Actavis UK is a subsidiary of Allergan Plc.

But once this business goes into the hold-separate and she takes over as hold-separate manager, at that

point she has a different role and a different master, and that is the key point from our point of view, because it is all very well sort of launching this ad hominem attack really on [redacted] in a rather sort of crab-like way saying, hinting that, well, she's very close to Allergan. But the fact is that once she becomes the hold-separate manager she is obliged to take on a different role and look to different interests, and the interests that she is obliged to take on at that point are exclusively the interests of the divestment business alone.

The only person that she is allowed to take instructions from at that point is the monitoring trustee and the Commission. She is not allowed to take instructions from Allergan from that point on.

To be clear, this is not just a theoretical thing. She is off. She has left Allergan at that point. She is off with the business, and she goes with the business to Teva. Now, as it happened she retired from business altogether the minute she went to Teva, but if things had gone to plan, as it were, she would have been off to Teva and then off to run the divestment business in the future as well.

She was not coming back to Allergan. That was not on the cards. That is very clear from the monitoring

trustee's report. She is incentivised to operate for the divestment business.

To say, well, look at her past is actually a bit naughty, because it is really hinting, it is being willing to wound but afraid to strike. It is hinting that somehow she still has her loyalties to Allergan. She should not, and there is no evidence that she did other than she complied with her role, her proper role as hold-separate manager, and there is no suggestion that she did not and she was not even interviewed and it was not put to her that she did not.

THE PRESIDENT: I am sorry to interrupt, I just want to be absolutely clear on what basis you were just addressing me there.

MR JOWELL: Yes.

THE PRESIDENT: Were you addressing me on the assumption that [redacted] was in the naughty camp, i.e. that she had some, well, let us postulate, hypothesise that she actually knew all of the naughtiness regarding the sham agreement, let us say. Now, were you addressing me on that assumption and saying that even if there was that --

MR JOWELL: The answer is yes, yes.

THE PRESIDENT: -- there was that level of naughtiness?

MR JOWELL: Yes, because there is absolutely no

suggestion -- well, there is no evidence of and it has never been alleged, let us put it that way, that Allergan Plc knew about this agreement.

THE PRESIDENT: I am sorry, I am not being clear enough.

MR JOWELL: Yes.

THE PRESIDENT: You are absolutely right, we are talking about the extent to which a punishment can be vested in Allergan. That is why you are addressing us.

MR JOWELL: Yes.

THE PRESIDENT: I accept that.

MR JOWELL: Yes.

THE PRESIDENT: What we are debating, or what at least I am debating, is the route at which you get fingered for this, and it is obviously a somewhat vicarious route.

MR JOWELL: Yes, very, entirely vicarious.

THE PRESIDENT: What I am concerned to understand so we can actually lay down the principles by which this operates, the route by which it happens, and it seems to me that it may be the case that the theories of attribution actually do matter in terms of working out how it is that your client gets fined a rather large amount of money.

MR JOWELL: Yes.

THE PRESIDENT: Now, if [redacted] was as guilty as sin of infringements and subjectively knew, then I suspect you

would be getting quite a lot of pushing from us saying, well, surely she was under a duty, even as the manager of a separate undertaking, to make sure that an infringement was stopped and indeed was reported up the line to Allergan to make sure that they did not sell, on a false basis, something to Teva. That is something which, I think, Mr Stewart accepted when I put that question to him.

But I do not need to ask you all this because no one is saying that [redacted] is as guilty as sin.

MR JOWELL: I --

THE PRESIDENT: To be absolutely clear, unless someone on the CMA stands and says: this is what we are saying, we are not going to be making that sort of finding.

MR JOWELL: No.

THE PRESIDENT: So the question really is: how, taking a non-guilty as sin [redacted], do you get --

MR JOWELL: I think it is an a fortiori case. If it is accepted, and it is not alleged that she personally knew, I mean, she wasn't even interviewed by the CMA so it is very difficult to see how they could make that allegation, then it is really a fortiori. But I do think it is important to bear in mind that the particular point we are on is once this -- Allergan Plc is at one level and then you have Actavis UK at another

level. Now, there are a number of different points.

The first point is -- and then underneath that and then prior to that you had AM Pharma. Now, AM Pharma, on the CMA's theory, they knew about the agreement, they say. The first question is: how does the agreement of Mr Patel, how does that then succeed when Mr Wilson and others come in and take over the running of the business in May? That is difficulty number one that Ms Ford addressed you on.

Difficulty number two is how do you then, when the business transfer from -- and I think the answer to that potentially might be, well, Mr Patel's knowledge is attributed to AM Pharma as a corporate entity even after he goes. So the corporate entity does not forget about it, as it were, after he leaves.

Ms Ford says, and I agree with her, that that is not correct in the case of this type of arrangement which naturally, which requires a human awareness of the agreement.

But let us say for the sake of argument that that is not correct and it is attributed to AM Pharma. Problem number two is: the business in September is then moved to Actavis UK, so even if AM Pharma knew, Actavis UK did not know about the agreement. So that is the second problem that the CMA must then overcome.

But then there are then problems three and four, which are then: how do you attribute Actavis UK's knowledge to Allergan Plc? The answer is you do not. Nobody can possibly suggest that Mr Stewart somehow is deemed to know just because [redacted] knew, even though she did not know, but even if one assumes for the sake of argument she did know, then nobody can suggest that Mr Stewart and Allergan Plc knew.

One then has, Actavis UK then goes into the vault, as Mr Stewart put it, of the hold-separate. At that point we say, well, you cannot possibly, it is an even stronger case that you cannot attribute any knowledge to Allergan Plc because not only did it not acquire that knowledge from [redacted], who did herself did not acquire the knowledge of the agreement, but it certainly then cannot be said that at that later point that it acquires the knowledge, because at that point she then has her new master and the new master is the monitoring trustee. She is effectively, in this interim period, answering to the monitoring trustee and then after that she's off to Teva and then from Teva then she will -- which will then spin that off into a separate business.

So at this stage the notion that you can get anything attributed -- any sort of culpability to Allergan is wrong, and it is also wrong to say there is

anything that Allergan needed to investigate either, because there was nothing that they -- certainly in relation to the agreement, there was absolutely no basis to say there was anything that they should have investigated at any stage.

THE PRESIDENT: Just to be clear, I mean, I am forcing you somewhat significantly off piste here, and I do apologise.

MR JOWELL: Not at all.

THE PRESIDENT: But you are, I think, still maintaining the fundamental point that although this question of attribution arises fair and square on Ms Ford's point about continuation of the sham, that is a liability question. You are addressing me at the moment on punishment, penalty, and I think your first point is that these questions of attribution, interesting though they might be, actually do not arise in penalty cases because one has the European decisive influence approach for clawing in the undertaking.

MR JOWELL: Well, not quite.

THE PRESIDENT: Not quite.

MR JOWELL: Because actually if we are right that Allergan did not have decisive influence for the period from March to August, it is not liable as well as --

THE PRESIDENT: Yes.

MR JOWELL: So for this period it goes both to liability, but as a back-up argument I also say --

THE PRESIDENT: That is a fair correction.

MR JOWELL: Let us suppose against me that you were to find there was decisive influence based on the presumption, I nevertheless say it is still highly relevant, should have been something that should have been taken into account in relation to the penalty for this period, because even if we have decisive influence on the basis of presumption of influence, our ability to influence it would have been enormously curtailed and therefore that is something that would be relevant to penalty.

THE PRESIDENT: The reason I am drawing a distinction between liability and penalty is I do not think you are going so far as to say that the decisive influence test -- maybe you are, the decisive influence test on liability has the consequence of rendering irrelevant the normal rules of English law regarding attribution of responsibility in the case of corporations. Or are you saying that?

MR JOWELL: No, I am not saying that. I think under normal rules of corporate attribution of English law there would be no question that Allergan Plc would be liable for any --

THE PRESIDENT: I understand that.

MR JOWELL: Yes.

THE PRESIDENT: It is really going back to your question of legal predictability in the criminal law, and what I am trying to work out is what principles we draw on in order to work out whether you should or should not be met with a significant penalty. The reason I am pressing you, and I am sure we will be pressing the CMA on this, is at the moment I do not see in a crisp sentence or two the battle lines that exist between yourself and the CMA. As I said, in all the other points one knows exactly where the parties are coming from and there is a difficult question.

MR JOWELL: Yes. I think the CMA accepts the principle of the decisive influence test --

THE PRESIDENT: Yes.

MR JOWELL: -- and that is the question, well, was, for this period, the divestment business operating independently or was it habituated to take instructions from Allergan? We say, well, re the commitments it is incredibly simple. It says the word "independent" and it says, stipulates that they cannot take instruction, so actually why are we even debating this.

Their argument is twofold. One is it is [redacted] and that actually goes nowhere but they use it, really, for prejudice; and then their second argument is rather

more subtle, and what they say is -- well, let me show you what they say. If we go to the Decision at paragraph 9.186 which was page 891 of the Decision {A/12/891}. If you just read with me the first paragraph. This is where they are coming from:

"In the circumstances the CMA considers that Allergan continued to exercise decisive influence over Accord-UK during the Hold Separate Period. The commercial strategy of Accord-UK was set under Allergan's decisive influence in the previous nine months, during which Allergan also acted to transfer AM Pharma's business to Accord-UK. This preceding period, when Allergan exercised decisive influence over AM Pharma and Accord-UK unencumbered by the Commitments, is vital context for the Hold Separate Period. The Court of Justice has recently reiterated in *Goldman Sachs* that an authority may have regard to factors from a prior period as demonstrating the exercise of decisive influence during a later period, provided it can show their continued relevance. In this case, by the time the Commitments came into force on 10 March 2016, Accord-UK's strategy in relation to hydrocortisone tablets was well established under Allergan's decisive influence. The Hold Separate Period cemented the status quo ante:"

So that is their argument. They say, well, you set it in the previous period, you set the strategy in the previous period and therefore we say that rolls forward, and because she had to continue with the existing business plans they say therefore your decisive influence continued into the period of the hold-separate.

You see if you go to --

THE PRESIDENT: Just pausing there.

MR JOWELL: Yes.

THE PRESIDENT: Are we, in 9.186, reading the commercial strategy in line 3 as being an unlawful commercial strategy? Is that a word that needs to be inserted in order to --

MR JOWELL: This is something you must ask the CMA, and of course there are really two aspects to that. One is the agreement aspect and the other is the pricing aspect, so it may be different for the two. But I think if one goes to the CMA's opening you see that they amplify this point a little. If one goes to that, it is in {IR-L/6/1} at page 75 {IR-L/6/75}. You see in paragraph 214 they make the point again. They say:

"The key point is that the Commitments cemented the status quo ante -- ie, Allergan's exercise of decisive influence over the commercial policy of Accord-UK ..."

And they say:

"From 10 March ... Commitment 36 specifically required Allergan to make available sufficient resources for the development of the Divestment Businesses 'on the basis and continuation [they underline] of the existing business plans' which Allergan had overseen. The guiding principle of the hold separate regime was 'business as usual'."

They say:

"... Allergan was obliged to preserve ... the economic viability, marketability and competitiveness of the Divestment Businesses."

THE PRESIDENT: It does raise fairly and squarely the attribution question, because presumably one can only claw someone like Allergan in if one can say that this commercial strategy that was continued was either intentional or negligent in terms of the infringement. If it is not intentional and not negligent how can, I ask slightly rhetorically, Allergan be fingered for continuing something which is --

MR JOWELL: -- which it does not even know about?

THE PRESIDENT: -- of which it is innocent?

MR JOWELL: Yes, which it does not even know about.

THE PRESIDENT: That is why I am saying attribution does rear its head, because if you are saying that the

acquired undertaking did have this naughty state of mind because of the theory of attribution that I put to Ms Ford which she did not like, then one can see that simply saying, "Carry on as before" includes carrying on the unlawful conduct. I mean, you get hit by a very wide form of attribution of state of mind. But that, I am sure Mr Bailey, whoever is making submissions for the CMA, will correct me, but that is, I can see, the theory by which Allergan is -- I am sure you have a lot to say about whether that is correct or not --

MR JOWELL: Yes.

THE PRESIDENT: -- but that is why I am so troubled about not really understanding the route by which the penalty operates, because it is quite closely tied, I think, to the way liability arises.

MR JOWELL: Yes. Well, it is and it is not. I mean, in a sense the question of one -- should be able to ask the question of decisive influence, in a sense independently of the actual infringements that one is concerned with, and it may be that -- I would be interested to hear what the CMA have to say on this, but it is at least arguable, in theory at least one could say, well, the question at any one time whether a particular parent company has decisive influence over a subsidiary is a question that should be capable of being answered in

the abstract, even taking out of mind the particular infringements under consideration.

If you ask yourself, if you apply the test and you look at the commitments it is actually, in our submission, very clear. The appeal to the prior period and the setting of business plans in the prior period does not actually establish in any way that the decisive influence continues into the subsequent period of the hold-separate.

The reason for that is really that there was no obligation on the hold-separate manager or the monitoring trustee to slavishly continue with those business plans. You do not see that, actually, in the commitments, and they were free to depart from those business plans.

But secondly, actually on the facts of this case, if it is being suggested that somehow the business plans themselves entailed the infringements that is just not the case, because we do not see that in the business plans themselves.

That is in a sense where one does decisive influence generally and the particular infringements, perhaps, do come to together to an extent, because when they talk about these business plans what one sees by way of business plans really are just these projections. One

sees [redacted] reports to Allergan Plc, and effectively what do the projections say? The projections say: we anticipate that AMCo will not come into this market, and they say we anticipate a massive falling off of the price of hydrocortisone over the next two to three years, and these are our revenues over that period. That is really all one has in the way of business plans.

There is nothing in those business plans that committed [redacted] to any infringements in any sense. That is really the problem for the CMA. One can see that they might be better placed if there was something in the business plan. For example, if this was a cartel case and the business plan itself said, thou shalt continue with the cartel during the next period, then one might say, ah, well, the decisive influence in this respect should be held to continue. One can see at least an argument to that effect.

But there is nothing like that in the business plans here. They are just projections.

THE PRESIDENT: No, I mean, it is important to ensure that one is working out which questions one is answering. Let me try and summarise what I think you are saying about attribution and decisive influence, and you can tell me just how far you disagree with that formulation.

Looking first at the actual infringing entity, in other words leaving out of account the parent for the moment, we have a question of: has there been an infringement during the course of the period of time at which the entity was acting?

MR JOWELL: Yes.

THE PRESIDENT: You are right, if one has a cartel case -- no, even if one has something which is evident, say, the side agreement, the sham agreement had been fully articulated in a document, then you can say, well, actually you obviously should have known, even if the person who agreed the agreement left the entity the evidence is still there and unless you put a line through it and say, we are not doing this any more, you are continuing to infringe.

MR JOWELL: We are now talking about the AM Pharma point at the very beginning?

THE PRESIDENT: That is right. Still at the front line, as it were.

MR JOWELL: Yes.

THE PRESIDENT: The peculiarity that I was debating with Ms Ford was, well, what do you do when actually the naughtiness is present only in a single human being who then off sticks, and Ms Ford's position is you cannot say that the continuing understanding which existed when

A was in the company continued, because --

MR JOWELL: -- because of the particular nature of that understanding.

THE PRESIDENT: Indeed. So whether that is right or wrong, we know that is a difficult question and there we are.

MR JOWELL: Yes.

THE PRESIDENT: So let us assume Ms Ford is wrong and there is some kind of attribution of human being A's intention to the entity in which he or she worked. You then have an intention that continues, and therefore an infringement which continues.

MR JOWELL: Yes.

THE PRESIDENT: Still talking at the subsidiary stage.

MR JOWELL: Yes.

THE PRESIDENT: So when one then comes to the parent, the question is not: is there not an infringement? We know there is, if the answer goes against Ms Ford's contentions. The question then is simply: is there or is there not decisive influence over the subsidiary?

MR JOWELL: Correct.

THE PRESIDENT: If there is then moving, as it were, from English rules of attribution to European rules of attribution, if there is, then you are in trouble --

MR JOWELL: Yes.

THE PRESIDENT: -- and if there is not, which is your case,

then you are not.

MR JOWELL: Yes.

THE PRESIDENT: Is that an analytical process which you can live with?

MR JOWELL: I think that is correct, yes. But I would add just one footnote to that, which is that in the normal scheme of things if the subsidiary is liable then the parent, if it has decisive influence, is also then potentially, at least, liable for the infringement.

When it comes to penalty though, and I will address you in due course, what is extraordinarily odd is that then there is a massive uplift on the penalty for specific deterrence, and that, we say, is completely unwarranted unless the parent also had not just decisive influence but some kind of culpability for the --

THE PRESIDENT: Fair enough.

MR JOWELL: That I will come to.

THE PRESIDENT: That we will have to come to. I do apologise for taking so much of your time, Mr Jowell, but it has been very helpful.

MR JOWELL: No, no, I am here to assist. So yes, that is right. So that is the first question on attribution. The second question on attribution is that -- you mentioned the debate with Ms Ford as to whether you can attribute it to the company, but it can only be

attributed to that company where Mr Patel worked, which is AM Pharma. We say once the business is then taken over by Actavis UK in September that we do not see a method by which you can then attribute it from AM Pharma Limited to Actavis UK Limited. They are separate corporate entities, and therefore that attribution does not work.

THE PRESIDENT: That I understand, but the issue you have, though, is that you have, looking at the paragraph in the CMA's case, you have an explicit "continue as before" directive which, depending on how one solves the attribution problem, is actually saying continue with your unlawful intention as before. I appreciate you do not attribute the knowledge, but you would say that you have said to your newly acquired subsidiary, carry on as before, the newly acquired subsidiary having an improper state of mind.

Now, where that takes you in terms of level of naughtiness no doubt you can address us on.

MR JOWELL: No, I do not think anyone can make that jump because --

THE PRESIDENT: Right.

MR JOWELL: First of all, the question is one can either look at the issue of decisive influence, as I said, either wholly in the abstract without the infringements

or taking the infringements into account, if you like.

THE PRESIDENT: Yes.

MR JOWELL: If one looks at it in the abstract, which is generally how it is looked at, one has to ask the simple question: for each different period of time first of all, what is the corporate ownership? If there is a 100% corporate ownership then there is a presumption of decisive influence but that can be rebutted by showing that the evidence shows that the subsidiary in question conducts itself independently and does not habitually take the instructions of the parent.

We say the commitments mean that that was the case here and it is accepted that the commitments were fulfilled.

Now, then there is the question: well, is that displaced by the fact that the commercial strategy in the prior period was set, they say, under the decisive influence of the parent company, and the commitments assume, they say, that the overall commercial strategy would be continued into the hold-separate period.

I am just dealing with it now purely in the abstract. The problem with that case is twofold. First of all, the problem is that there is nothing in the commitments that obliges the hold-separate manager to continue with the pre-existing business plan. It is

assumed that she will do so but there is nothing that obliges her to do so. Her obligation, her overriding obligation is simply to act in the best interests of the divestment business and to operate it independently.

THE PRESIDENT: If that requires a comprehensive change of direction she has to implement that.

MR JOWELL: She is obliged to do that.

THE PRESIDENT: Yes.

MR JOWELL: So, for example, if it turned out that suddenly somebody discovered that two of the key products that the generics business sold were unsafe she would, and therefore they could be at liability for being sued in respect of them, and it was good indeed therefore to discontinue those products she would have to discontinue those products. She would not even be able to tell Allergan about that decision unless it was in the public domain. She could not consult them, let alone take instructions from them. The only person that she could take instructions on matters of strategy, and indeed day-to-day management, would be the monitoring trustee answerable to the Commission.

THE PRESIDENT: Presumably though she would be or could be under an obligation to communicate. Let us suppose she discovers that there is an illegality in the heart of her organisation which she is obliged to stop and that

stopping it effectively reduces the value of her corporation by a material amount. Presumably not only is she under a duty to stop it, perhaps consulting with the trustee or not, but she would have to communicate that upwards to Allergan and sideways to Teva, would she not?

MR JOWELL: She could do so only under the supervision of the monitoring trustee.

THE PRESIDENT: And if it was in the interests of the company.

MR JOWELL: In the best interests ultimately of the company.

THE PRESIDENT: Right.

MR JOWELL: So at that point she then -- I mentioned the problem with health and safety, that is what she would have to do. Similarly, if somebody came in and said, look, there is this unlawful agreement or that we are excessively pricing and exactly the same would apply. She would be entirely at liberty in the best interests of the company to stop that and she could not take instructions, she could not even communicate it to Allergan without the monitoring trustee's consent and approval.

Ultimately, if Allergan -- and conversely, if you look at it the other way, it was put to Mr Stewart, well, if you, Allergan, had perceived there had been

something illegal going on you could have gone to the Commission, what was put to him, you could have gone to the Commission, and that actually is very, very telling because the point is what Allergan could not do in that period is tell [redacted].

So let us suppose that somebody had gone to Allergan in that period and said, you know what, we think that the divestment business has entered into an unlawful exclusionary agreement or we think on reflection that these prices for hydrocortisone even though they are tumbling are not tumbling fast enough for this not to amount to an abuse of dominant position. Let us suppose that Allergan had then been concerned about that and wanted to do the right thing. They could not instruct [redacted] to stop the conduct. They could not instruct her to reduce prices. In fact, they did not even know what prices she was charging because they did not have access to the confidential information at that point.

All they could do, as the cross-examination effectively recognised, was go to the Commission. Actually it is interesting to think, well, what would have happened if they had gone to the Commission? One suspects the Commission might have been very suspicious if they had said, Commission, you know what, we think that these hydrocortisone prices even though they are

falling very rapidly, we understand from our market intelligence or whatever, we are very concerned that they might not be falling rapidly enough and that actually this is an abuse of a dominant position. I think the Commission probably would have responded, what is going on here? Is not this just actually an attempt to undermine the divestment business by depriving it of revenue? One suspects the Commission would have been extremely sceptical of any such approach if it had been made.

But my main point is, to follow through, is let us suppose the Commission had said, sorry, do not be silly. Their prices are tumbling and this is nothing to do with you and whoever heard of excessive pricing in the pharma sector anyway? What is this all just a ruse perhaps just to try and undermine the divestment business? Where would that have left Allergan? Well, they would not have been able to instruct the divestment business to lower prices. The most they could have done in those circumstances is perhaps collapse the deal and collapse the commitments.

But I think that only shows to illustrate that they did not have decisive influence in this period and in fact, it does not matter whether one takes it in the abstract or one considers it in the circumstances of

these particular infringements, it is absolutely clear that from March, as Mr Stewart said, this business was in a vault and Allergan was powerless to instruct it what to do and therefore it should not be held liable and is not liable in law for what that business does.

If that is a convenient moment for the shorthand writers.

THE PRESIDENT: Thank you very much, Mr Jowell. We will rise until five past midday.

(11.56 am)

(A short break)

(12.05 pm)

MR JOWELL: Mr Chairman, I have just a few more comments on the hold-separate period and then move on, if I may, subject to the Tribunal's questions, to the penalty generally.

But just to summarise our position in response to the CMA's drag-forward point effectively, that, well, you were in control, decisive control in the previous period and therefore we drag it forward into the hold-separate period because of the expectation that the previous business plans would be followed.

We say that there are two fundamental flaws with that, each of them sufficient to dispose of it. The first problem is that it is clear from the terms of the

commitments that the overriding obligation of the hold-separate manager and of the monitoring trustee is to run the business independently and in its own best interests, and that gave them both operational and strategic independence and entitled them and in fact obliged them to change strategy or change business plans if that was the best thing for the business, and it would of course be the best thing for the business, if the business was committing an infringement, to change plans.

Allergan had no power, had no power at all to hold them to following the pre-existing business plans. So that is the fundamental problem number one, and fundamental problem number two is that actually when you consider the particular business plans in this case it would still be irrelevant, because it is important to actually focus and say, well what are we talking about when we are talking about business plans here?

What one sees by way of a business plan for Actavis UK is really a set of projections or forecasts for the performance of the various products that you have seen that are sold by the business and that are going to be sold by the business. What one sees in those business plans is really a base case, and then an upside and a downside. So they predict a range of

possible outcomes.

But what is important is that there is nothing in the pre-existing 2016 business plan for Actavis UK that set it to a specific unlawful strategy. There is certainly nothing in the business plan that commits them to implement an unspoken exclusionary agreement, and there is also nothing in the business plan that commits them to continue to charge very high prices for hydrocortisone.

On the contrary, actually the business plans anticipate hydrocortisone prices coming down rather rapidly, and there is nothing in the business plans that precludes those prices coming down faster than anticipated. So there is certainly nothing that requires or entails the implementation of either of the types of alleged infringement in this case.

Those are the fundamental reasons why this point just does not succeed and you cannot carry forward the business plan or the control from the previous period into this very new and entirely separate arrangement where the business is meant to be totally independent.

There are two other points that the CMA places weight on -- not much weight, but I should just mention them. First, it is said that there is a continued economic link because they say, well, Allergan continued

to receive profits from the divested business. Now, that may be partly true but it just does not get you very far because whenever you have a parent that is a purely financial investor they will also receive dividends or profits up. But as Advocate General Kokott records, that is actually one of the examples where there is not decisive influence; it does not suffice to be a purely financial investor to give you decisive influence.

Indeed, as Mr Stewart explained in his evidence, Allergan was certainly not seeing this as some sort of profit centre for them. It did not feature in their earnings per share, he said, because this was just accounted for under discontinued operations. So this is really a tiny pin-prick. It certainly does not amount to decisive influence.

The other point the CMA rely on is the possibility that Allergan might withdraw from the sale and hence withdraw from the commitments. Well, of course Allergan did not withdraw. If it had withdrawn then yes, it is decisive influence would at that point have reactivated if the commitments fell away, but that is really nothing to the point. During the period we are concerned with it was subject to the commitments. They were legally enforceable obligations. It respected them and it

precluded them from giving instructions absolutely to the subsidiary at that time.

We say actually this really continues to be a very straightforward application of a decisive influence test, and the decisive influence is conclusively rebutted for this particular period from March to August.

THE PRESIDENT: Do you take, as it were, a pre-vault point? I mean, it was fairly clear from Mr Stewart's evidence that the acquisition and the sale overlapped to a reasonably significant extent and therefore it may have been -- we will have to re-examine his evidence, but it may have been in Allergan's mind that actually you would be transiting pretty quickly into a vault situation. Is that a point that you are taking as to colour the pre-vault period, as one might call it?

MR JOWELL: It does colour it to a degree, but we take that point really in relation to penalty.

THE PRESIDENT: I see.

MR JOWELL: We could have argued, and it was along the lines it was argued for example by the *Parker-Hannifin* case, that from the point of sale to Teva in July we lost decisive influence because at that point Teva had certain veto powers, but we accept the case law is quite strict and the fact that theoretically we had rights to

control the subsidiary in that period up to March is not enough to displace decisive influence, but I am afraid we do draw our line in the sand about the separate vault.

THE PRESIDENT: No, that we have the message on.

MR JOWELL: We do say, though, that that pre-vault period is relevant when it comes to culpability and context and the setting of the penalty, which is what I would like to turn to next --

THE PRESIDENT: Please do.

MR JOWELL: -- and why we say the fine imposed of 111 million is wholly out of proportion. Now, could I start with a few salient general facts which are relevant, not least because one of the important functions of the Tribunal as I mentioned, and as the case law shows and as I mentioned yesterday is to take a step back and say, well, is this fine overall a proportionate one?

If I could just remind you of certain facts. Now, they are relevant because there are certain points in the Decision, which we refer to in our supplemental note on the evidence at paragraphs 3 and 4, where the Decision gets pretty close to saying that Allergan parent, as they put it, invested in and then endorsed an anti-competitive strategy of Auden/Actavis and it even

suggests there was a sort of culpable failure on the part of Allergan Plc to discontinue, actively to discontinue that strategy.

We say that when you look at the facts in the round those suggestions are completely unfair. They are unfair both procedurally and substantively. They are unfair procedurally because if the CMA really wanted to make that allegation then it should have properly investigated Allergan itself. It should have sought Allergan's documents, it should have interviewed its witnesses in order to make a fair assessment. But it did not interview Mr Stewart, it did not interview the late Mr Ramdanborne. It did not each seek to interview [redacted] of Actavis UK who was giving the presentations up to Allergan.

Instead what it tries to do really in this area is to cherry-pick various comments from various documents in a way that I am afraid does create an inaccurate impression.

Now, the first salient point is one that has not really been mentioned so far, but to any layman in a way it is the obvious point, and that is the complete absence of any warning or any complaint from any customer or any regulator. Now, Ms Ford rightly observed that the Department of Health failed to

exercise the powers that it had in the statute, but actually the point goes rather further than that because one has to bear in mind the excessive pricing that is alleged in the Decision goes back almost half a decade before Allergan purchases, or Actavis purchases Auden McKenzie.

Now, according to the Decision the prices charged for hydrocortisone during all that almost half a decade were excessive, and of course those prices are known to the bodies in the National Health Service that bought the hydrocortisone. There is no disguise about them, they are there in the plain light of day. The clinical commissioning groups are paying for them. Before that perhaps the health service trusts were paying for them. The prices were all known over those years and years by the Department of Health, and it had powers under the statute to intervene, and then of course once hydrocortisone is brought into Actavis UK it has powers under Scheme M which it had from very early on in the period of the Actavis ownership.

Under those powers, as Ms Ford showed you, it could seek information on pricing and costs of particular products, all with a view to ensuring reasonable prices.

But nevertheless, as far as we are aware, at no point prior to or during Allergan's involvement was any

complaint made of the prices charged for hydrocortisone by the NHS, by the Department of Health and even nothing was said by the CMA either. The CMA's investigation, the first steps were just days before the coming into force of the hold-separate period, and no meaningful detail was given to Allergan about what the CMA were investigating until long after they could have done anything about it. It was only in September 2016. This is all recorded in Mr Stewart's witness statement at paragraph 6.8 and 7.15-7.17, which were not challenged in cross-examination.

So Allergan were never warned by the customer or by the regulators that it ought to take steps to reduce or cause its subsidiaries to reduce the prices that they were charging.

Now, that is the salient fact number one, and it is very important context to culpability.

The second point of context is one we have already mentioned, which is what you called, Mr Chairman, the pre-vault period and the fact that from July they had contracted to sell their entire generics business to Teva and thereafter Allergan's interest and ability to influence the activities of its subsidiaries was constrained and its commercial interest in those businesses was very limited. Of course, as I have shown

you from March, their hands were completely tied in influencing those businesses.

The third contextual point is one we have also already covered, which is the expectation that the prices of hydrocortisone and the market share of hydrocortisone were anticipated drastically to decline. So it is just completely unfair to say, as the Decision does, that Allergan was investing in the exploitation of the high profitability of hydrocortisone. It was investing, actually, on the assumption quite to the contrary that it would not have high profitability, and that is why indeed it wasn't prepared to pay as high a price for the subsidiary.

Now, although it is right to say that competitor entry was in fact delayed by about six months or so, nevertheless Allergan continued always, under its period of ownership, to understand that competitive entry was occurring and that prices were imminently to fall. You see that consistently in the presentations.

Another contextual point that also came out of the evidence is this: that yes, hydrocortisone, in the very near-term at least, had had and was expected to have in the very near term high net margins of 96%, but those were not out of line with the margins that were being sold by the other generic products. You may recall that

I showed this to Mr Stewart in re-examination. One sees in the documents that there are at least four or five other generic products, similar generic products that were also being sold for very similar margins, and even higher in some cases.

So if you are in Allergan's shoes and you are looking at the business plans, as they like to call them, the projections being put forward you see hydrocortisone prices tumbling and you see net margins of hydrocortisone no different to a number of other products. So there is nothing there in those business plans, really, to put you on notice, and particularly not where there have been no complaints over years and years about these prices, at least by the customer and by the regulator.

The next point relates to the unwritten agreement. Now, the Decision, as we have said, does not allege that Allergan Plc knew about the alleged 10mg agreement. Nevertheless, there are certain points where the CMA seems to be suggesting that somehow it ought to have known about it. I want to take those head-on, if I may.

Could we look at the Defence, please which is in {IR-A/6/136}. This is paragraph 364(d), and if we could go down to (iv), please. We see:

"The October 2015 presentation to senior Allergan

staff also recorded, in the section titled '2006 Budget', the essential facts that underpin the 10mg agreement. Actavis was supplying AMCo with a fixed 'Market share' of 15%. Actavis was supplying AMCo at some 97.9% 'off Tariff'. It therefore predicted that Actavis's hydrocortisone market share would erode in 2016, but there would be 'no AMCo'. Indeed, AMCo is conspicuously not listed as a competitor in this document."

Now, the fact that the presentations to Allergan Plc show that Actavis was not anticipating AMCo as a competitor, that it was providing a particular amount of product to AMCo, does not come anywhere near to establish that they knew about the underlying unlawful agreement that is alleged in this case. It is simply wrong for the CMA to be suggesting here that somehow they did know or could have known about it.

It is common ground that there is nothing on the face of the agreement or its ostensible performance that would lead somebody to that conclusion, still less to someone sitting in New Jersey who is responsible for 10,000 products, of which this is one business plan and a footnote in a business plan. It is bordering on the absurd to say somehow they knew the essential facts that underpinned this agreement.

If we go to the Decision you will see that the allegation, if one looks at the footnote 629 of this Defence, if you could go to the bottom, you see it refers to the Decision paragraph 9.170(b).

If we go to the Decision itself, {IR-A/12/885}. You will see it says:

"On 20 October 2015, [redacted] circulated an Allergan budget presentation to individuals ..."

And it goes on to talk about hydrocortisone as a top generics product, and then if we could go down, please. It says {A/12/886}:

"[It] noted that AMCo was being supplied with a 'Market share -- 10mg' of 15% at a '% off Tariff' of '97.9%'."

Now, that is not even close to the essential facts that underpin the 10mg agreement. It is not something that puts anybody on notice of an unlawful exclusionary agreement.

So we say that this is all very unfortunate, and there is nothing there that would tell you that these were some kind of disguised payments not to enter the market or that there was some understanding between the parties that AMCo would not enter the market. It is just an assumption or an expectation that AMCo would not enter, and as you see, it was receiving a certain amount

at a certain price.

If one looks at the presentations overall, what they are all about is anticipating imminent market entry by a number of future competitors. So we say it is quite wrong to sort of hint that either [redacted] knew about this agreement or still less that senior management knew about it. It is an unfortunate example, actually, in the Decision which has a number of these instances, I am afraid, of being willing to wound but afraid to strike, of effectively hinting at things without actually putting the allegation or putting the allegation to the individuals concerned.

But if one steps back and asks: well, what did the Allergan executives actually know? One can summarise it in this way: they knew that market entry by competitors had been delayed by about six months from March 2015 to October 2015, but they also learnt at the same time that the competition was starting in earnest and multiple entrants were coming in in that coming year, and that that was going to cause a very significant drop in Actavis's market share and prices.

They knew that hydrocortisone had a high net margin of 94%, but they also knew that that high net margin was no different from the net margins that were being achieved by several other generic products that

Actavis UK was selling.

They learnt that entry from AMCo was not anticipated, but that was just one potential competitor and there were many others that were anticipated to come in. Overall they knew that there was going to be an imminent reduction in market share and prices.

We see no evidence that anybody in Allergan Plc, having seen these presentations, sought to do anything other than passively receive that information from Actavis UK. That is, I think, a fair summary of the position and we say that is really relevant background when it comes to the propriety and the proportionality of the fines on Allergan.

Could I turn next to a different topic, which is the law on excessive pricing.

PROFESSOR MASON: Can I just clarify one thing, because I thought at one point you also made the argument, and if you can give me a moment, if we go to page 67 of today's transcript and line 6 there.

MR JOWELL: Yes.

PROFESSOR MASON: There we are. Actually it starts line 4:

"... still less to someone sitting in New Jersey who is responsible for 10,000 products."

Could I just understand there, are you also putting the point that this would have just been largely

invisible because it would have been a speck in the ocean, or are you saying it was visible and there was nothing about it that was problematic in any way?

MR JOWELL: I say both. I say both. But I say it is unreasonable to suppose that a parent company like Allergan should spot these abuses, if they are abuses, in circumstances where the customer, where there is no customer complaint and there is no regulatory complaint, and particularly in circumstances where you are a multinational company and you are supervising. So I say no culpability, but I also say even if, let us say, Mr Stewart had focused in on this one product and had looked at it in context, there is nothing there that stands out as exploitative commercial behaviour, because of two factors really. One is the imminent entry and the expectation of tumbling prices, and the other is, well, the net margins do not stand out from other net margins that are being achieved in the UK generic sector. So how on earth is somebody, say, an executive in New Jersey to then discern that somehow this is exploitative pricing? It is just wholly unreasonable, we say.

It is even more unreasonable when one considers the law on excessive pricing in the UK as it appeared at that time, because even if we assume that somebody in

the shoes of Allergan Plc should have a UK lawyer advising them on these business plans, which is itself very questionable, even a UK qualified lawyer would not discern, as I come on to explain, that there was excessive pricing as is now alleged on the basis of the information that was presented to these executives.

PROFESSOR MASON: If I might, but if I have just cut off a point that you are about to make please do --

MR JOWELL: No, please.

PROFESSOR MASON: Since you took us there specifically, if I could therefore just check the point with you, and if we could go back to {IR-A/12/885}, which is the reference to the Decision. I think we may need to go on to the next page, actually, {IR-A/12/886}, please, because it went over the page, did it not? So at the top of the page, there specifically, this is not so much the excess pricing as the 10mg arrangement of "% off Tariff" of 97.9% there.

MR JOWELL: Yes.

PROFESSOR MASON: Again, the point you are making is that there is nothing commercially that would have jumped off the page?

MR JOWELL: Nothing even remotely that would have jumped off the page, yes.

PROFESSOR MASON: Okay, thank you.

MR JOWELL: Well, certainly not as evidencing some kind of unwritten exclusionary agreement, an agreement not to enter the market which is the heart of the allegation that is made in relation to the 10mg agreement.

If we ask ourselves, I want to focus on the state of the law on excessive pricing as it stood in 2015/2016. I will leave it to others, really, to argue the law principally, to argue the law of excessive pricing as it stands today, and I do so because I want to ask the question, if you like, that Lord Diplock posed, which was: would a person, as he says, or their lawyer have known in advance what the legal consequences of the pricing of hydrocortisone would be? Would they have known with at least reasonable certainty, which is the test that Lord Diplock puts it, that they were infringing the law?

Now, if you were a lawyer in 2015/2016 and you were advising on this, and let us say Mr Stewart had called in a UK lawyer and said: I want you to advise me on whether this pricing of hydrocortisone is lawful or not, is there something wrong here? That is, of course, obviously a rather unreasonable standard to hold him to but let us suppose that he had. There would be two key cases in 2015/2016 that you would be looking at.

The first of those would be *Napp*, which we have

seen already. Why *Napp*? Well, it is the only UK unfair pricing decision at the time in the pharmaceutical sector. Indeed, I would add based on our research the European Commission at that time had not even opened any investigations into excessive pricing in the pharmaceutical sector. The first that we have detected is the *Aspen* investigation, which was only opened in 2017. So *Napp* is the only pharma excessive pricing precedent that you really have at that time. One has seen that under the *Napp* test the imminent entry would be dispositive of any excess pricing on the part of Actavis UK for the period of Allergan's ownership, because of the expectation that prices were going to come down by 90% within three years.

Now, the next authority, the second authority that any legal adviser worth their salt would have gone to is the Court of Appeal's judgment in *Attheraces*, which at that time was the leading authority on excessive pricing.

Now, before we come to that could I take you first, if I may, to the judgment of Mr Justice Etherton at first instance, and it is in {M/47/1}, please. I do so because his judgment has actually been rather oversimplified to the point of mischaracterisation in

subsequent commentary, and perhaps even in some subsequent cases. It has been suggested that Mr Justice Etherton's approach was just a purely mechanical cost-plus approach that any pricing above cost-plus is automatically an abuse. That is not correct, and that in fact is to set up a straw man and Mr Justice Etherton, as he then was, should not be, in my respectful submission, anyone's straw man.

Now, the facts of *Attheraces* were somewhat complex, but in brief summary the position was this: *Attheraces* was a broadcaster and it also had a website, and it had purchased at considerable expense the television rights to show UK racing fixtures in certain overseas territories, by which I mean outside of the UK and also outside the Republic of Ireland. The customers of these TV broadcasts and the website were overseas bookmakers, and the overseas bookmakers used the British racing as a filler product for their betting customers.

But in order for the broadcasts to be attractive to the bookmakers ATR also had to supply the data consisting of the information of the identity of the runners and riders in each race.

The British horseracing board, the BHB, had a database of information that gave it exclusive access

to the real-time information on the runners and riders just before the start of each race, which obviously is crucial if you are going to place a bet.

Historically the runners and riders data had been supplied to overseas broadcasters for very nominal sums, but the BHB then understood that it was going to lose a lot of its income that it received from its levy, its statutory levy. It also lost a case in Europe where it sought to argue that its database of this data, of horseracing data, was covered by a database right. So it did not have IP protection.

At that point it then decided to massively increase the amounts it charged bookmakers in the UK and also *Attheraces* for the data. It was charging *Attheraces* as a way of indirectly charging the overseas bookmakers. The BHB refused to sell the data at all or provide the data at all unless *Attheraces* paid the amounts it demanded.

If we could go in the judgment to page 8, please, to paragraph 14 {M/47/8}, and here the judge sets out his conclusions. He says, if you could go over the page {M/47/9}:

"The product supplied by BHB is UK pre-race data. It is not ... 'the ability to create value from the whole show of British racing'."

He says in (ii):

"The relative product market is ... the market for the supply of UK pre-race data to those in the horse racing industry that require such information for the services they provide their customers ..."

He says:

"The geographical extent of that product market ... is all countries outside the UK and Ireland;"

And he says:

"BHB is dominant in that market."

And you see his conclusion if you go to (vi):

"The prices specified from time to time by BHB to ATR prior to the commencement of the proceedings were excessive and unfair, and so an abuse of BHB's dominant position in the market, because they were significantly in excess of the economic value of BHB's pre-race data and not otherwise justified. The economic value of the data is to be measured, on the facts of the case, by the cost to BHB of producing its Database (about £5 million) together with a reasonable return on that cost. BHB's proposed charges to ATR were so far in excess of any justifiable allocation to ATR of that amount as to be plainly excessive. I reject BHB's contention that its proposed prices are justified by the right or need to take into account the cost of the positive 'externality'

of British racing, that is to say the cost of providing those aspects of British racing which make it an attractive subject matter for broadcast and for betting. BHB's proposed prices were not justified by any application of the economic principle of Ramsey pricing."

Now, it is clear even just from that summary that Mr Justice Etherton was not equating economic value always and everywhere with cost-plus, still less saying that anything above cost-plus was automatically abusive. He fully appreciated the need to consider economic value, but he found on the facts of the case that the factors relied upon by BHB did not amount to economic value to the purchaser, and he found on the facts of the particular case that economic value was the cost of producing the data plus a reasonable return. He also did not find that any price above cost-plus was abusive. He says, no, the price is so far above, so significantly above cost that it is abusive.

The judge considered the Decision of the Commission in *Scandlines* where the first Decision, where emphasis is placed on this notion of economic value, and at paragraphs 187-192 he considered the potential importance of the positive externalities of the activities of BHB in light of *Scandlines*.

If I could pick it up at page 41, please {M/47/41}. You see at paragraph 191:

"It must be accepted that, quite apart from the decision of the Commission in the *Scandlines* case ... in appropriate circumstances the competitive price can reflect an amount in addition to cost of production. The classic example is the price which may fairly be charged by a pharmaceutical company for a particular product, and which is set at a level which takes into account expenditure on research and development and also the cost of failed products. This point is made in the draft OFT competition guideline issued for consultation in April 2004 ..."

And then he quotes from that. Then he says:

"Further, it must be accepted that, as in the *Scandlines* case, there may be circumstances in which the competitive price reflects a feature which makes the product especially attractive to the consumer. As Mr Hollander submitted, this is a principle of uncertain extent, but in economic terms is likely to be related to an economist's demand curve, in which the expenditure on the particular feature 'pushes out' the demand for the product or the service in question."

So in effect he is seeking to say, well, if the producer, in this case BHB, spends things on British

racing that increase the demand for the product from the point of view of the betting customers and therefore the overseas bookmakers, then that is something that can be taken into account in economic value.

But then he then went on to consider whether the particular items of expenditure relied upon by BHB, like paying for the club for retired jockeys and so on, did in fact push out the demand for pre-race data to the overseas bookmakers; he concluded that it did not, and he went through the various items of expenditure.

I give you an example. If one goes to paragraph 205, please {M/47/43}. He says, for example, in paragraph 205:

"The evidence is, for example, that BHB's advertising expenditure has been spent almost entirely in the United Kingdom. The extent of its overseas advertising has been limited to approximately £50,000 out of £3 million, and such advertising has been targeted at benefitting the breeding industry in the United Kingdom."

So he is saying, well, the advertising budget is not benefitting at all the overseas bookmakers or their customers. So he goes on to say:

"It is to be noted, in particular, that the evidence of Mr Nichols was that expenditure of the money sought

to be charged by BHB in respect of the use of its pre-race data by non-Irish overseas bookmakers would be unlikely to affect the demand for British racing by such bookmakers or their customers."

We see the judge's conclusion on the competitive price at paragraph 212, if we could go forward, {M/47/44}. You see there he says:

"For all those reasons I consider that the competitive price is such as would recoup to BHB the cost of producing its Database (about £5 million) together with a reasonable return on that cost, and also, in principle, some additional small element to reflect any specific head of expenditure by BHB that could be identified as benefitting ATR's customers. As I have said no such separate head of expenditure has in fact been identified in the evidence before me."

So this was not a mechanical cost-plus exercise. What he did was he looked at the facts, and he concluded on the particular facts that there was no particular attractive feature as there was in *Scandlines* that justified some additional amount for economical value, and he concluded that there was nothing in the expenditure that pushed out the demand curve for this product to these customers. Therefore he concludes that on the facts the competitive price was no more than the

cost-plus price.

If one goes forward to his discussion of excessive pricing, one finds it at paragraph 291 {M/47/58}, and you will see he says:

"The parties are agreed that unfairness in pricing is to be assessed by reference to the relationship between price and the economic value of the goods or services in question ... and that the test for unfair pricing ... is whether the price 'is excessive because it has no reasonable relation to the economic value of the product supplied' and 'is either unfair in itself or when compared to other competing products'."

He says:

"One way to determine that question is to make a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin ...

That is not say there are not other ways of determining whether the price is unfair ...

As paragraph 252 of *United Brands* ... indicates, the fact that a dominant firm charges a high price and enjoys a high profit margin does not necessarily mean that its conduct is abusive. It is always necessary to consider whether the price is also 'unfair' either in itself or when compared to the price

of competing products.

On the other hand the charging by a person dominant in the market of a particularly high price, that is to say, one which gives rise to a particularly high profit margin, and which cannot be justified by comparison with other competing products or on some other objective criteria, is unfair and abusive conduct."

He then quotes the approach applied by the Commission and the OFT and the CAT and the OFT's guidelines, including, if one goes down one sees he also quotes the *Napp Pharmaceuticals* judgment.

If one goes to the end of that paragraph, please you see in paragraph 299 he says:

"In my judgment, the prices specified by BHB from time to time between ... [in the period] were excessive and unfair and therefore an abuse within Article 82 ..."

He says:

"The economic value of BHB's pre-race data is not more, or not significantly more, than the competitive price.

"BHB's principal justifications for the level of its proposed charges ... are the externality of British races and, in economic terms, the fact that its expenditure 'pushes out' the demand curve ...

"For the reasons I have given I reject BHB's case on

those matters."

He goes on to say that BHB's charges to ATR were so far off any justifiable allocation of the cost of production and reasonable return that they were plainly excessive.

So that is Mr Justice Etherton. If I could then turn to the Court of Appeal which is at {M/55/1}, please. If we could go, please, to page 32. {M/55/32}. If one could go down a little to paragraph 172. Thank you. You see this is Mr Roth's criticisms of the judge. He says:

"Mr Roth's first main criticism was that the judge took a mechanistic approach to pricing, ignoring the nature of the particular product and the basis on which it is marketed.

"It is well recognised, in cases such as the pricing for pharmaceutical products, that it is not correct to apply the cost-plus approach uniformly to the determination of all issues of excessive pricing. It is necessary to consider all the relevant circumstances and to have regard to the particular circumstances of the product in question.

"Pre-race data differs from what Mr Roth described as 'standalone' products with standalone costs of production, such as the bananas in *United Brands*.

Pre-race data is not a standalone product. It is a secondary product or a by-product of British racing. Its existence and value depend on the primary activity ..."

If you then go forward to page 35, please. {M/55/35}. At paragraph 186 we see the second main criticism:

"Mr Roth's second main criticism was that the judge's conclusions equating economic value with cost-plus did not involve any separate analysis of economic value. The judge gave no meaning to economic value other than the competitive price defined in terms of the supply side. Economic value looks to the demand side rather than the supply side. It means the value to the customer, not the cost to the seller."

If we then go forward, please, to page 38. {M/55/38}. You see the conclusions on excessive pricing:

"In our judgment, although the judge reached the right conclusions on important issues raised by the claim for abuse of dominant position, he erred in holding that the charges proposed by BHB were excessive and unfair. We are in broad agreement with Mr Roth's submissions criticising the judge's approach to the issue of excessive and unfair pricing of the pre-race

data.

"The judge correctly stated the law as laid down in *United Brands* ... that a fair price is one that represents or reflects the economic value of the product supplied. A price which significantly exceeds that will be prima facie excessive and unfair. But the formulation begs a fundamental question: what constitutes economic value?

"On the one hand, the economic value of a product in market terms is what it will fetch. This cannot, however, be what Article 82 and Section 18 envisage, because the premise is that the seller has a dominant position enabling it to distort the market in which it operates.

"On the other hand, it does not follow that whatever price a seller in a dominant position exacts or seeks to exact is an abuse of his dominant position.

"How is the critical judgment of the economic value of the pre-race data to be made? That has to be determined before deciding whether BHB is seeking to charge ATR a price which abuses its dominant position by trying to obtain substantially more than the economic value of the pre-race data."

Then important words:

"There is nothing in the Article or its

jurisprudence to suggest that the index of abuse is the extent of departure from a cost-plus criterion. It seems to us that, in general, cost-plus has two roles: one is as a baseline, below which no price can ordinarily be regarded as abusive: the other is as a default calculation, where market abuse makes the existing price untenable.

"ATR argued that, if the indicator of abuse is a presumptive competitive price, cost-plus is what a competitive price should be. This seems to us at best a rule of thumb. Competition may drive price below cost for a time or in a part of the market. Where profit is obtainable, the margin of profit will be as great as the market will yield, reflecting such factors as elasticity of demand. Thus, even a hypothetically competitive market may yield a rate of profit above, as well as below, the reasonable margin represented by cost-plus. Those and related issues were usefully discussed by Laddie J, in *BHB v Victor* Chandler." I will come back to that case if I may.

"It seems to us that the most a successful challenge under Article 82 that can achieve in a case like this is a renegotiation, not a cost-plus limit on prices, for whatever else Article 82 does it does not create a European system for determining prices."

Mr Hollander submitted that, unless the court starts from the ratio of cost to price, it is tearing up European competition law. If by this he meant that in the absence of a price which represents more than a reasonable return on production costs, there can be no case of excessive (or discriminatory) price we would agree. But to the extent that he sought to make charging above cost-plus the principal criterion of abuse of a dominant position, we do not agree. Exceeding cost-plus is a necessary, but in no way a sufficient, test of abuse of a dominant position. None of the authorities cited by Mr Hollander suggests otherwise."

The court then goes on to accept ATR's contention that a dominant undertaking cannot always just charge whatever the market will reasonably bear.

It then notes if one goes forward a little to 212, it notes that:

"Mr Roth's central contention is that there is no reason why the economic value of the product should not be its value to the purchaser rather than cost-plus, as held by the judge."

If one goes to 213 he then notes the Commission's Decision in *Scandlines* which supports the view that the exercise under Article 82, "while it starts from

a comparison of the cost of production with the price charged, is not determined by the comparison."

It then goes on to a rather confusing discussion about a wholesaler and a retailer.

The Court of Appeal then concludes at paragraph 218, if we could go to that. {M/55/41}. It then concludes that the judge took too narrow a view of economic value in saying that:

"... it was just the cost of the compilation of the pre-race data plus a reasonable return."

If you could then jump to the court's ultimate conclusion which on page 57, please. {M/55/57}. You see:

"The principal issue is excessive pricing; on that the reason for our conclusion is that the judge erred in holding that the economic value of the pre-race data was its competitive price based on cost-plus. This method of ascertaining the economic value of this product is too narrow in that it does not take account, or sufficient account, of the value of the pre-race data to ATR and in that it ties the costs allowable in cost-plus too closely to costs of producing the pre-race data."

I see the time. I would like, if I may, to go on to Mr Justice Laddie's judgment in *BHB v Victor* Chandler. I can do that after the break if that is

convenient.

THE PRESIDENT: Of course. We will resume then at 2 o'clock. Thank you.

(1.02 pm)

(Luncheon Adjournment)

(2.00 pm)

THE PRESIDENT: Mr Jowell.

MR JOWELL: Mr Chairman, so what we get from *Attheraces* when one sees it both at first instance and in the Court of Appeal is a resounding rejection of the notion that an excess above cost plus a reasonable margin amounts to an abuse. That is, the Court of Appeal tells us, just a baseline or a default, a necessary but in no way a sufficient condition.

Economic value means, the Court of Appeal tell us, value also to the purchaser. It is not exactly stated how that is to be ascertained but it is not just, certainly not just a propensity to push out the demand of expenditure by the seller that pushes out the demand curve for the purchaser because that was taken into account by the judge below, and it is certainly not just a feature of the product that renders it particularly attractive, because that was also taken into account by the judge below. Economic value means value to the purchaser in some other wider sense; precisely by which

metric is to be measured is not stated.

The rejection of cost-plus as a metric is very much underlined by the approval that you saw in paragraph 208 of the judgment given to Mr Justice Laddie's judgment in *BHB v Victor* Chandler, which was a parallel set of proceedings. If one could go to that, it is in {M/42.1/1}, please. This was a strike-out by the BHB against a parallel claim for excessive pricing that had been brought by Victor Chandler bookmakers.

If you go, please, to page 11 {M/42.1/11}. We see paragraph 45:

"Although the proposed pleading does not say so in terms, Mr Turner [this is not John Turner, Justin Turner I believe] confirms that the allegation is that BHB has breached its alleged dominant position by imposing unfair prices. It is important to notice that it is the imposition of unfair prices, not high prices, which can constitute an abuse. However, the amendment contains nothing which could be said to justify the allegation that prices charged are unfair. All that is said is that the rates are fixed at 10% of ... gross profit or 1.5% of the bookmaker's turnover, that the cost of preparing the Pre-Race Data is approximately £4 million a year and that BHB's total income from data licensing ... [was] expected to amount to £600 million

over 5 years, that is to say, about £120 million each year. Even if these figures are correct and tell the whole story, they do not begin to set out the basis for asserting that the charges are unfair as opposed to high."

If we look then down at 47:

"Mr Turner argues that, in effect, there is a per se rule. As he puts it, where a dominant undertaking charges prices greatly in excess of the cost of production, this is in principle an abuse of its dominant position. He says that the price charged by an undertaking enjoying a dominant position in a particular market must be compared with the price he would have been able to charge had there been competition. If he charges more than he would have charged in a competitive market, he is abusing his dominant position. He is obliged to behave in the same way as he would have had there been competition meaning, I assume, full blooded, no-quarter-given competition. He says that in a market where there is full competition, the price which a trader can charge will move towards a figure which will allow him to recoup his costs together with the cost to him of the capital he has used. In many cases this will mean he will only be able to recover the capital he has expended together with an interest at

a LIBOR-type rate."

Then if one looks at paragraph 48 the judge comments as follows, he says:

"Even before one considers the case law, it appears that this approach is based on a number of doubtful propositions. It assumes that an in a competitive market prices end up covering only the cost of production plus the cost of capital. I am not convinced that is that so. Sometimes the price may be pushed much lower than this so that all traders are making a very small, if any, margin. Sometimes the desire of the customer for the product or service is so pressing that all suppliers, even if competing with one another, can charge prices which give them a much more handsome margin. In other words, even when there is competition, some markets are buyers' markets, some are sellers'. I do not see that there is any necessary correlation between the cost of production and the cost of capital and the price which can be achieved in the marketplace. Furthermore the question is not whether the prices are large or small compared to some stable reference point, but whether they are fair.

In addition, this rule breaks down as soon as one applies it in the real world. What happens if there are only a few customers? Must the cost of production,

including all research and development, be recovered from them? If so, does that mean that the price varies depending on the number of customers one has? Does it also mean that the price must go down once all the research and development costs have been recovered? Does it mean that traders cannot increase the price if they engage in successful advertising campaigns which whet the consumer's appetite? If Mr Turner's proposition were correct, it would mean that for most fashion products (clothes, cars, perfumes, cosmetics, electronics and so on) the pricings charged would be deemed to be unfair. Indeed it must follow that if the price of a product differed significantly in a single market or between markets in different locations, one must assume that, at best, one set of customers is getting the fair price and all the ones being charged more are being charged an unfair price. This would be so even though no trader occupies a dominant position."

The judge goes on in similar vein in paragraph 51 where he analyses *United Brands* {M/42.1/12} and he says:

"I do not accept that this supports the proposition advanced on behalf of [Victor Chandler}. On the contrary, it appears, particularly from

paragraph 252 ... that all ECJ was saying was that comparing prices with costs determines the profit margin. Once that has been achieved it is necessary to go on to the next stage to determine whether the price is unfair. What it did not do was suggest that high prices or high margins are the same as unfair prices. Indeed, were Mr Turner right, it seems to me that the law reports would be full of cases where undertakings in dominant positions would have been found guilty of abuse by simply charging high prices. As Mr Vaughan says, the reality is that there are no such cases."

I also refer you to paragraph 56.

So that is the useful discussion that the Court of Appeal commends in *Attheraces*.

Now, if we then turn to a hypothetical reasonable lawyer advising Allergan in 2015 and 2016, what would they make of this? Well, it would be profoundly unclear as to the criteria by which any allegation of excessive pricing could ever be established. It certainly could not be said that a mere considerable excess over cost-plus, in other words a handsome net profit margin, amounted to a likely abuse, certainly not in relation to pharmaceutical products. On the contrary, the Court of Appeal has said very clearly that that does not amount to sufficient, to constitutional abuse. What is

necessary is to take into account the economic value to the purchaser. How that was to be measured was left at large, but clearly the judge at first instance in *Attheraces* had erred in law in not taking that into account sufficiently.

It is specifically recognised in both the judgment at first instance and in the Court of Appeal that in the pharmaceutical sector a cost-plus approach was particularly problematic and likely to be inappropriate.

Now, the fact that the law was unclear in this area is reflected in the textbooks that existed at the relevant time. We have provided excerpts of some of them in our notices of application. If I could take you to some of them, if we could go to *Bellamy & Child*, the 7th edition, which is in {M/95.01/1}, and if we could go to page 4, please {M/95.01/4}. If we can go down to paragraph 106, 10.106:

"It is economically rational for a dominant firm to charge a price which maximises its profits and is higher than the price it would have been able to charge in a competitive market. Such a price, however, may result in the imposition of unfairly high prices on customers or consumers. Article 102(a) identifies, as an example of abuse, 'directly or indirectly imposing unfair purchase or selling prices ...' Unfair pricing may

be ... unfairly low ... or unfairly high ... designed to achieve for the dominant undertaking larger profits than it would earn in a more competitive environment.

As with other forms of abuse, the boundary between the legitimate rewards of monopoly power as the fruits of successful investment, innovation or efficiency, and illegitimate use of such power, is hard to identify with any precision. Although excessive pricing is clearly established as a form of abuse by a number of cases, including *General Motors*, *United Brands*, *British Leyland* and *Bodson*, decisions by the Commission and national courts demonstrate the considerable difficulties of establishing this abuse."

Then it mentions there are cases in which there is margin squeeze or price discrimination. Then it goes on, "Test for an abusively high price". Perhaps if you just want to read paragraph 107 and 108 {M/95.91/5}.

THE PRESIDENT: Of course. Could we try and do them on two pages? (Pause) Yes.

MR JOWELL: So you see of course there the specific mention of pharmaceutical products and that the interpretation of a Court of Appeal judgment in *Attheraces*, noting that the law on excessive pricing is about distortion of competition and not about controlling excessive profits.

Then if one goes to Whish & Bailey, another one of

the leading textbooks, at {M/112.1/1}. This is the eighth edition, as you can see. If one goes over to the page, please, and again, if you do not mind, forgive me. Forgive me, it is where the text begins. Page 4 {M/112.1/4}. If you see here, it says:

"There are persuasive arguments against direct control of prices under competition law.

First, if normal market forces have their way, the fact that a monopolist is able to earn large profits should, in the absence of barriers to expansion and entry, attract new entrants to the market. In this case the extraction of monopoly profits will ultimately be self-defeating and can act as an important signal to other firms to enter the market. If one accepts this view of the way that markets operate, one should accept with equanimity periods during which a firm earns monopoly profit: the market will in due course correct itself, and direct control of high prices will have the effect of undesirably distorting this process."

It goes on to say:

"However markets may fail to function in the manner just described for various reasons. One is that a dominant undertaking may be able to prevent new entrants undermining its position by exclusionary behaviour. Judicious intervention by the competition

authorities can prevent such behaviour and leave it to the market to fix prices."

I would commend this whole discussion to you, the second and third points as well, but if one could go to the next page, please, I just pick it up with the fourth reason {M/112.1/5}, against the direct control of prices.

"A fourth problem is that even if it is accepted, despite these arguments, that exploitative pricing should be controlled, there is the difficulty of translating this policy into an administrative legal test. A legal rule condemning exploitative pricing needs to be cast in sufficiently precise terms to enable a firm to know on which side of legality it stands."

If one can go down to the "Approach in the EU and UK", it says:

"It is clear that neither the European Commission nor the [CMA] in the UK have an appetite for investigating high prices under Article 102 or the Chapter II prohibition. However this is not to say that such cases never arise, and, as will be seen in the discussion ... there have been investigations of excessive prices in both jurisdictions."

So what these authorities stress is not only the rarity of excessive pricing cases but also the lack of

conceptual clarity as to the basis on which an abuse of unfair pricing is to be identified.

There is no greater clarity at European level and the rarity of European enforcement is also striking. We have been trying to research whether the European Commission has ever actually fined anyone for excessive pricing. The only clear example that we have come up with is the *British Leyland* case in 1970 when *British Leyland* was fined £350,000 in what was really a kind of market partitioning abuse as well as excessive pricing. Other than that we have only found examples of FRAND cases with Microsoft or what are effectively margin squeeze cases, but there are no European decisions we have found, I mean European Commission decisions, of fining people at this point for excessive pricing.

Indeed, therefore it is not surprising that in 2017 a year after Allergan's alleged infringement ended, Advocate General Wahl in his opinion in the *Latvian Copyright* case, which concerns alleged excessive pricing there, he starts it with a question: is there such a thing as unfair prices?

So the impression that the CMA seeks to give in its submissions that somehow, ah, well, just look at *United Brands*, it is all obvious, I am afraid is

just a complete rewriting of legal history as far as this particular form of abuse is concerned.

If you take the case of a lawyer advising Allergan at this point in 2015/2016, what would they have said? The first starting point, I think, is, well, what are the questions they would have asked? I think the first question they would have asked is, inspired by *Napp*, is they said, well, are you expecting competitive entry and competitive pricing within a reasonable period? The answer would have been yes, we are. Well, 90% price reduction in 3 years, and that would probably be in itself enough to say, well, very little chance of an infringement here.

But let us suppose they had probed further and they had asked some of the practical questions that lawyers might go on. They might have said, well, how long has this profitable pricing for hydrocortisone been going on? They would say, well, many years. Oh, and do the Department of Health and the NHS know about it? Of course they know about it, they published the drug tariff and they pay the prices. Have they ever complained? No, not once. We have not had a single complaint from the Department of Health, not a single complaint from the NHS, and no complaint from the CMA.

So the next question that a practical lawyer might

ask is: have there been any investigations, any requests for justification? No, nothing, not a thing. Then they might say: well, I see this high net profitability for hydrocortisone, how does that compare to the other products in the portfolio? Oh, very similar, a number of generic products are sold with similar net margins. Then they might say: well, there is this very important case, *Attheraces* and *Attheraces* says there is economic value to be attributed on the purchaser's side. Is this an important product for the purchaser? The answer would be, oh, it is life-saving. It is essential.

Now, to suggest in those circumstances that a reasonable lawyer advising Allergan Plc should have said, well, you must immediately on day one of your ownership massively discount the price of hydrocortisone beyond the anticipated discounts that you are already anticipating and bring it down to an amount which is not much more than above cost-plus, is fantastical. It is completely unreal and completely unreasonable.

So against that background, could I turn to the fine.

THE PRESIDENT: Yes.

MR JOWELL: Can I start with its composition. If we go to {IR-A/13/1}. This is the annex E of the Decision, and

if we go to page 73 {IR-A/13/73}. This is the first table of annex E, which contains a useful breakdown of the fine. You can see how this is for the unfair pricing abuse to start with. You can see it does it step by step usefully here. So you see on the left the steps run through. It starts with 1, and we have "relevant turnover", and we see the CMA takes that at 17 million and it applies a 30% starting point. So the absolute maximum severity.

Then in 2 we see the duration, and you see the penalty at the end of step 2 is 51 million, but that is 51 million for everyone. That is for the whole period of the abuse.

Then you have director involvement as an aggravating factor, which ups by 15%, and then the mitigating factor of there being compliance. That downs it by 5%. Then we have the penalty at the end of step 3, 56 million. If we could then look at the rest of the page, we then see step 4. We see in step 4 here that we have the penalty, if you see the first line, "Penalty per ownership period after allocation". So this is allocation to each period of infringement. So you have A1 and A3, which is Accord-UK; A2, which is Accord-UK and Allergan. So Allergan's, if you like, fine going into step 4 is 6,755,000, and that is based on a 30%

severity and the uplift.

This is really where we see things, I am afraid, going into outer space because we see in step 4 you can see that that 6 million, 6.7 million suddenly becomes 67 million. That is then an adjustment for specific deterrence and proportionality. So it is times by a factor of 10. That is added to the 6 million to reach the penalty per ownership period at the end of step 4 at 74 million. So it is a 1,000% uplift. I will just briefly show you the same for the 20mg unfair pricing. It is not as dramatic. That is on the next page, page 74, please {A/13/74}.

You see, if we can go down, if you look at step 4 going into step 4 in the B2 period the fine on Accord-UK and Allergan is 1 million, a little over 1 million, and we see the adjustment for specific deterrence and proportionality is upped by a little under 1 million to take it to a nice round 2 million figure at the end of stage 4. So a much smaller uplift, just a mere doubling.

Then if we then go to the fine in respect of the 10mg agreement abuse, if you go to the next page {IR-A/13/75}. Again, if we can -- we see going into step 4 the period C2, the fine on Allergan is 17.4 million, and then the adjustment for specific

deterrence and proportionality is upped by another 17 million, another doubling but here on a rather larger base figure. So we get to 34 million.

Now, it is tempting to go methodically through each stage and criticise each stage. I am not going to do that, because I think given their overwhelming quantitative significance I really want to just focus with you today on these massive ratchets at this stage 4 for specific deterrence and proportionality.

What is immediately striking about them is that what it means is that the fine on Allergan Plc is far greater by an order of magnitude than the fine even on its former subsidiary for its infringement in these periods.

That is despite the fact that its own liability of Allergan Plc is wholly derivative from the liability of the subsidiary, of Actavis UK. So, as I showed you I think yesterday, one normally expects the fines for wholly derivative conduct or liability to be the same, and they are both jointly and severally liable for the same amount.

So how do they justify this massive uplift at these stages? It really is justified by two factors by the CMA. One is said to be the financial benefit that it is asserted was derived from the infringement, and the other is deterrence, specific deterrence.

If we could go back to the Decision, please, at {IR-A/12/1059}, please. If you see there at 10.260 it says:

"The CMA has considered whether the penalty should be adjusted by reference the need for specific deterrence. As set out in section 10.C.III above, the CMA has had first regard to the financial benefits generated by the undertakings involved in the infringements. Table 10.7 sets out the estimated financial benefit that can be attributed to each period of ownership with respect to the 10mg Unfair Pricing Abuse committed by Auden/Actavis."

If one looks in the table one can see that the benefit above the baseline of £20 a pack, which is the point which the CMA recognises that they say, well, we do not allege any abuse below that, they say it is 37.9 million.

If one goes to paragraph 10.263 below this, please, one sees that. That what they allege would not have been accrued absent the pricing abuse.

So the first part of the 67 million uplift, they say, well, that 37 million is financial benefit. Now, even if one just stops there, that is in our submission wildly disproportionate to try to impose on Allergan Plc the entirety of the financial benefit as said to have

been derived from the infringement. But even if -- and Ms Ford and others will explain why that is so. But even if you were to accept that, we are still 30 million short of the uplift that is actually imposed.

If we could go to the next page, please, to {IR-A/12/1061}, we see under the heading "The penalty should reflect the nature and impact of the Infringement". Under that we see factors in 10.265 to 10.268 that have already been taken into account. We see seriousness is mentioned, but that is in 10.266, we see, it is among the most serious infringements. But wait a second, that has already been counted. That is how you got your 30%. This is double-counting.

Then it says, well, there is the severe financial impact on the NHS. It is no longer said that the fact that the NHS is the customer somehow changes the position as a matter of competition law, and the harm that the NHS has suffered is just, at the most, going to be the flip side of the benefit received. So that is already counted in the uplift for financial benefit.

Then if we go over the page {IR-A/12/1062}, 10.268, we say, well, it took place over a sustained period of time. Well, again, that was reflected in duration, which was already counted in.

Then we come into the critical further factors which

they say are for specific deterrence. We see, if you look at 10.270:

"Allergan and Accord-UK are jointly and severally liable for the penalty for the infringement committed by Auden/Actavis during Period A2 as they were part of that undertaking at the time of the infringement. Since they no longer form part of the same undertaking ... the CMA has separately considered for each of [them] whether the penalty that relates to Period A2 is set at a level that would deter each of them."

"Deter each of them." So there is somehow a notion that Allergan Plc needs to be deterred. Then in 10.271 it talks about Accord-UK and it hits the statutory cap.

Then if we go to 10.272 {A/12/1063} we see that it notes:

"Allergan is currently owned by AbbVie and forms ... an undertaking of considerable size."

It comes to the conclusion at the end of that paragraph that:

"A financial penalty that forms such a small proportion of worldwide turnover is unlikely to deter the undertaking from committing infringements of competition law again in future, when considered together with the other case specific factors."

Now, there is just an obvious fallacy here. The

parent undertaking, Allergan Plc, still less AbbVie is not alleged itself to have committed any infringement of competition law. So if we go back to Jeremy Bentham, there is nothing for it legitimately to be deterred against unless you take the view that somehow it is personally culpable. We see a similar analysis if we go to page 1074, please {A/12/1074}. This is in relation to the 10mg agreement abuse.

If we go to 10.311, please, at the bottom of the page we see they say no uplift for financial benefit, and I think Ms Ford showed you this already. So in relation to this you will recall that there is a £17 million uplift at this stage, but none of that uplift is to account for financial benefits in respect of the 10mg unfair pricing abuse, because:

"... the CMA has not taken any financial benefits ... because any benefits attributable to the Agreement are captured in the financial benefits relating to the 10mg Unfair Pricing Abuse."

So put another way, no part of the 17.4 million uplift at stage 4 for the agreement abuse, none of that can be justified by benefit to Allergan Plc because that is already taken into account in relation to the pricing abuse.

So then what are they fining? What is this specific

deterrence uplift for? Where does the 17.4 million come from? The answer is specific deterrence. Now, there is no allegation that Allergan Plc knew about the alleged 10mg agreement, and there is no allegation that it should have known. The CMA, of course, takes the various slides that were presented to Mr Stewart in its defence and in its submissions, and it puts together different snippets and it says and makes the allegation, when you put all of those together it says, well, there are, it says, it says effectively they are indicia.

But it was not even put to Mr Stewart that he could have deduced that there was some unlawful agreement from those different snippets on the slides. It was not even put to him and we called him as a witness.

So we say that what you have here is an uplift of in excess of 50 million specifically on Allergan Plc as parent, imposed specific deterrents without any justification. It fails to take into account whether Allergan Plc is culpable in any way. Unless the parent is to be deterred in the way that Jeremy Bentham said that dogs are to be deterred, this is not legitimate deterrence because they could not reasonably know that something was being done in advance. If you want to impose specific deterrence which is legitimate, you have to ask the question: has AbbVie or Allergan done

anything in the past that they specifically need to be deterred against doing in the future? If the reality is that only the subsidiary has done something wrong, if at all, and the parent is just held liable, effectively vicariously, as owner then the only legitimate specific deterrence is deterrence on the subsidiary and that is what suffices, because it suffices to impose a fine on the UK subsidiary and on the basis of that UK subsidiary's size. That company would then have every incentive to adapt their future conduct.

Put another way, a fine on the basis of the local unit will suffice to discipline the conduct of the local unit in the future. But there is no legitimate purpose in deterring the parent unless the parent itself has done something wrong.

What one sees in the Decision are various elliptical references that seek to somehow attribute some kind of fault to Allergan Plc. They talk about Allergan not acting to discontinue the abusive behaviour of its subsidiary, Accord-UK.

When one considers the facts of the infringements that just makes no sense at all. It is completely illogical in the case of the 10mg agreement abuse, because that is an unwritten, tacit agreement and there is no proper evidence that anybody knew or should have

known at Allergan Plc level, and equally unreasonable to suppose that the directors of Allergan parent company Mr Stewart effectively in New Jersey, should have acted precipitously to bring down the price of hydrocortisone faster than it was already coming down.

One simply really needs just to articulate what the CMA is implicitly suggesting here, which is namely that Mr Stewart was somehow at fault for not bringing down the price of hydrocortisone even faster than it was already, to just see that this is a proposition that is commercially and in all senses entirely unreal, particularly when one considers the wider circumstances: the short period of ownership, the hold-separate, the anticipation of imminent competitive entry and above all, perhaps, the complete absence of any complaints or queries from the customer or regulator at this point.

Now, there are just two further points on specific deterrence that are mentioned in the Decision that I should deal with. They are in paragraph 10.275, and that is at page {IR-A/12/1063}. You can see there that the first point that is made is that the relevant turnover used for the 10mg pricing abuse in stage 1 is lower than it would have been had the abuse ended at the point that Allergan divested, and you can see in the footnote 3830 that the contrast is between 48 million

and 17 million.

Now, at most that would justify slightly increasing the penalty by something like, on my calculations, at most, even if you took all of that and said let us use a different turnover you would still only get 2.5 times the initial 6 million. You do not get anything close to an uplift of the 10 times that they have imposed.

The second point that is made is, well, prices were higher or highest, they say, during Allergan's period of ownership. Well, if you are going to do that then you surely have to take the price evolution during Allergan's entire ownership period. If I could show you that from our notice, that is at {IR-A/1/17}. If we could go down to paragraph 30, please. You will see:

"The Decision notes that the price of hydrocortisone reached its highest level during Allergan's period of ownership ... The long-term trends, in terms of the price of the product, are set out at various places in the Decision including figures ... [and so on]. The basic picture is:

(a) the pricing and marketing of hydrocortisone after May 2015 ... followed the well-established trend in price behaviour from the prior period. The price continued to rise until March 2016 but not notably faster than it had done previously. Indeed, the price

increases between May 2015 and March 2016 were relatively modest by reference to those that had come before. In April 2008 the 10mg tablet cost £4.54. By June 2015, that price had risen to £62.63 ..."

So that is before Allergan's period of ownership, and then it reaches a peak of £72 in March 2016. So it increases, yes, it increases by 15%. But then:

"From March 2016, and for the final part of Allergan period of ownership, the behaviour of hydrocortisone tablet prices diverted from its historic trajectory."

Instead of rising they fall such that by May/June 2016 they are back under £60 a pack, so below the price that the tablet had been when Actavis UK acquired Auden. That follows the competitive entry.

You cannot just look and say, oh, well, they went up by a little bit before they came down. That is scarcely a reason to multiply a fine by 10 times, still less on the parent company. Of course, also it is worth taking in mind this is also a form of double-counting, because to the extent that the price went higher that is already captured in the supposed benefit that Actavis obtains from the price above £20 a pack.

So, to conclude on this point, we say that Allergan and AbbVie are not themselves at fault. There is nothing in either of their conduct to deter against, and

hence no uplift for specific deterrence is justifiable, and on any conceivable view no uplift remotely of the scale imposed could be proportionate.

This aspect of the penalty is not justified by any concept of legitimate deterrence. It is "dog law". What is more, it is a particularly pointless form of dog law from Allergan's point of view because it is a United States company that does not even operate in the generic sector anymore.

What is more, the Decision recognises that AbbVie, which is now the company that owns Allergan, has an admirable competition compliance regime, indeed, one for which it receives mitigation of a fine of 5%. You will see that in the Decision at 10.224 {A/12/1048}, where it is accepted that Allergan's compliance programme is comprehensive both globally and in the UK specifically.

Allergan has departed the generics market altogether. It is overwhelmingly a United States company where this particular form of anti-competitive activity, excessive pricing, does not exist as an anti-trust violation. So the CMA's deterrence theory simply makes no sense at all as far as Allergan is concerned.

If it is said, ah, well, this is to deter third parties, I am afraid that is not legitimate unless there

is culpability to begin with, but also I would add that the CMA ignores, in that respect, the fact that the Department of Health now has new powers to deal with this very specific sector, and that is a point that the CAT makes in *Flynn Pfizer*, if I could just show you that. It is at {M/150/144}, and if one can go to paragraph 461. The one point that the CAT makes in relation to penalty really is they say:

"Having listened carefully to the submissions made by each party and, for present purposes, we make one specific point ... Had we upheld the CMA's findings on abuse, we would likely have regarded the very substantial uplift for deterrence applied to Pfizer as, on its face, difficult to justify and not required by the CMA's own penalty guidance ... If we had needed to come to a decision on the level of penalties to be applied to Pfizer in this case, we would have given the appropriate uplift for deterrence close scrutiny, particularly having regard to the new price control powers of the [Department of Health] that have recently been passed into law."

Now, before I finish I should mention just a few further specific points on specific aspects of the fining calculation. The categorisation of excessive pricing as a serious offence liable for the very maximum

of 30% is to put it in the same category as hard core cartels, price-fixing effectively. We say that ignores a very important distinction between excessive pricing and cartels, and that is that cartels constitute a form of conduct that is readily identifiable.

By contrast, excessive pricing is very hard to distinguish from usual profit-making on a market. That is a point that the textbooks that I showed you all make, and it is a valid one and it is particularly valid when one has this additional element of economic value which is simply a concept that certainly at this point in time, but even today is really entirely at large and has not been properly defined or explained when some element of economic value that is of benefit to the purchaser can be taken into account.

Directors of companies like Allergan and others, they do not have a Professor Valletti, as it were, in their top pocket who can supervise their pricing decisions to tell them when a highly profitable price suddenly tips over into an excessive price. In that respect it is completely different from a cartel where you know what you are doing is wrong by its nature.

PROFESSOR MASON: Actually I think you may just have clarified it for me in the latter part of your statement, but just to be clear. If it could be

established, I understand what you are saying about the uncertainty ambiguity, lack of clarity in the law, but if it could be established that prices are excessive are you saying that is not as serious an offence as forming a cartel?

MR JOWELL: It is as serious in its effect, in its economic effect but it is not as serious in its culpability because it cannot be easily or as readily ascertainable. It is simply not ascertainable. I would say what might be equivalent to cartel-like behaviour would be the following: suppose that you had a sector specific regulator and they imposed ex-ante a price control on an undertaking and they said, you cannot price above £20 and the undertaking price at £30 not by mistake but deliberately. Now that I would accept would be as serious as a cartel.

But this is such an amorphous concept, excessive pricing from a legal point of view. It may be different from an economic point of view. Economists they just say it is anything above competitive pricing but that is not how it is to be defined in a legal point of view, and I am not sure you are expressing dissent.

PROFESSOR MASON: I think economists are a little bit more nuanced than that. I will leave that be.

MR JOWELL: Fair enough, but one thing that economists do

all assume in their models, correct me if I am wrong, I understand from dimly recalling my days of studying economics the one thing that economists do all assume is profit maximising behaviour by all actors in the economy. That is a standard assumption that is made. Therefore, anyone who has market power in an economy and is able to therefore have power over price is potentially taking what could be conceived of to be a monopoly profit and certainly any undertaking that is deemed to be dominant.

But that cannot possibly be the test for excessive pricing. Therefore one has the test attenuated in numerous respects and one sees it attenuated by the requirement that there should be a massive, an enormous excess, it should be disproportionate, there should be no reasonable relationship to price. One sees it attenuated in *Napp* by reference to the requirement that it should also be the case that there are not effectively market forces already on hand to bring the price down, and one sees it attenuated also by the Court of Appeal in Attheraces by saying, well, there is also this element of economic value to the purchaser which is an element that is left entirely at large as to how that is to be calculated although we are told that in the pharmaceutical market it is likely to

be a very important factor.

So in those circumstances to then say, well this is the 30% starting point. It is just like a cartel because it has the same effect as a cartel, is not a fair approach from a legal point of view because it does not account for the legal difficulty and the practical difficulty of ascertaining when profit, ordinary profit maximising conduct, which is assumed, suddenly becomes unlawful.

I could mention in the United States there was a case I think around 1920 L Cohen Groceries, I think, in the United States in which there was a law which sought to impose, I think it was very similar terms to article 102, unfair or unreasonable prices could not be imposed in wartime, and the law was struck down by the Supreme Court on the grounds that it was unconstitutionally vague. It was contrary to the due process because nobody could know when prices were unreasonable or unfair.

Now, we cannot do that. You cannot strike down the whole provision as unconstitutionally vague, but what one must say surely is until that concept has been brought home in a way that is concrete and can be understood and ascertained by economic actors in the market, it surely cannot be right to be penalising

people for infringing it and certainly not penalising people at this point in time in 2015 and in these extraordinary amounts.

The next brief point I should mention is the inclusion in the fine of an additional 15% uplift for aggravating circumstances by reason of senior management involvement. We say the alleged involvement of Actavis staff does not constitute the alleged involvement of Allergan staff. So that element must go.

There is also, we say, the unfair duration of the agreement and this has two aspects: the start date, the proper start date for Allergan Plc and the proper end date for Allergan Plc.

We say first of all if you do take the view, well, Allergan ought to have seen these hydrocortisone prices and sort of brought them down immediately, even before they would have done so within the next year or so, you cannot sensibly say they should have done that on day one of their ownership but they had to have sufficient time to get their feet under the desk, surely. The earliest really that it is even remotely reasonable to suppose that they could have given such an instruction would be October 2015 when they start to receive presentations.

The second aspect of duration is the endpoint which

again if I am wrong on the hold-separate we say that the endpoint for any penalty should certainly be March 2016 when the hold-separate period commences because for whatever else it does it certainly is a massively mitigating factor in relation to Allergan's ability to have oversight and indeed control over the subsidiary undertaking.

So to conclude, if I may, unless there are any questions, I would simply say this: that businesses like Allergan investing in the United Kingdom should not we say be subject to massive fines for quasi criminal infringement that hit them like asteroids out of the blue. Such fines are not only inconsistent with legal principle but they also undermine business certainty, that is the key feature, a feature even more important than robust competition law, in encouraging investment and garnering prosperity in this country.

We say that the effect of this Decision is to penalise Allergan for the crime of buying a UK pharmaceutical company, holding it for 14 months and selling it on. We respectfully suggest that that is not only obviously unjust but would also be an act of great self-harm to competition and investment in the United Kingdom. Those are our submissions.

THE PRESIDENT: Mr Jowell, thank you very much. We have no

1 further questions. We are very grateful.
2 MR JOWELL: Thank you.
3 THE PRESIDENT: Mr Brealey is it you next?
4 MR BREALEY: It is me. Shall we start or do you want to
5 have a break for ten minutes and then I can --
6 THE PRESIDENT: Should we give you a clean start. We will
7 rise for ten minutes and then.
8 MR BREALEY: Clear the air and ...
9 THE PRESIDENT: Very good. We will resume at 3.10.
10 (3.00 pm)
11 (A short break)
12 (3.10 pm)
13 Closing Submissions by MR BREALEY
14 MR BREALEY: Sir, now for some light relief. Over the next
15 three hours or so, I think we divided it up, I wish to
16 address the Tribunal on six issues and I will highlight
17 them and then we will go through them. Six issues, so
18 there are six factual themes really.
19 The first is Project Guardian. This is at annex 3
20 to our Closing, and we have heard very little about this
21 and it is highly relevant. So the first is
22 Project Guardian.
23 The second is the benefits of having your own
24 product, the benefits of having your own product. We
25 deal with this at annex 6, and it is highly relevant to

Mr Beighton's state of mind in 2012 and early 2013 when he inherited the informal supply agreement.

The third is the lack of AMCo evidence of a promise not to launch. So Project Guardian is essentially from Auden. The third point is a lack of AMCo evidence of a promise not to launch. We deal with this in annex 7 of our Closing.

The fourth is a lack of customer demand in 2014. The evidence of a lack of customer demand obviously is relevant to why AMCo signed the second supply agreement. Mr O'Donoghue is going to deal with the meaning of the agreement and the second supply agreement. We divided that up.

The fifth is market definition, and this is important to the CMA's legal characterisation of the supply agreement, and the sixth I have labelled "double standards". This is the double standards applied by the CMA on dispensing off-label. We deal with that in annex 10 in particular, and we highlight the different standards applied by the CMA to pharmacies and to AMCo when it comes to dispensing off-licence.

So those are the six issues. I am sure there will be others as we go along, questions from the Tribunal, but Project Guardian, the benefits of having your own product, lack of evidence of a promise not to launch,

lack of customer demand in 2014, market definition and the double standards on dispensing off-label.

So without further ado can I go to the Project Guardian material. This is at annex 3 of our Closing which is at {IR-L/8/160}. Clearly there is a lot of material in our Closing, there is a lot of material in our annexes and I obviously have not got time, nor does the Tribunal want me to, to read it. What I am going to do is look at some of the key documents because the key documents are relevant to AMCo's state of mind but particularly Auden's state of mind.

But if we just look at the introduction of annex 3, Project Guardian, this gives a flavour. So:

"The CMA says that 'Auden was particularly concerned about the threat AMCo's entry posed to its position as sole supplier, going so far as to launch Project Guardian in a bid to discourage off-label dispensing specifically of AMCo's 10mg tablets'."

So that is what the Decision says. Paragraph 2, we know that it was an aggressive marketing campaign and we will see some of the flyers. The Decision says it was:

"... designed specifically to warn 'specialists, patient groups, regulators, GPs and pharmacists, customers and health departments ..."

About the risk of dispensing off-label:

"The 3-year campaign ... was designed to maintain the market exclusivity ..."

And it is worth noting that up until a few months before the CMA issued the Decision, the CMA had contended that the Project Guardian was exclusionary and abusive, but:

"The CMA abandoned this conclusion by way of a Stop Decision dated 6 May 2021 ..."

But it does highlight the relevance of this material to Auden's state of mind and AMCo's state of mind.

Paragraphs 6, 7 and 8, I do not know if it is on the screen, 6, 7 and 8 {L/8/161}, we say it is relevant to the appeal for two main reasons: first, it disproves the existence of the alleged 10mg agreement; and second, it disproves an object to distort competition. We develop that. But those are the two reasons why Project Guardian is relevant.

So I will just deal with the first:

"Project Guardian [we say] is the antithesis of the CMA's claimed existence of the unwritten 10mg Agreement ... On the CMA's own case, Auden in early 2014 believed that AMCo was close to entering the market. It believed that AMCo's entry was 'imminent', and its Commercial Director stated that 'AMCo will launch

mid May/July 2014'."

We are going to see some of these documents:

"Auden was 'particularly concerned about the threat AMCo's entry posed to its position', and was intent on ensuring that the entry was unsuccessful."

So that is the first reason. It is relevant to whether there was a promise to stay out of the market. The second reason, you will see from paragraph 8, is that "The objective", this is four or five lines down:

"The objective was to 'polarise' the market between the two versions ..."

Basically we say that is what happened, and we will come on to that when we come on to market definition.

If we go over the page to page 162 of annex 3 {IR-L/8/162}, we set out the chronology of Project Guardian. What I intend to do probably for the next 20 minutes is go through some of the documents.

THE PRESIDENT: Yes.

MR BREALEY: Before we get to the Project Guardian documents themselves we will just go to three by way of context. So can we go, first, to {IR-H/316/1}. They will all be IRs. So this is an internal email from Guy Clark, he is the head of strategy, the chief strategy officer, to Jane Hill, who is the senior commercial director, John Beighton, Robert Sully who we know, and

Brian McEwan who loomed large. Now, this is in the context of buying Amit Patel's business, the Auden 10mg business. So:

"Dear all, I received a call from Amit today, who was not happy with the higher order being sent by SCM, before the agreement is signed (by him) and without having given an indication whether we are going to buy the product or not."

So "buy the product" is buying his business.

"I think Rob will cover this by separate email, but his main points were:

(a) why was an order sent for the higher amount? I said that I believed it was in anticipation of the newly-agreed volumes. He said that he had explained to Brian that agreement on these volumes was contingent on our interest in acquiring the product and giving him an offer. I said that I had no idea about this and that we were keeping the two activities separate within AMCo.

(b) He then said that he has a 'very big company' interested in buying his product, and therefore needs to know from us ASAP whether we are interested or not. He said he does not mind which it is, but that he just needs to know ASAP."

Then the (c), and the next paragraph I emphasise:

"He then went on to say that if we don't make an

offer to buy the product, and thus that he implied that he therefore wouldn't sign the supply agreement, he would then take action to protect his product by advising all parties (mentioning the [Department of Health] and MHRA amongst others, including major multiples) that our product should not be dispensed against generic prescriptions.

This supply deal is not going to happen (in my opinion), and I'm not sure we want it to happen from what I hear from Rob."

That is Rob Sully.

"I think we need to now get a really clear plan in place how to launch our product ..."

This is by way of context, but four points I draw from this. First, much of the supply debate at this time was about buying his business. The second point you draw is that Mr Rob Sully was quite negative about Auden, which is consistent with what he said about not trusting Mr Patel. Third, there is a clear perception by Auden that AMCo's product should not be dispensed against generic prescriptions, so there is a fear that the AMCo product is going to be dispensed, and the fourth, and it is a point I am going to emphasise time and time again, there is absolutely nothing about a promise not to launch or have this product as back-up.

Can I then go to document {H/331/2}, please. If one just goes down a little bit. It is again, this is by way of context as to what AMCo was doing at the time. So this is Guy Clark again, this is an internal email, John Beighton and Robert Sully. He says, "It's getting frustrating". So this is about, essentially, the tests that were going on at the time, the assay tests, the stability tests:

"It is getting frustrating ... I've had 3 entirely different opinions about the status of our product in the last 24 hours. I liked Bharat's answer the best (we should almost certainly be able to get it released) ..."

I emphasise that, and then he goes on to summarise other people's opinions as to whether it could be released or not.

But I emphasise that Guy Clark here likes the answer the best, "We should almost certainly be able to get it released."

So again, in AMCo's state of mind at this time Guy Clark, chief strategist, likes the answer, "It will get released."

Then, and this is the last document by way of context until we get to Project Guardian, if we go to {H/332/1}, I do not know if you can expand it a little bit. So, this is from Mr Sully. Again, it is about the

Auden contracts. This is trying to put the supply contract in a formal way. "External legal privilege applies":

"Jane, [that is Jane Hill the commercial director] Brian [that is Brian McEwan] tells me that he has agreed with Auden that we will document the agreement to date, and will bring it to a close."

So AMCo are bringing the supply agreement with Auden to a close.

THE PRESIDENT: Mr Brealey, just to understand the redactions. These are for privilege purposes, are they?

MR BREALEY: I will double-check. I cannot remember seeing so many redactions, but --

THE PRESIDENT: I was wondering whether --

MR BREALEY: Can we go to the IR. Every single document I go to is IR {IR/H/332/1}. That is better.

So again, so this is from Robert Sully to Jane Hill, the commercial director:

"Brian tells me that he has agreed with Auden that we will document the agreement to date, and will bring it to a close."

So they are bringing the supply arrangement with Auden to a close:

"He has floated end February or end March. I am happy with either and I have asked John [that is

John Beighton] to confirm which he would prefer.

This means [says Mr Sully] that we achieve the clarity that Pinsents have advised [which is essentially what he said in chief in cross-examination] plus we end the arrangement as we get ready to launch our own hydrocortisone from Aesica."

Again, nothing about a promise not to launch, nothing about having the product as a back-up. It is the complete opposite. All I am trying to do at the moment is look at the evidence before this Tribunal and see whether it in any way, shape or form constitutes strong compelling evidence of a promise not to enter and have the product as back-up. This is completely the opposite to the CMA's case.

So with that, I then turn to the Project Guardian documents and see what is in Mr Patel's mind. If we go to {IR-H/358/1}. This is a consultant's document, "Professional Advice (Hydrocortisone) Proposal" prepared for Auden McKenzie by a Mr Paul Bennett, 6 February 2014. So it is dated 6 February 2014.

If we go over the page, please {H/358/2}, so the purpose of this document, you can see this for yourself. It is introducing Mr Paul Bennett and the client. Then if we just go up a little bit, please. What are the client's requirements? So this is Auden's state of mind

in February 2014:

"It is the providers understanding that advice and support is required to assist Auden McKenzie ... to develop and deliver a strategy designed to ensure that its current market share for the supply of hydrocortisone tablets (10mg and 20mg ...) is maintained or strengthened at a time when a competitor's product (namely Amdipharm Mercury ... [that is AMCo]) threatens to weaken Auden McKenzie's market share.

The client is particularly concerned that the competitor's products [obviously AMCo] may be prescribed for use outside the strict terms of its product licence and therefore compete unfairly with the client's own products that are licensed for use for particular therapeutic indications."

We will see this time and time again, Auden saying:

"There are legitimate professional and commercial reasons why the client wishes to ensure that those who should be concerned [pharmacies for example] with the appropriate use of hydrocortisone tablets are informed of this situation and encouraged to take the necessary steps to ensure that the (competitors) product [AMCo's product] is not prescribed on the NHS to patients for unlicensed indications."

Completely contrary to any promise made by AMCo to

Auden that it will stay out of the market. The fear is that the AMCo product is going to be dispensed. Auden is not receiving any comfort, has not received any comfort and I will come back to this, for its £1.

The next document, please, is {IR-H/533/1}. Although this is dated June 2014 -- could we go to page 5 {IR-H/533/5}, because it just, again, highlights a similar point about another -- this is another consultant. Again, this is 12 February. We see this, 12 February 2014. This is all part of Project Guardian:

"Further to our discussion on Monday, please find below additional details.

1. Auden McKenzie acquired the Brand 'Hydrocortone' tablets ..."

Okay. Point 2:

"Currently only a generic version is available and marketed in the UK ...

3. 3 MA holders -- Auden McKenzie + 2 others.

4. 1 of the MA is dormant and we do not know the status of the license.

5. The other MA for the generic is held by Amdipharm [AMCo], who will launch their product in Q2/3 2014.

6. The Auden McKenzie MA is fully licensed for all 3 indications.

(a) Congenital hyperplasia.

(b) Adrenal insufficiency in Adults.

(c) Asthma.

7. The Amdipharm MA [AMCo] is only licensed for (a) [that is congenital hyperplasia] and (c) [asthma] due to Orphan Drug Status granted in 2011."

It then goes on, patients have to be made aware of this ...

But again, this identifies, on 12 February 2014, Auden's perception that AMCo is coming into the market, completely contrary to any promise by AMCo that because it received its £1 it is going to stay off the market or have its product as back-up.

So we go on with the chronology, so we now go to document {IR-H/351/1}. This is a template letter to stakeholders, and this is in the electronic bundle. This is dated 31 January, so that is how -- I do not see the date from the document, but it is apparently it is 31 January.

This is a draft template letter that is being drafted by the consultants:

"This is a template for use when initially engaging with stakeholders. It requires tailoring to each category of stakeholder (out of the 5 core groups identified) and must be personalised to the individual recipient.

The key messages/purpose is to:

Raise awareness that Auden McKenzie is the only manufacturer of Hydrocortisone 10mg tablets that has a marketing authorisation in the UK ... for the licensed indication of primary, secondary and acute adrenocortical insufficiency."

The next bullet point:

"That the AMCo (Amdipharm) 10mg Hydrocortisone product about to enter the UK market has been granted a licence ... with significantly more restricted indications, namely congenital hyperplasia in children. (This should be the only negative statement directly made about the AMCo product as it is factual. Recommend that the alternate manufacturer [which we know is Aesica] is not named.)"

So Auden there is saying it is a fact that AMCo is about to enter the UK market. No evidence of any promise, or that Auden thought that AMCo had made a promise not to launch or to keep the product as back-up.

There are just a few more documents, but can I go now to {IR-H/412/1}. This is 4 April now, 2014. So we have had December 13, we have gone January, February, March, now we are 4 April:

"Hi [Paul] [this is the consultant].

We are fine with the letters to go with the change as below.

Some info that is missing --

In terms of which number to call ...

The competitor product will launch mid-May/beginning June ... so we should get these letters out asap."

So these template letters are now going to be personalised and they are going to go out asap. But again; Mr Patel, Auden, believes that AMCo, the competitor product will launch mid-May/beginning June.

So before we get to the pharmacy letters one more document {IR-H/441/1}. This is a communications proposal to support Project Guardian. This is a proposal submitted by Salix Consulting for Auden McKenzie, it is dated 16 April 2014. If we go to the next page and then we go to page 3, please {IR-H/441/3}. So "Background":

"Auden McKenzie is reacting to a potential threat to its market share of hydrocortisone 10mg tablets.

The threat comes from new arrival, Amdipharm, whose product may be adopted as a cheaper alternative to the current market leader.

Auden McKenzie has developed a reactive sales and marketing programme, Project Guardian.

On behalf of Auden McKenzie, Paul Bennett Consulting ... approached specialist consultancy, Salix, to explore how we could support Project Guardian with media and press handling."

So the consultant, Paul Bennett, has gone to Salix to see how Project Guardian can be supported with media and press handling.

"Specifically, you require a plan for handling media and tactical implementation of press office function prior to and during deployment of Project Guardian."

So why on earth go to all this trouble and expense if you believe that AMCo has made a promise not to launch its product, to stay out of the market and keep it as back-up? The whole thing just does not stack up.

Can we then go to {IR-H/429/1}, which is the draft letter to the pharmacies. So addressed to "Pharmacy Body", name, attach, 14 April 2014.

Dear, whoever it is going to be -- Dear pharmacy:

"As the manufacturer of the only currently available UK licensed hydrocortisone 10mg tablet indicated for the treatment of primary, secondary and acute adrenocortical insufficiency, Auden McKenzie ... Limited are contacting clinicians and patient support groups to draw attention to an important issue.

Auden McKenzie was granted marketing authorisation

by the Medicines Healthcare Products Regulatory Agency (MHRA) for its formulation in 2007 ... The indications specified on the ... product licence include primary, secondary and acute ... insufficiency; a condition that affects some estimated 25,000 patients in the UK of which approximately 16,800 require hydrocortisone treatment."

You will see footnotes there, footnote 1, 2 and 3. Footnote 1 is Auden McKenzie. "Recently" -- so the reference to the patients is to footnote 2:

"Recently [the draft letter says], another manufacturer has been granted a licence by the MHRA for its formulation of hydrocortisone 10mg tablets ..."

Footnote 3, "Amdipharm UK Limited." So these pharmacies are going to be specifically told that AMCo is launching its product.

"... and we wanted to ensure that you were aware of the potential for confusion that may arise. The alternate product is not licensed for use in adrenocortical insufficiency.

The new product has considerably narrower licensed therapeutic indications. For example, it is indicated for congenital hyperplasia in children but not in adults."

Drawing a distinction this is a product for

children, for use in children, not in adults:

"We believe that clinicians and patients will understandably find this potentially confusing when prescribing, dispensing or administering hydrocortisone 10mg tablets and felt that it was important to highlight this situation to you."

I think you can go on, but that is -- if you see the hard copy it goes on to give, and we will see this when we actually come to some of the actual letters, it gives the guidance, and you will see there, sir, that there is a specific reference to the General Medical Council's guidance and to the four bullet points of the guidance which Dr Newton endorsed, and we shall see when we come to some of the pharmacies they endorsed it as well. But that is raising awareness of the guidance and dispensing off-label.

So that is the draft letter to the pharmacies. Go to two pharmacies, go to {IR-H/469/1}. This is not an Auden, but this is a -- Boots received the Auden letter. This is the 8 May 2014, and clearly supports what Jane Hill in her interview told the CMA, that Boots were not interested in being supplied with the child's version. So this is an internal Boots memo.

"Subject: re Auden McKenzie letter

Thanks [Claire]

Given this I've suggested ... that she might deal directly with them. We'll see ..."

This is from the director of professional standards and superintendent pharmacist. If one just goes down the page a little bit, how are they dealing with the Auden McKenzie letter:

"Sorry it's taken a while to get back to you. I've been gathering the facts!

The letter received from [Paul Bennett, that is the consultant] on behalf of Auden McKenzie is intended to highlight that the hydrocortisone 10mg tablet they manufacture is the only licensed generic indicated for the treatment of primary, secondary and acute adrenocortical insufficiency. Another generic has been granted a licence recently however this generic is not licensed to treat adrenocortical insufficiency.

Included in the letter is a copy of the RPSGB guidelines for supply of unlicensed medicines along with an invitation to work in partnership with Auden Mckenzie ..."

Then I emphasise the next bit:

"The good news is that [blank] has confirmed that the preferred generic we supply is the Auden McKenzie generic and there are no plans to change this generic in the future.

Kind regards, Pharmacist Professional Support Manager, Professional Standards Office."

It links what Jane Hill told Mr Beighton and Mr Sully.

If we go lastly to {IR-H/488/1}, this is from Jane Hill. This is Jane Hill talking about Day Lewis:

"Hi all, Please see attached."

That figure of 75,000, 16,800 is to the patients. But the important thing is, she is sending the message from Day Lewis.

"Hi Jane, Sorry for the delay in sending you this attached letter. They did not send an electronic version, so I had to have it scanned. Also I would please urge you to make sure that this is of the utmost confidential nature and that you do not forward it to anyone ..."

So that is, again, linking Day Lewis's message to Jane Hill, you see the 29 May. The last document we go to is {IR-H/488.1/1}, which is the letter so if we just enlarge this a little bit. This is from Paul -- I do not know if that is confidential now. This is from the consultant to Day Lewis:

"I wanted to drop you this email as a follow on from the letter I hope you received from Auden McKenzie ... a few days ago that I was a co-signatory to.

I am working with Auden McKenzie to support them in considering the professional issues associated with prescribing and supply of hydrocortisone for the treatment of adrenocortical insufficiency.

I would like to try and get some time with you to explain why we think this is an important issue and ... Help Day Lewis patients get the best possible care ..."

Then if we go on, so this is a follow up to the letter by the consultant {H/488.1/2}. This is the letter that was sent to Day Lewis which is in the form of the template, so it is to the superintendent pharmacist at Day Lewis. It is referred to the person who contacted Jane Hill. He says he has looked at it. You see there that that letter is in the same form as the template, and if you just go up a little bit you see Auden McKenzie writing to Day Lewis, footnote 3, specifically mentioning AMCo as the new entrant.

When one looks at this in an objective way without all the innuendos that we have, in my submission it is plain as a pikestaff that none of these documents provide any evidential support for an AMCo promise to keep its product off the market. Auden clearly believes that AMCo, having terminated the Auden supply agreement, will supply its own product into the market for dispensation, and this evidence is entirely consistent

with Mr Beighton's and Mr Sully's evidence that they did in fact want to launch their own product and that the product was not regarded as a back-up.

So with that, that is essentially I am trying to look at it from what was in Auden's state of mind in late 2013/early 2014. With that I would like to turn to the second main issue, the benefits to AMCo of its own product.

We turn to annex 6 to our Closing, it is at {IR-L/8/210}. This is annex 6 to our Closing, "The benefits of being an intellectual property (IP) owner versus being a distributor for another's product".

THE PRESIDENT: Are you using "IP" in a somewhat broad sense in that you are not obviously talking about patented drugs here, you are just talking about a process where you control the manufacture and sale of the product?

MR BREALEY: Control and manufacture, you have your own trademark, yes.

THE PRESIDENT: Okay.

MR BREALEY: I mention IP because that was in one of the recommendations, if you remember, just before the board of directors, so we picked up better to have your own IP versus distribution. So that is how AMCo actually used the word "IP".

THE PRESIDENT: I see.

MR BREALEY: So that has been adopted, the IP, which we will come on to when we come to annex 7. But you are absolutely, right, sir, it is not a patent as such, it is a collection of trademarks and control.

Annex 6, in that box we set out three main issues:

"The benefits of being an IP owner generally.

The benefits of entry 2012 - pre-June 2014.

The benefits of the supply agreement - post 2014."

I am going to deal with the first two bullets. Mr O'Donoghue is going to give the Tribunal the narrative of the 2014 written supply agreements. So we have tried to divvy it up as much as we can.

Obviously, as before, I am not going to read out the whole of the annex but we will look at some of the exchanges and I know some of it will be extremely familiar to you, sir.

Before I get to the first two bullets, this is all relevant to consider what would have been in AMCo's mind in 2012 and early 2013. This is relevant. What would have been in AMCo's mind? There are three bright line points I wish to draw from the evidence in annex 6, three bright line points.

First, that in 2012 and 2013 there were clear benefits to AMCo having its own product, its own IP agreement with its CMO. So the first is in 2012 and

2013 there were clear benefits to AMCo having its own IP agreement over a distribution agreement. In summary, they were greater control of the product, as you just said, sir, Mr Beighton described the Auden supply arrangement as very flimsy; second, greater volumes at the same price - Mr Beighton described the Auden volumes as measly; and then greater value if the business were to be sold, and we will quickly have a look at that.

The second bright line point is that the CMA makes a fundamental mistake in appreciating the economics of being the first generic to launch in 2013, and this was debated at some length between Ms Demetriou and you, sir, the President, but the CMA makes a fundamental mistake when it appreciates the economics of being the first generic to launch in 2013. That is the second bright line point.

The third bright line point is the utter ridiculousness of the alleged promise that AMCo is said to have made to Amit Patel. Everybody so far has concentrated on what may have been in people's heads, and in my submission the officious bystander, appraised of the facts in 2013, would never have believed that Mr Beighton could have made the promise he is alleged to have made. When one stands back from it, the promise is utterly ridiculous.

Those are the three bright line points. The benefits of being an IP owner generally, these are essentially at paragraphs 3 and 4. On paragraph 3, it is when he was giving evidence, I think in re-examination, not in chief, so that is a mistake. It was in re-examination:

"Mr Sully was asked why it would be more beneficial for AMCo to be the IP owner of the product it was supplying rather to have a distribution agreement for a third party's product. He emphasised that a key benefit to AMCo was that it would be in control of the product, rather than be dependent on the commercial terms dictated by a third party. He stated in re-examination:

"Question: Could you just explain why it would be more beneficial to be the IP owner rather than have a distribution agreement?

Answer: Yes, sir, so for a number of reasons. So, as I mentioned, the majority of the companies' products were our own IP. That meant you had full control of the product. You could arrange for whoever you wanted to manufacture it for you and you were not beholden to somebody else who ultimately had control. So clearly the opposite is if it is someone else's IP and they dictate the terms effectively on which you get the

product and how long you get the product for and at what cost etc. So we wanted to be fully in control of this product, because this was a product we wanted to launch. As I mentioned, it was one of our big ... launches for 2014."

Mr Beighton in cross-examination, as I say, said that the volumes were measly. I think that might be a northern phrase, I am not sure, a northern word, but "measly", and that the written agreement was a "very flimsy unreliable distribution deal".

So the question to Mr Beighton:

"Question: ... the reason why suddenly this was going to the board was because your negotiations were not going very well with Auden. You thought you were not going to get a supply agreement and so let us push the Aesica product forward. That is right, is it not?

Answer: We had pushed this product forward for -- we never stopped pushing this product forward for the -- I mean, again, the reasons we wanted this product is that we would get more volume. Not only the reasons, but there were many reasons why we would want this product instead of the Auden McKenzie distribution deal, not least we would be making more money on an ongoing basis, but we would be launching a product with our own IP and then being able to prove -- if you think about

this, if we had at some point, which we were considering at some time, to sell the business, if we had got a very flimsy unreliable distribution deal, then you would not get the value for that from a prospective buyer. If you have got your own product with your own sales with a CMO that is under your own control, that product would be given much more value by a potential buyer."

He continues:

"A number of different reasons -- and including some of the reasons that Mr Sully explained this morning or earlier this afternoon these -- just complete control over your own product is worth a lot."

At paragraph 5, what he says there is supported by some of the corporate documents, particularly when look at the last couple of lines where it is emphasised having your own IP is an asset, essentially; having a flimsy distribution deal is not really an asset.

So those were the benefits generally that are just highlighted. But importantly, I come to the benefits of independent entry pre-June 2014. This is quite an important point when it comes to the dynamics for late 2012, early 2013. It is something, sir, the President, that you probed so you will be familiar with it, probed with Mr Beighton.

So paragraph 6 of the annex:

"The CMA's failure properly to distinguish between the period at the start of the alleged 10mg Agreement from the period post June 2014 [we say] is a serious failing. Different market conditions and perceptions applied. When AMCo (with Mr Beighton as CEO) inherited the Auden supply agreement, AMCo considered that the market was fully contestable. It is an accepted fact that when AMCo inherited the Auden supply agreement in 2013, AMCo had no product of its own: the 10mg hydrocortisone tablet was a pipeline product in development. But [and this is an important point] the benefits of early market entry were seen as a benefit. This is shown by the Deloitte 'Final due diligence report' dated 23 October 2012."

We saw this, I am not sure we need to go to it given the time, but a relevant passage we have set out here:

"The current market for Hydrocortisone tablets is supplied solely by Auden McKenzie. Management plan to launch their product to take a share of this market. There is a high risk of other new competitors in addition to ... [Amdipharm] which would impact market prices and [Amdipharm's] market share. However, [AMCo] may be able to get to market earlier than other suppliers because they own the original MA for this product."

Now, before I go on to what we are going to call the death spiral can I just go to another passage, this is in the Closing at annex 7, at {IR-L/8/228} at the bottom. We refer to this Deloitte report, this Deloitte due diligence report in a few places. But this evidence, we say, is paragraph 3:

"... the intention of the new owner of Amdipharm, (which became AMCo) to launch its own product once it was developed. The CMA has accepted that this was the intention at the time."

If we go over {L/8/229}, this was the cross-examination of Mr Beighton.

"Question: Now, the due diligence material does not, as far as we have seen, refer to any supply agreement with Auden and I think that is because the focus at this stage was on the launch of a new product; is that right?"

And the answer from Mr Beighton is:

Answer: Yes, this is what we intended to do with the Amdipharm business once we bought it."

So there does not seem to be any dispute that in October 2012 the focus of the company was on the launch of a new product.

Can I go back to page 213 {IR-L/8/213}. Why would they want to launch the new product? Paragraph 7:

"In cross-examination Mr Beighton was probed as to whether AMCo would in fact benefit by launching its product (rather than by just taking the Auden supply price and limited volume). In cross-examination, the CMA's erroneous premise was that AMCo's market entry would trigger a death spiral in prices as Auden and AMCo battled it out. However, this is not how the market would react according to the experienced view of Mr Beighton. It is ... not how Alissa anticipated its market entry would play out."

Indeed, it is not how the CMA says the market dynamics play out. The CMA say that in the Decision.

I just want to refer to those three pieces of evidence which support this. So it is Mr Beighton's understanding, Alissa's conduct and the CMA in the Decision itself.

So we are on the death spiral. So paragraph 8:

"Mr Beighton stated in cross-examination that compared to the 'very flimsy unreliable distribution deal' with Auden, the economics were such that he would have been 'bonkers' not to launch his own product. He considered the 6,000 packs supplied by Auden to be 'measly'. [And he] stated as follows:"

The question at the bottom:

"Question: Mr Beighton, it would make a difference,

would it not, because as soon as there is generic entry into the market, prices would collapse so this is a way of keeping -- for Auden to keep volumes and to keep prices high?

Answer: Yes, but unless he thinks I am completely bonkers, why would I not launch my product as soon as I got access to 40,000 packs a month? I promise you that the economics of this I would have -- are hugely in favour of launching my own product."

He goes on:

"Answer: That is my evidence ..."

I will just say on the question before it that there is a partisan cite by the CMA at paragraph 50 of its Closing, but we will not bother with that. He goes on:

"Answer: That is my evidence and my evidence is also that this, whatever the number we made in profit from Hydrocortisone, would have been hugely exceeded by launching our own product with our own lower costs of goods and our own unlimited supply."

Now, as the Tribunal knows, this issue of a potential death spiral was probed by the Tribunal and the President. I will ask the Tribunal, I will not read it out, but if one just reads the exchange at paragraphs 9 and 10 and then I will just pick it up at page 216 {L/8/216}.

THE PRESIDENT: Of course. Could we put the two pages side by side. Thank you. (Pause). {IR-L/8/214-215}.

MR BREALEY: When one has finished that I will go to {IR-L/8/216}. Why am I emphasising this? It is because what would have been in Mr Beighton's mind when he inherited this flimsy distribution deal? So the President says on the top of page 216:

"Please.

Answer: Yes. Typically what happens in these circumstances when only one competitor comes to market and this is -- remember I am a generics guy so I am used to bringing these products to market. Usually there are -- when a patent expires, there are 10 or 12 competitors come out, coming in at the same time and the market immediately shoots down to barely above cost of goods. In a situation like this where only one competitor comes in, clearly depending on the -- how [rational] that competitor is, he, or she, me, would have come in with Hydrocortisone, for example, at a discount of whatever I felt was needed to take half the business. I would not go for more than that for rational reasons, because I did not want to see the competitor backlashing in some way and then ending up in that downward spiral just between the two of us. So I would take 50% at let us say 10 or 15% discount. So

there is obviously always a danger that Auden McKenzie in this circumstance start fighting with me and we end up just at cost of goods, but I do not think that would have happened. That sort of thing usually happens when the competitor is -- does not really care too much or they've got -- they have so many other products. They've got [a] junior product manager looking after them. In this case, Mr Patel would have been very eager to have maintained the value in his business I am sure."

So the President says:

"So.

Answer: So do you see? What I am trying to say is that the price in this case would not have dropped substantially."

Then rather than me read, could I ask the Tribunal to go, read the rest of page 216-217.

THE PRESIDENT: Yes, of course. Again, if we could do it side by side that would be very helpful. (Pause) Yes.

MR BREALEY: So if we pick it up at page {IR-L/8/218}

Mr Beighton continues:

"There is a balance, isn't there, because what I do not want to do is to provoke the other party to have this downward spiral.

The President: Yes, I see, so you might voluntarily limit supplies in order to avoid provoking Auden from

entering into a price death spiral.

Answer: Exactly.

The President: Which is not in your interests.

Answer: Exactly.

Then the answer goes on, halfway on the page:

"Answer: ... especially as it was such a measly amount that I was getting."

Then he assumes that he would not have ended up in a price war with him.

So paragraph 11:

"In short, it is wrong to presume that a change from a monopoly to a duopoly would lead to a spiral downwards in price. As Mr Beighton explained, the incumbent knows that it will lose market share but that the new entrant knows that a price war is counter-productive. Mr Beighton explained that this type of approach was common in his experience."

He says.

"I think it is a proven view with lots of evidence supporting that that does not happen with two competitors."

So that was his experience, and he says that is how it happens in the marketplace.

But just pausing there before we get to the CMA's understanding, the CMA have used the wrong economics

when they are trying to infer -- and they do infer, when they are trying to infer the promise not to launch your own product because it is more favourable to have the 6,000 at the beginning of 2013.

But just continuing with the economics, is the economics supported? Yes, it is, because we have set out there, we do not have to go to it because it is the paragraph in the Decision, it is the CMA's understanding. This is at paragraph 3.56 of the Decision {A/12/57}. The Decision supports this proven view because it says:

"Usually, generic entry into the market is phased. Initially, there may be competition between generic entrants to be the first to enter. It is expected that the first generic entrant will obtain the highest profits as it only needs to price slightly below the incumbent, assuming that the incumbent does not compete on price straight away. Other generics entrants might enter the market at a later stage, and it is typically with subsequent entry, and the initiation of price competition in a market with multiple generic entrants, that price competition becomes fiercer."

So the CMA in the Decision supports Mr Beighton's economics.

Then what else supports the CMA and what else

supports Mr Beighton? We have the actual fact of entry of Alissa, Alissa's understanding. This is our paragraph 13 and 14 {L/8/219}:

"As Dr Matthew Bennett also states in his report:

'The view that a single skinny label entrant was unlikely to have entered at a substantially reduced price, is also consistent with Alissa's pricing pattern as the first skinny label entrant in October 2015. As seen in the chart below, Alissa charged a price that was very similar to Auden/Actavis's price at the time (£68) and only dropped its price when AMCo and others entered.'"

So yes, the price ultimately spiraled down because of the introduction of several skinny label suppliers, Bristol, Resolution and Teva, as is common with the industry, but that would have been the same for AMCo whether it was supplying the product under an IP agreement or a flimsy distribution deal.

Indeed -- this is at paragraph 15 -- that is why in 2012 and 2013 there was an urgency for Amdipharm and then AMCo to get product to market before other suppliers (with MAs) entered the market. This was an objective we have just seen that was foreshadowed in the Deloitte final due diligence report.

Indeed [and I will come on to this probably

tomorrow] the Deloitte report and the urgency attached to product launch is evidenced in the contemporaneous evidence and witness evidence (see annex 1 and annex 7). For example, in an email dated 13 February 2013, Brian McEwan thanked Wayne Middleton ... for his efforts in expediting the development of AMCo's own 10mg hydrocortisone tablets ...

We will see this probably tomorrow:

"Wayne, many thanks, appreciate your efforts to expedite."

So that is the economics. This annex also refers to two other issues which in my submission are important to AMCo's belief. I have called this "If I was him ..." this is at paragraphs 17 and 18:

"There has been a lot of speculation in the proceedings as to what was in Mr Patel's mind at the time. Why would he continue to give AMCo a 97% discount?

[We know] Mr Patel did inform the CMA in his witness statement but the CMA appears not to believe him."

"Mr Beighton" --

This is in my respectful submission quite important:

"Mr Beighton frankly accepted in cross-examination and in questions from the Tribunal that he did not really understand Mr Amit Patel's reasoning.

Mr Beighton stated that he would not have done the same deal. This is entirely consistent with the contemporaneous evidence that we have set out there.

For example, in an internal email dated 2 January 2014 Mr Beighton stated to Guy Clark [the chief strategy officer] and to Mr Sully [the general counsel] 'if I was him I would tell us to [piss] off and stop supplying us. I really wish that we could find a way to put our own product on the market even without the indication.'"

He says at the time, "If I was him I would tell us to [piss] off and stop supplying us."

Why is that relevant? It does not evidence in the slightest any thought process in Mr Beighton's mind that he had made a promise to Mr Patel not to enter.

Lastly -- and then if I can make this last point before we --

THE PRESIDENT: Of course.

MR BREALEY: I have put it quite high, but I do it for a reason. The market sharing premise -- this is our paragraph 20 -- does not make sense either. In my submission it is utterly ridiculous to infer a promise by Mr Beighton not to launch his own product.

Now, remember that this agreement is that they can develop their own product, manufacture their own product

but they will not launch it. That is the deal. That AMCo is allowed to manufacture, develop but then the promise is not to launch it.

So paragraph 21. The premise does not make sense objectively. So the following facts must be borne in mind.

First, it is an accepted fact that AMCo had no product in 2012 nor in 2013 when it is alleged that AMCo agreed to continue with the inherited 10mg agreement. The 10mg hydrocortisone tablet was a pipeline product. As the Deloitte report says, it was a pipeline product. AMCo did not have product in 2012 nor in 2013. That is the first point.

Second, as I have just said, CMA expressly acknowledges that, under the alleged 10mg agreement not to launch, AMCo was allowed to develop and manufacture its own 10mg hydrocortisone product.

As we know the CMA states in its opening that it was entirely rational nor AMCo to want to retain the ability "to be in a position to enter the market with its product". And the CMA accepts that AMCo did seek to develop and manufacture its own product. It says, "There is no dispute that AMCo took steps to manufacture its own 10mg tablets with Aesica during the period of the 10mg agreement".

Now, given these accepted facts, it would be a pie crust promise by AMCo - easily made, easily broken - not to enter independently at some future date. Mr Patel is getting no guarantee in the slightest that AMCo will not enter independently once the product is manufactured.

Important fact, this is not a promise that Mr Patel can see immediately whether it is being broken. In fact, as Mr Sully stated in cross-examination, and I will just pick up on the answer on page 222. {L/8/222}:

"That is absolutely not the case and we could not enter with our product at any time until way later on. So it never occurred to me that he is doing this to keep us off the market, because we knew full well we were not staying off the market. We were pushing ahead as fast as we could. In fact, in many ways he was helping to fund our development of the Aesica."

So paragraph 23 and then I will finish.

"Therefore, given the facts that (a) Mr Patel was receiving nothing tangible in the authority/medium term; AMCo was allowed to develop and manufacture its own product; (c) AMCo did develop and manufacture its own 10mg hydrocortisone product; (d) AMCo was receiving a "measly" amount of volume from Auden; (e) AMCo would receive the same if not better (50% better) COGs from

Aesica, no officious bystander would infer a promise by AMCo not to launch (come what may): the officious bystander would not say that a market sharing agreement would be in either Mr Patel's or Mr Beighton's mind. It is not in Mr Beighton's interest (because he prefers to develop and supply a product in which he owns the IP since that would provide him with an asset of considerably more value to the business) and it is not actually in Mr Amit Patel's interest (this promise because there was a substantial risk that he will just fund AMCo's development costs and facilitate AMCo's entry)."

I will leave the Tribunal with that thought. I am sure there will be some questions, but when one actually looks at the evidence as it was in 2012 and 13 it does not -- this promise that Mr Patel thinks he is getting is not worth a row of beans.

If there is one fact that really shows that it is what we say in paragraph 22. This is not a promise that Mr Patel can see immediately whether it has been broken because if you had ready made product on the Monday and you promised not to launch and you broke it on the Tuesday, Mr Patel could see that you were breaking that promise but the promise is I will not launch on some unspecified date in the future. You give me the money

now and I promise not to launch when I have got ready made product. It just does not make sense.

THE PRESIDENT: But the empty crust is a truth of any illegal agreement.

MR BREALEY: I missed that, sorry.

THE PRESIDENT: Sorry, the empty crust or the worthless promise is true of any unlawful agreement. I mean, you cannot, at least since the *Highwayman* case, litigate unlawful agreements in court so on that level the promise is --

MR BREALEY: That is not the point though, sir. True, you can have concerted practices, are they moral, whatever they are. That is why that fact that is a promise that I am going to do something in the future, give me the money now and I promise not to launch in a year's time; I mean, no officious bystander is saying that Mr Patel is going to accept that. Why? He is a clever man. He has a pretty successful company. I do not think we can assume he is bonkers. Would he really pay AMCo the money that the CMA says it got in return for such a promise? It is not, as I say, a promise that Mr Patel can monitor immediately. It is -- then what happens is in June 2014 you get a written agreement which Mr O'Donoghue will look at. Lawyers on both sides, sign it. There you have some certainty.

The reason it is important, because everybody is trying to get into the heads of either Mr Beighton or Mr Patel and say well this is the only explanation that you can infer this market sharing promise, this promise not to enter. I have shown you the evidence that does not support it but is it inherently likely that it was made? And that is my point here. I am just saying actually look at it another way. You are saying it is the only explanation; I am saying well that explanation does not really make sense at all.

THE PRESIDENT: No, indeed, I see exactly what you are saying. The last point to pushback slightly on what you are submitting.

It is the case, is it not, that whether you have a promise which is as per the written agreement or whether you have a promise which is the improper promise that the CMA has found, the last three lines of paragraph 23 i.e. "was not in Mr Amit Patel's interest" is true.

MR BREALEY: Although if it is true --

THE PRESIDENT: In other words, it is true whichever permutation you are considering.

MR BREALEY: No, because the CMA are saying no, no, no, Mr Patel is getting something in return for his £1. He is getting some security. He is getting some comfort.

THE PRESIDENT: What, of non-entry?

MR BREALEY: For non-entry.

THE PRESIDENT: Yes, but what is he getting if that promise is not made? That is going back to your oddity point and we have to --

MR BREALEY: If he is giving a pound on the Monday, a pound on the Tuesday and all of a sudden, they are not going to the get the pound on the Thursday and Friday because they have broken their promise. But this is just taking, a promise that is going to be fulfilled in the future.

What makes it even odder is you are allowing AMCo to develop and manufacture. One of the reasons we have this annex 1, we have this whole list, is because it looked as if the case was well, you made this promise and you went slow. Now you can see that. If you are going slow, then Mr Patel can monitor that etc. But that has changed. We have seen that in the written opening. The CMA's case is the deal was you can develop, you can manufacture but you promised me that you are not going to launch when you are ready and you will continue perhaps with these measly amounts and Iraq at Mr -- no officious bystander is going to say that is sensible on either part.

But that is my submission as to rebut, well the only

inference is you made this promise not to enter.

THE PRESIDENT: No, I understand.

Mr Brealey, 10.30 tomorrow.

MR BREALEY: Thank you.

THE PRESIDENT: Very good. Thank you very much.

(4.30 pm)

(The hearing adjourned until Friday, 16 December at 10.30 am)