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)

Tuesday, 20 December 2022

(10.00 am)

Closing submissions by MS DEMETRIOU

THE PRESIDENT: Ms Demetriou, good morning.

MS DEMETRIOU: Morning, sir. Just in terms -- just a word about housekeeping, because we heard what the Tribunal said at the end of yesterday in terms of timing.

THE PRESIDENT: Yes.

MS DEMETRIOU: We do fully understand the appeal of finishing at 1 pm on Friday, but for our part we are a little concerned about timing because we have had five days of submissions from the appellants and we are concerned that we will need three potentially long days to finish our submissions and so we will see how we get on. We will obviously do our best, but I just wanted to flag that now and we were rather working on the basis -- at the CMC we raised this as an issue and the tribunal very kindly then said that if necessary we could have long days starting earlier and so I just flag it up, but we will do our best, sir.

THE PRESIDENT: We will see how we go.

MS DEMETRIOU: We will see how we go.

THE PRESIDENT: We have no desire to shortcut any submissions.

MS DEMETRIOU: No, we are just conscious that we have had

five days of the appellants who have made very detailed submissions. We have got a lot of written material and of course the tribunal, quite properly, has provided some points on which -- the paper on economic value, for example, that we need to respond to and we apprehend the tribunal will have questions as we go along, which we want to have a proper opportunity to answer.

THE PRESIDENT: No, I understand.

MS DEMETRIOU: Just in terms of responsibility. I am going to be addressing you on the agreements, whether there was a common understanding. I hope to be finished by 3.30 or so. Mr Jones will then address you for the rest of the afternoon on the object case, so if there is an agreement why it is an infringement by object.

Mr Holmes then I think will need a day and a half at least for excessive pricing for abuse and market definition and that side of the case, and then Mr Bailey will address you on the hold-separate period and on penalty. I think you will need a couple of hours for that.

So that is how we have divided it between us just so that the tribunal is aware.

THE PRESIDENT: Thank you.

MS DEMETRIOU: I propose to structure my submissions in the following way on the agreement. I am going to first of

all summarise, literally in a couple of sentences, the CMA's case on the 10mg agreement, what we say the agreement was.

Secondly, I am going to make some submissions on what the CMA does not have to show in order to resist these appeals and, in particular, I am doing that because it is evident that for forensic reasons the appellants have sought to set the CMA a higher standard than it needs to meet, and so I want to address the proper approach first.

Thirdly, I am going to identify what in essence it is that the appellants say was going on with this arrangement and I want to show the tribunal in particular that on the facts there is actually very little between the CMA's case and the appellants' case, that the issue between us is in fact a narrow one, but a critical one.

In particular, I am going to show the tribunal that it is the appellants' own case that Auden sought to use the supply agreement to incentivise AMCo to stay off the market with its own product and, secondly, that AMCo used the threat of entry to secure the supply agreement.

The key question the tribunal needs to decide is whether that state of affairs was reflected in a common understanding or whether Auden and AMCo were acting

entirely unilaterally. That really is focusing in on the key issue in this appeal.

Fourthly, I am going to turn to the evidence and show you why the CMA is right to find that there was a common understanding and that Auden and AMCo were not simply thinking precisely the same thing in sealed off silos. They were not simply thinking the same thing unilaterally. In making these submissions, I will take the tribunal very briefly to some of the case law on common understanding and I will also, as well as addressing the evidence, address you on the question of adverse inferences at that stage in my submissions and I will explain why the various, as I am going along, why the various grounds of appeal advanced by the appellants are wrong.

Fifthly and finally, I am going to address the arguments on the duration of the common understanding that Ms Ford focused on.

Sir, members of the tribunal, starting with the CMA's case in a nutshell, the CMA's case in a nutshell is this: the supply agreement between Auden and AMCo, whereby Auden agreed to supply AMCo with particular quantities of 10mg hydrocortisone at a 97% discount to the market price, operated on the basis of, or in the context of, a common understanding between the two

undertakings that in return AMCo would not enter the market with its own product. That common understanding underpinned the supply arrangement. That is the CMA's case in a nutshell.

THE PRESIDENT: Sorry, no, when you say would not enter, do you mean would not enter at that point in time, would not enter next month, would not enter ever?

MS DEMETRIOU: Sir, I am going to deal with that and we say the CMA has not particularised the duration and does not have to, but that is a point that I am going to deal with directly in terms of sweeping away some of the false obstacles that the appellants have constructed for us in this case.

What the CMA has found is that in return for supply AMCo would not enter. We are not saying that they agreed a particular duration. The understanding was whilst the supply lasted AMCo would not enter. But it obviously preserved the right to enter and to give three months' notice, if it wished to do so, and I am going to come to all of that, but I want to explain first of all in a nutshell what the CMA's case is.

What I want to do now is clear away some of what we say are the false hurdles that the appellants have sought to set up for the CMA.

The first relates to sham. So the first false

hurdle is that the CMA has to show that the written supply agreements were a sham in the sense of being fictitious or dishonestly put together.

I want to start by looking at the case law cited by Mr O'Donoghue, so *Snook* and *Hitch*.

If we go to *Snook* first. That is at {M/2/1}. That is where it starts. If we could go to page 9, which is the start of Lord Denning's judgment {M/2/9}. I am not going to read it out. I would ask the tribunal just to glance through pages 9 to the beginning of page 11. Perhaps we can put page 9 and 10 up side by side on the page. What the tribunal will see is that Auto Finance created false documents. The documents contained fictitious figures and stated that Mr *Snook* had sold his rights in the car when he had not.

One of the issues in the case was whether these documents, which appeared to show a refinancing operation, were a sham to cover up a loan.

The issue was decided on a point that is not relevant in our case; namely, whether the defendants were involved in negotiating the transaction, but it is still important to see what the court said about the legal test for sham agreements.

Now, if we just look first at page 14, C to E. {M/2/14} This is Lord Denning who was dissenting on

this point, but he emphasised, if we go to page 14, he emphasised a factual point at C to E, which is that the documents were filled with fictitious figures and statements, all of which are badges of sham.

Then we have Lord Diplock who gave the majority judgment. That starts at page 16, but if we go to page 17 at letter C. {M/2/17}. So what we see here is:

"I think it is necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word..."

The word being "sham":

"I apprehend that if it has any meaning in law, it means acts done or documents executed by the parties to the sham which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create."

So that is concerned with the legal concept of a sham and the conclusion is that all the parties thereto, we see this a bit further on, "must have had a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

So to be a legal sham, for there to be a legal sham,

there needs to be according to *Snook* the apparent creation of legal rights and obligations on the face of the document, which the parties do not in fact intend to be bound by. This might, as Lord Denning said, be indicated by fictitious figures and statements.

Now, the *Hitch* case, we do not need to get into the facts of it, but that repeats the *Snook* test. If we go to {M/19.1/16}, paragraphs 63-68 and if you look at 63:

"It is of the essence of this type of sham transaction that the parties to a transaction intend to create one set of rights and obligations, but do acts or enter into documents which they intend should give third parties ... the appearance of creating different rights and obligations."

Then it says:

"An enquiry as to whether an act or document is a sham requires careful analysis of the facts and the following points emerge from the authorities."

I just ask the tribunal to just scan down to the end of paragraph 68. But, again, the point that we draw from this is that we can see that the legal question is whether the parties are trying to give the appearance that they are bound by particular terms when in fact they do not view those terms as binding. In other words, they do not intend the apparent agreement to take

effect.

Now, there is no dispute that if the CMA had found that the written supply agreements were a sham within the meaning of this case law, it would have set a very high hurdle for itself, but it would have had to have found, the CMA would have had to have found that the parties concluded these written supply agreements without actually intending to be bound by their terms, so they were a deception to the world at large.

And only --

THE PRESIDENT: Ms Demetriou, I do not want us to go down a rabbit hole of debating what is and what is not a sham. You were in court, I think, when you heard the exchange that we had with Ms Ford about what it was that needed to be proved and the burden of showing, the burden being on you, of showing that there was an additional rider to the written agreement. We talked there about the burden that exists on the CMA of wanting to show an illegal rider that is additional to the terms in the document.

Now, frankly, I do not care whether the label "sham" is or is not used. One can have a debate about whether *Street v Mountford* was a sham case or whether it was not. I am rather indifferent about the label.

What I am more interested in is the question of

burden and what you have to climb in order to make good your case. So let us not fuss about which bits of what you accept is a legal agreement were intended to be carrying on or not. We have had debate about things like the livery provisions and that sort of thing and Mr O'Donoghue has addressed us on that.

You have got to show, the burden being on you, that there was an agreement which you are characterising as an unlawful agreement.

MS DEMETRIOU: Sir, yes.

THE PRESIDENT: Two stages. I do not think that the question of sham, in the sense of a total sham, is in play here. I do think, which is why we have been asking certain questions, that the interplay between the agreed provisions in the written agreements and the oral rider, which you say existed, is something that we need to be alive to. That is why, for example, we have probed the question of livery, because it did seem to us --

MS DEMETRIOU: Sorry, probed the question of I did not hear that word?

THE PRESIDENT: Livery, the branding, because it did seem to us something that needed to be explored as to why AMCo did not take on board the ability to shift its own colours on to Auden's product.

Now, Mr O'Donoghue has come back staying, well,

there were all sorts of issues about that and it may be the failure to invoke those provisions is not as odd as it at first sight seemed. So we are very interested in the operation of the written agreements, because it casts light on what you say is a rider, but I do not think any of that affects the level of the burden that you have in establishing what is -- let us call spades spades -- a dishonesty case.

MS DEMETRIOU: Sir, no, it is not a dishonesty case. I am going to deal with that separately. Can I unpick a few points in what you have said?

THE PRESIDENT: Yes, of course.

MS DEMETRIOU: I am going to give you a summary answer, but I am actually going to take these points in turn.

THE PRESIDENT: Okay.

MS DEMETRIOU: So if perhaps the answer I am about to give you does not fully answer your question --

THE PRESIDENT: We will shut up.

MS DEMETRIOU: No, I promise I will come to them, because I am very alive to these points.

First of all, I am relieved to see that the tribunal has not accepted or is not troubled by the submission that Mr O'Donoghue put that we have to meet the higher burden in the *Snook* case law. We say that is simply not the case. So it is not a sham case in the sense that we

have to meet a higher burden of proof.

THE PRESIDENT: Well, I do not think Mr O'Donoghue was taking very much issue with what we debated with Ms Ford and I think, to be fair to Mr O'Donoghue, sham is a word that first came out of my lips, not his.

MS DEMETRIOU: It is in the Decision. So there are about three paragraphs where the word "sham" is used in the Decision, which I am going to take you to, sir.

THE PRESIDENT: I think the essence is very much the debate that we had with Ms Ford, that if the agreement works on its face and there aren't such unusual facts as to require us to move away from that and find the existence of additional terms, which are not reflected in the agreement, then the substance of the debate that we had with Ms Ford is that actually we will stick with the honest explanation not the -- you will come to honesty in due course.

MS DEMETRIOU: I will come on to honesty. So we do not have to show dishonesty. Our case, just to be clear, is that we are not alleging a separate dishonest rider or a separate dishonest side agreement. What we are saying is that the premise, the commonly understood premise, for this supply agreement was that it was happening, supply was being given on these terms, on the basis that it was an alternative to AMCo coming on the market and

that was understood by both parties.

That is not a rider or an additional term that is absent. That is the context in which it was commonly understood by both sides that the agreement operated. So we are saying that this is a supply agreement which -- you are right. The tribunal is right that there are certain oddities in it, which we explored in cross-examination. One of them is the livery. We explored those in cross-examination with Mr Sully and it appears that some of those are explicable, because what they used was a template from another agreement with Teva and so there are some oddities that would arise if you did use a template without properly considering what are the terms that we are trying to reflect in this agreement.

But our case is more modest. It is still anti-competitive, but it is more modest than that which the appellants have sought over the last five days to try and erect for us. Our case is that the supply agreement was a supply agreement. Those were the terms, the essential terms that were agreed, but both sides understood that the premise for that was that AMCo would not enter the market with its own product. That is the CMA's case.

We do not need to show that that is dishonest. We

do not need to show that it is a hidden term. We do not need to show that it is a side agreement or a rider.

So, sir, that is our answer in a nutshell, but, as I say, I am going to take you through the steps in which we get there.

Now, we say in relation to sham that the elevated standard in *Snook* does not apply, because the CMA has not found in its Decision that the parties did not intend to be bound by the written supply agreements. On the contrary, the CMA relies on the essential terms of the supply agreements, in particular the price of supply of £1 and then £1.78, which was well, well below market price.

It is common ground, this is common ground, that the written supply agreements required Auden to supply the 10mg product to AMCo, that the parties considered the written agreements to be binding as to the terms of supply and that Auden did in fact supply AMCo on broadly the terms set out in the written agreements. I say broadly, because as the tribunal has pointed out, there were some gaps or misdescriptions in the written agreement, for example, relating to livery, and you will recall also the first written agreement, which was retrospective, talked about the right of AMCo to apply for an MA, which of course it already had.

So there were some oddities, but the essential point -- there is also the question of volumes, sir. Let me just pick that up. So the basic point is that the first written agreement described 6,000 packs as an estimated volume, when of course there was not anything estimated about it and AMCo's attempt to order more in January 14 was rejected.

The second written agreement described 12,000 packs as a minimum volume, when in fact it was a fixed volume. On the latter point, sir, you said in discussion with Ms Ford that you recall that Mr Sully and Mr Beighton had said that AMCo's supply chain team had asked for more volumes but had been refused more volumes under the second agreement.

That is right, sir. You were right to have recalled it that way. You can see that at paragraph 80 of Mr Beighton's statement and paragraph 84 of Mr Sully's statement. They say that.

It is worth recalling of course that AMCo had originally gone in to negotiations in the autumn of 2013 pitching for 18,000 packs, the tribunal may recall that, which they did not get.

That is consistent, sir, with the idea that volumes, "the volumes agreed on, reflected the calculations on both sides as to the market share which AMCo could win

if it entered independently, and we know in fact, and I am going to come to it in more detail, that is how the negotiations unfolded.

Now, so there are -- on this point there are oddities in the written agreements, but it is certainly not the CMA's case that these demonstrate that the written agreements were a sham. On the contrary, the CMA relies on the essential terms in the written agreement, supply of these volumes at this very low price.

As I say, given Mr Sully's evidence, the fair interpretation is probably that most of these oddities and inconsistencies about the livery and so on are explicable on the basis that they simply used a template from another deal.

It is not the CMA's case that the agreements were a sham in the legal sense.

Now, it is correct that the CMA did use the word "sham" in a grand total of four paragraphs in the entirety of the Decision, but all it meant by this, as is clear on the face of the Decision, was that the supply agreements do not give the whole picture of the understanding between the parties. That is because of the critical point in this case, which is the understanding between the parties was that this supply

operated on the premise that AMCo would not enter the market.

Now, Mr O'Donoghue took you to paragraph 2.27 of the Decision, which is a summary. There is more detail in the Decision at paragraph 6.921. If we go to {A/12/818}.

You see that there the argument is reflected that AMCo and Cinven said that the CMA has not established that the supply deals were a sham, that everyone involved in them, including external counsel, were engaged in an elaborate deception to cloak their true intentions.

That is not the CMA's case. Then the CMA says:

"The description of the supply deals as a sham simply means that the CMA has found their true purpose to be for Auden/Actavis to pay AMCo, rather than simply to give it product to sell as in a genuine bona fide distribution deal. The supply agreements, under which Auden/Actavis supplied AMCo at a 97% discount to its other customers, would not have existed on these terms in the absence of counter-performance from AMCo. The CMA has found that the counter-performance was AMCo's agreement not to enter the market independently. The parties have not proposed any legitimate counter-performance".

And then 6.923:

"The CMA has not found or alleged an elaborate conspiracy beyond the terms of the 10mg agreement."

So, you see what the CMA means by sham. It is perhaps not the right descriptor. The CMA makes absolutely clear what it means. It is not alleging an elaborate deception. It is not saying, well, these terms, as in *Snook*, were cooked up to deceive the world. On the contrary, it is relying on the essential terms, but it is saying that the parties would never have agreed these supply terms, which are genuine supply terms, unless there was a counter-performance by AMCo and that is the agreement not to enter the market.

So that is all the CMA means when it says "sham". So that does not lead to any elevated standard of proof at all.

THE PRESIDENT: You say that that agreement is not a dishonest one. You say it can be reached innocently.

MS DEMETRIOU: Yes. Sir, I am going to come to that, yes.

So the content of the agreement, this is one of the points, sir, that you just put to me, because, if I may say so, you have put to me a number of relevant points that have been debated and have been put by the appellants and what I am trying to do is separate them out and deal with them one by one.

THE PRESIDENT: No, of course.

MS DEMETRIOU: So both Advanz and Cinven argue that there cannot have been a common understanding because the CMA has not identified the content of the agreement. That is their fundamental submission.

They have both complained, for example, that the CMA has not identified how long AMCo promised to stay out of the market for.

Now dealing with that point first. That is very obviously, we say, a bad point, because it is not necessary for the understanding to have been by reference to some particular period of time.

In the interests of time, I am not going to turn it up, but the tribunal will have seen from the summary of legal principles at paragraph 102 of the CMA's written closing submissions, and I just give you the reference for your note at this stage, that is {IR-L/7/51}, that it is sufficient for a finding of an agreement that there is a common understanding on the principle of a restriction of competition even if the specific features are not determined.

We say that is obvious when you think about other possible examples. So think about an agreement to fix prices. So suppliers agree to fix the price of a particular product at £10, but they do not say, well,

we are going to do this for the next nine months. They just say let us fix it for £10. The cartel might collapse after one month or six months or six years, but it would still have been a cartel, even if the agreement does not stipulate at the beginning a period of time.

So here, we say the understanding was that in return for supply, in return for supply, AMCo would not bring its own product on to the market.

Now, we do not have to show and we do not say that the parties expressly agreed a fixed period of time, but we do say the understanding was that whilst Auden was supplying AMCo it would stay off the market, and that is all we need to show.

Now, I think because Advanz and Cinven recognise that in order to show a common understanding we do not have to set out terms as they would be in a written contract. In their closing submissions, in their oral closing submissions and in their written closing submissions, they have sought in fact to advance a narrower version of this argument about lack of particularisation and as you, sir, have just apprehended they do so specifically by reference to the written supply agreements in clause 2.2 of the written supply, second written agreement.

That is really the point that Mr O'Donoghue focused

on for large parts of his oral closing submissions.

I confess, this is probably my fault, that I have at times found those arguments that the appellants have advanced in relation to clause 2.2 quite hard to follow, but I have now realised that that is because they have in fact advanced two diametrically opposed and inconsistent arguments. I want to show you that.

So let me identify what the inconsistent arguments are first that they have put forward.

The appellants say, first, that clause 2.2, you will recall that is the notice period clause, they say first that clause 2.2 of the second written agreement constitutes, and I am quoting now, "a two year non-compete clause". So they say that clause is a two year non-compete clause and their argument on that basis is that the CMA has not found the terms of the agreement to be unlawful and so they say, well, if a two year non-compete agreement is not unlawful, how can the common understanding be unlawful and in fact what does the common understanding add to the two year non-compete clause?

That is their first argument. I am going to show you this. They say second, and this is inconsistent, they say that they characterised clause 2.2, completely opposed to the first argument, as a clause which

expressly preserves the right of AMCo to enter the market at any time and their point on that premise, on that basis, is that the common understanding is in conflict with that clause and the CMA faces a very high hurdle if it wants to show that there is an understanding which conflicts with the express terms of the agreement.

Now, these arguments are, first of all, as I have said, completely inconsistent with each other and if we take up Cinven's written closings at {IR-L/3.1/5}. If we look at paragraph 6 and can we scroll so we can look at subparagraph (2). Subparagraph (2) says:

"The Second Written Agreement had a two-year term and provided that AMCo was obliged to purchase all its requirements for hydrocortisone from Auden, unless and until it gave 3 months' notice ... (a rolling exclusive purchasing agreement...) The CMA also does not consider that the Rolling EPA gives rise to an anti-competitive agreement by object. It is clear from the contemporaneous documents that the Rolling EPA contained -- was new and prompted new action by AMCo to comply. In the light of that, it is wholly unclear: (i) on what basis the CMA says that AMCo had previously agreed not to enter, and (ii) on what terms it says that AMCo ... had agreed not to enter and how those terms

differed from the Rolling EPA. Put simply, it is unclear what the CMA's allegations of a 10mg agreement not to enter adds to the lawful two-year non-compete obligation. The CMA has failed to answer this basic question ..."

Then at (3) they say very differently:

"In circumstances where the Written Agreements were genuine and hard-fought negotiations in which AMCo successfully insisted upon, and obtained, an express right to enter with its own product, the CMA's case must inevitably be that, in fact, AMCo and Auden agreed the opposite. The logical implication of the CMA's position is extremely serious, since it must mean either that: (i) a relatively large number of individuals both internal and external to AMCo/Auden, including AMCo's general counsel and external lawyers ... spent considerable time, effort and money to document an agreement which they knew was a sham."

Again, I say that is just not our case:

"or (ii) these individuals' efforts were genuine but were, somehow, 'countermanded' by one or more decision-makers within AMCo/Auden."

I want to deal with both of those arguments in turn, but I do say at the outset that it is a very unpromising start to their argument that they cannot decide on what

clause 2.2 means and they say two different things.

Let us go to the clause. It is at {H/528/5}. If we can scroll down, please. So 2.2, AMCo shall procure all its tablets from Auden, but if AMCo wants to enter the market with its own product, it must give Auden at least three months' notice. That is the effect of this clause.

Then we have seen from the termination provisions that Auden has the right to terminate in those circumstances the supply of its own product.

So the first point we make is that this is not a two-year non-compete clause at all. There is nothing here which says AMCo cannot compete on the market for two years. It is a requirement to give notice if it does bring its own product on to the market.

Now, I am just going to divert here slightly. I am going to come back to that point, but I want to -- sir.

PROFESSOR MASON: I am sorry to interrupt, just for a sense of completion, if nothing else. Could we have the second page side by side so we can just see the end of 2.2 just to refresh our memories.

MS DEMETRIOU: Of course. Yes, I should have asked for that to be put up, because you can see the three months' notice period is at the end of that clause on the next page.

PROFESSOR MASON: Thank you.

MS DEMETRIOU: So I am going to come back to the point that this is not a two-year non-compete clause, but while I am on the subject I want to slightly divert for a moment and go back to the first written agreement so you can see what was said there. That is at {IR-H/172/6}. Can I just ask the tribunal to read for itself clause 3.2. (Pause) So the point I make about this is it is essentially the same as clause 2.2 in the second supply agreement, save that it does not have the requirement to give three months' notice to Auden, but, otherwise, it is a clause to the same effect, apart from that notice provision.

I just pick that up, because Mr O'Donoghue spent lots of time arguing that the negotiation of clause 2.2, the second written agreement, was very significant because AMCo was protecting its right to compete. He said "Mr Sully fought tooth and nail."

But it is important to be clear that this was not a new point in the second written agreement. So that the requirement to give notice was a new point, but in fact the principle existed in the first written agreement.

So just to summarise and take stock, the retroactive first written agreement allowed, in theory, for

independent competition, allowed on its face for independent competition from AMCo, but we know that that had not happened by the time the agreement was signed in February 2014.

The second written agreement allows on its face for independent competition from AMCo, albeit on notice, three months' notice to Auden, and on the basis that Auden had a right to terminate the supply agreement in those circumstances.

So returning to Cinven's and Advanz's two inconsistent submissions, the first submission is that this clause contains a two-year non-compete clause and that simply does not get off the ground, because clause 2.2 is not a non-compete provision at all. The fact that it is not a non-compete provision answers the appellants' point and also answers its question, its question being: well what does the agreement found by the CMA add to the terms of the supply agreement? In fact, there is clear water between the two, because the clear water is that although there was no contractual restriction in the agreement on independent competition from AMCo, provided it gave notice, the parties shared, and this is the CMA's finding, the parties shared an unwritten common understanding that AMCo would in fact not enter the market independently in return for the

supply.

So that is the difference between -- that is the answer to the appellants' question.

Now, moving on to the appellants' second submission, which is that the CMA's common understanding is diametrically opposed. So their first submission is the CMA's case does not add anything to clause 2.2. Their second submission is that the CMA's common understanding is diametrically opposed to clause 2.2. We say that too is wrong. The existence of the common understanding that AMCo would not enter the market does not require the CMA to show, or the tribunal to find, that the parties did not intend clause 2.2 to be binding.

We say on the contrary, clause 2.2 is consistent with the common understanding, because clause 2.2, read together with the associated termination clause, shows us that the parties' position was that if AMCo wanted to enter the market independently, then, one, first it had to give notice to Auden and, secondly, Auden had the right to terminate.

Both Mr Beighton and Mr Sully agreed that, in those circumstances, Auden would in all likelihood terminate. In other words, market entry by AMCo would spell the end of the supply on these preferential terms. Now, that is fully consistent with the parties proceeding on the

basis of a common understanding that supply, the quid pro quo for supply, was AMCo not entering the market. If AMCo did enter the market, the understanding was that supply would cease.

But, again, there is a difference between clause 2.2, what it says on its face and the termination provision, and the common understanding, because clause 2.2 does not say that AMCo will forego independent entry. It allows for the possibility of independent market entry, but it is neutral on whether or not it will happen. It gives them the right to enter, says that they have to give notice, but it does not tell you about what the parties understood would happen in practice.

That is where the common understanding comes in.

So that is what we say about the two arguments put forward by Cinven and Advanz. The third point we make is that the CMA is not inviting the tribunal -- and we saw this from the part of the Decision I took you to, 6.921 and so on -- not inviting the tribunal to find that Mr Sully, or anybody else, set up the written supply agreements deliberately to deceive anyone. No external lawyers were hoodwinked. We are not saying these written agreements were deceptively entered into. We are saying these were in fact the essential terms of

the supply, but what happened was they agreed these terms on the premise that AMCo would not enter the market in exchange.

So the tribunal does not need to find, in order to uphold the CMA's case, that Mr Sully deliberately misled the AMCo board, for example. That is the point I have already made on sham agreements.

The CMA's case, as I say, is that shared understanding was the premise for the supply agreement. To put the point another way, the only reason why Auden was willing to agree to supply on the terms recorded in the supply agreements was because of the parties' shared understanding that AMCo would not enter the market independently if Auden supplied it on these advantageous terms.

We say that was obvious to the parties. It was the starting point for the whole deal. It went without saying, but in fact it was said, as I will come to show you.

So that is the CMA's case and this --

PROFESSOR MASON: Sorry, again to interrupt you, but I just wanted to check. So there you said, and I am looking at the transcript, the only reason why Auden was willing to agree to supply and there should be appropriate emphasis on the word "only" there. So if an alternative reason

could be found, does that invalidate your point?

MS DEMETRIOU: No, I am going to come to the point made about alternative reasons. We say that what the tribunal needs to decide is whether, on the balance of probabilities, this was the common understanding that in return for these advantageous terms the parties understood that AMCo would not enter the market independently. Of course, I am going to come on to the alternative explanation put by the appellants, because in fact it is very similar to the CMA's case, but there is a critical distinction, which is that the appellants say, well, we were looking at this in a unilateral way and the CMA say that the understanding was shared, but I am going to come on to that point, sir.

THE PRESIDENT: You are not saying, I do not think you are saying, that the provision that you say renders this anti-competitive arises out of an implication. You are not saying that, are you?

MS DEMETRIOU: Arises?

THE PRESIDENT: Out of an implication from the express terms that are agreed?

MS DEMETRIOU: No, we are saying that there was a shared understanding on the evidence that the premise for --

THE PRESIDENT: Shared understanding is a little dangerous, because A can have the same understanding as B not

communicated in any way. Sharing in that sense. But that is not enough to get you out of the unilateral *ICI* trap.

MS DEMETRIOU: I understand. I am not saying that is enough.

THE PRESIDENT: So we are talking crossing a line here.

MS DEMETRIOU: Crossing a line, sir. I do not dispute that. Crossing a line. When I use the words "common understanding" or "shared understanding", I mean crossing the line.

THE PRESIDENT: Okay. I think we need to be careful here because I do not think -- well, I do not think it is a very helpful term, because a shared understanding is one that is consistent with what the appellants are saying as with what you are saying.

MS DEMETRIOU: Sir, I take that point entirely. I think "common understanding" is a better word, because that is what the case law talks about. The case law talks about "common understanding". I am happy to use "crossing the line".

THE PRESIDENT: Just to give you a sense of where I am coming from, Mr O'Donoghue's written submissions have, entirely understandably, erred on the contractual technical. There is a lot of off acceptance, where is the consideration sort of point. I am misquoting, but

we are not particularly impressed by that sort of point. We understand why it is made, but it is inherent in this sort of argument that there is going to be a degree of informality.

MS DEMETRIOU: Yes.

THE PRESIDENT: But that is why I am being quite clear that we need to be very careful how we handle this informality, because, at the end of the day, if you do not get something that crosses the line, you are going to lose.

MS DEMETRIOU: Sir, that is a very helpful clarification, if I may respectfully say so. I agree with what you have said. I apologise if shared understanding --

THE PRESIDENT: No.

MS DEMETRIOU: I want to reassure the tribunal that I am on the same page in terms of the test and I entirely recognise that I have to show a crossing of the line and I am going to come on to that when I look at the evidence. What I am doing at the moment is explaining, as it were, because there are a number of misconceptions that have been floated by the appellants. I am explaining what the CMA's case is not. I am then going to go on, a little bit later, to focus on what the CMA's case is and in that I am going to explain why the line was crossed, on what basis the evidence establishes

that.

Just on the point, just finishing the point that I was on, which is that the common understanding, the crossing the line, the agreed position, if I could put it that way, was the premise for the supply arrangements is consistent with the threats from Mr Beighton that I am going to come on to in more detail; so if not, we will launch our own. I am going to come on to that. Those threats were made once the terms of the written supply agreements were well advanced. So once clause 2.2 had actually been drafted up, he was saying if you do not supply us, if we do not get this over the line, we will launch our own product.

What he was saying to Mr Patel, I am going to come back to this in more detail, is either you provide the supply on the terms being discussed, which formed the second written agreement, or AMCo launches its own product.

I just want to at this stage pick up a point made by Mr Brealey in his submissions, because the tribunal will recall he characterised the common understanding found by the CMA as ridiculous. That was his word "ridiculous".

Never a good sign, we say, when a party has to resort to hyperbole, but, more importantly, why did

Mr Brealey say it was ridiculous? He said if the CMA were right, then AMCo's commitment would be a pie crust promise -- so the expression he used is quite a memorable one -- easily broken, pie crust promise, easily broken and, therefore, worthless to Auden.

But the CMA's case is that it was not worthless at all, because so long as AMCo abided by the understanding, then Auden's market position was protected and every month meant the preservation of Auden's market share and the ability to charge very high prices, which, as the tribunal knows, increased very significantly through the life of the agreement.

When Mr Brealey made that submission, the tribunal asked him, if I may respectfully say so, the killer question which was: if there were no commitment by AMCo to stay off the market then the situation would have been even more ridiculous for Auden, because, in those circumstances, it would have been transferring away vast profits for nothing in return whatsoever and Mr Brealey did not even attempt to answer that point when the tribunal put it to him and we say that is because he had no answer.

Now, I want to move on to say something about dishonesty, because another thing that the appellants have said from time to time is that the CMA needs to

show dishonesty on the part of the people involved in concluding the agreement. Mr O'Donoghue referred to "career ending" findings of dishonesty. But this is another attempt by the appellants to ramp-up the burden on the CMA. The CMA does not have to show dishonesty on the part of any of the protagonists. Of course it is trite law that dishonesty is not a necessary ingredient of the Chapter I prohibition and the tribunal will know that section 188 of the Enterprise Act creates a cartel offence and it was once, but is no longer the case, that dishonesty was a necessary ingredient of that offence. It is not even a necessary ingredient of the criminal offence any longer, but it has never been a necessary ingredient.

THE PRESIDENT: I do not think you need take that point.

MS DEMETRIOU: I am sure I do not, sir. Nor is it, more importantly, the CMA's case that the parties dishonestly set about drafting the written supply agreements. As I say, and you are going to become very bored of me saying this, our case is simply those agreements do not reflect the entirety of the understanding between the parties. In particular, the premise for the supply was that AMCo gave something in return, an agreement not to enter the market. So we say we can take dishonesty off the table.

THE PRESIDENT: Let us get Decision 6.922 back on the screen. So it is {A/12/818}. Now, let us suppose the Tribunal, have heard the evidence, endorses, big tick, the CMA's description here. What we would be finding is that the true purpose of the agreement is something other than is stated in the written terms. Now, you are not saying motive here, you are saying true purpose, which means it is achieving something other than what it is saying and you are saying it is not giving effect to what it says on its terms, that is to say, a genuine bona fide distribution deal. What you are saying is that they were doing something else.

Now, I must say the two points that are being made here, at least two points that are being made here, one that the written agreements are not reflective of their true purpose and that they are not reflective of what would be otherwise a genuine bona fide distribution deal is, well -- let us use polling terms -- it is a dog whistle for dishonesty, is it not?

MS DEMETRIOU: No, sir. What the CMA is finding here, and of course it goes without saying that the Decision needs to be read as a whole.

THE PRESIDENT: Of course.

MS DEMETRIOU: Here the CMA is responding to a particular submission about you need to show that there is

a dishonest conspiracy that the whole thing is a sham.

THE PRESIDENT: I understand. I mean, the 6.921 point is the point that persons who alleged regarding naughty behaviour always make. They say, oh, it is a conspiracy that drags in everyone. Now, that is something which almost always receives pretty short shrift, because the one thing about anti-competitive agreements that you can take to the bank is that those involved in them play it tight. I have absolutely no doubt that the case that you are putting and finding in 6.922 would not have involved the cast of thousands referenced in 6.921. That is fine.

MS DEMETRIOU: Yes.

THE PRESIDENT: But that is not the point. The point is, are there some actors who are knowing that the written agreements are not the complete story? It seems to me that almost by definition you have got to say that there are, because otherwise you do not get a communication that crosses the line. So someone has said something to someone on the other side saying that there is a term here, which we are agreeing, not necessarily contractually, but we are agreeing that is not in the written agreements.

Now, I know we do not need to establish an infringement to go into dishonesty.

MS DEMETRIOU: Yes.

THE PRESIDENT: But to establish the existence of a side agreement that is altering the purpose of the written agreements which you were saying are not consistent with a genuine bona fide distribution deal, well, this is dishonesty, is it not?

MS DEMETRIOU: No, sir, it is not dishonesty. It does not have to be dishonesty and the CMA has not found dishonesty. Let me try and explain it in this way to see if this meets the point you are putting to me.

Let us say, I am going to come to the evidence later, but let us say there had been an express discussion between Mr Patel and Mr McEwan and Mr McEwan had said, right, you have been supplying us with the 10mg product at £34 per pack for the last year and a half, which was the case. We have now got our MA, so we could enter the market with this product. So I am looking for a very substantial discount. In fact, I now want supply at £1 per pack.

Mr Patel says, well, why would I supply you at £1 a pack? Mr McEwan says, well, because otherwise I will enter the market with my own product, but if you supply me I will not.

Right, that is an agreement which crosses the line. However, it does not involve any deception. It is the

backdrop. As it were, I do not want to talk in contractual terms or in terms of a side agreement, but it is almost like a recital, the backdrop to the agreement that was agreed.

So if you asked both parties, well, what have you agreed? They would say, honestly, we have agreed supply at this price. But the understanding of each of them that has crossed the line by way of background was that the precursor to that was that they both appreciated that AMCo would not enter the market with its own product. That was why the price was so low.

Now, what that means -- translating that to the words -- and that is really when you read the Decision as a whole that is what the CMA has found. Now when you look at paragraph 6.922, which is where the CMA is responding to the submission which you have just explained I think, sir, correctly that it is one that often is made by infringers -- everyone must have known about it, elaborate conspiracy -- what the CMA is saying here is no. They are saying when we talked about sham, we did not mean that this was all cooked up and that the agreement does not mean what it says. What we mean is that there is an essential premise to the agreement, which the parties both understood, which was that AMCo would not enter the market and so when you then

characterise the agreement, it is not just another supply agreement. There is an essential understanding which explains why this agreement took place. That is the CMA's case.

That does not mean that any particular person was dishonest. It does not mean that the agreement was drafted in a dishonest way. In the same way that you can have any other understanding, you could have a representation. So I want to buy a particular product from you and the reason why I want to buy that product is because you have told me that it is an amazing product and nobody else has such a product on the market.

That is the basis on which I have entered into the agreement. We still have a straight sale agreement. It does not need to be a term or a supply or a side agreement that you have made this representation to me. It is the premise on which I am entering into the contract.

That is really what we say and that is why there doesn't need to be any dishonesty.

So I understand -- I think you, sir, have alighted on the reason why Mr O'Donoghue talked about career ending allegations of dishonesty and so on, but the CMA has never said that and there is no evidence about

career ending, these people's careers being ended. It is an entirely i*Napp*ropriate submission that was made.

We say we can take dishonesty off the table. What the CMA is saying when you look at the terms, when you look at the terms, they do not give the full picture. There is something that is missing, and that is that the premise was that AMCo would not come on to the market.

Obviously, I need to establish that the premise crossed the line. I will come on to that, but I am now dealing with why dishonesty is not a necessary factor. You will, again, search high and low, sir, and I know you know this. There is nothing in the Decision that establishes any dishonesty on the part of any of these individuals. That is not a hurdle the CMA has set itself.

So I then come to standard of proof, which is what is the standard of proof and the proper approach to these appeals? There are three points that we wish to emphasise. The first point is that the standard of proof is the civil standard. The CMA must establish its case on the balance of probabilities and, again, I really apologise, I am not going to take you to the case, because I know this is bread and butter for the tribunal, but it has been long established, including in *Napp*, that there is no intermediate standard of proof

between the civil and the criminal standard.

THE PRESIDENT: I do not think you need trouble us on that.

MS DEMETRIOU: I know I do not need to trouble you on that, sir.

THE PRESIDENT: I think the wolves or zebras or whatever it is in Hyde Park, as opposed to dogs, is the point we have in mind. If you want to say that is something we should not be looking at, then of course we would be interested.

MS DEMETRIOU: I am going to come to that when I look at the evidence.

The second point is that it is common ground that the CMA must adduce, and I am now quoting from the case law, "precise and consistent evidence in order to establish the existence of an infringement, but it is sufficient if the body of evidence viewed as a whole meets that requirement."

Again, I apologise for taking the tribunal to *Durkan*, but I am just doing it for convenience, because I can short circuit my submission. I know you know it very well. It is {M/81.1/33} and it is paragraphs 95 and 96. There you see the words "precise and consistent evidence":

"But it is sufficient, according to the case law if the body of evidence ... viewed as a whole, meets that

requirement."

Then at 96:

"Because anti-competitive agreements are usually arrived at covertly, the OFT may have to rely on circumstantial evidence to establish the facts."

Could we just zoom in a little bit, please, to 96. Then it talks about the *Aalborg Portland* case and then you see there the citation from the Court of Justice:

"Even if the Commission discovers evidence explicitly showing unlawful contact ... such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that is often necessary to reconstitute certain details by deduction.

"In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rulings."

We say that is the test and I apprehend it is common ground. Nobody has really taken issue with that.

The third point I wish to make I will take from our written closings. If we can go to {IR-L/7/6}. If we go to paragraph 19, please. Again, I am at risk of teaching the tribunal to suck eggs and so I just want to set out the position, but I know this is all basic stuff

as far as the tribunal is concerned. Please just bear with me for a moment. I will take it very shortly.

Here we refer to what the Court of Appeal says in *Phenytoin*:

"The appeal is not a de novo hearing but takes the Decision as its starting, middle and end point ... The appeal is 'against, or with respect to' the Decision and includes 'whether' there has been an infringement. That focus on the impugned Decision is reflected in the rules of the Tribunal. The appellant must identify the Decision under appeal and set out why it is in error."

If we go to the next page, paragraph 21:

"The scope of the challenge ... is limited to the four corners of the appellants' Grounds of Appeal."

So we say if follows from what the Court of Appeal said there and of course from a line of consistent case law on the part of the tribunal too, which you will be very well aware of, that, yes, the burden of proof is on the CMA, but it does not need to prove its case before the tribunal all over again. Because the CMA has carried out a lengthy investigation, examined thousands of documents, interviewed witnesses and, on the basis of all of that evidence, reached the conclusion that there was a common understanding that amounts to an infringement of the Chapter I prohibition by object.

Now, as the Court of Appeal said, the tribunal will take the Decision as the starting, middle and endpoint and the challenges to the Decision are those made in the appellants' grounds of appeal. So the task of the tribunal is to consider whether, in light of the specific arguments made in the grounds of appeal, the CMA has failed to discharge the burden on it of proving an infringement.

Of course, again, this is trite, but the tribunal's task is not to conduct a de novo hearing. What does that mean in practice? It means that where specific findings of the CMA have been challenged, so where, for example, it is said that the CMA has misconstrued a piece of evidence or reached an incorrect factual conclusion, then the tribunal has to determine, first, whether that is correct and, second, whether the consequence of that is that the CMA has failed to discharge its burden of proof.

But in determining the second of those things the tribunal must take into account of course all the other evidential findings made by the CMA in the Decision, which are not challenged in the grounds of appeal. There are lots of evidential findings in this Decision that are not challenged. One of them is the finding that AMCo suspended the Aesica project as soon as it

entered into the Auden supply agreement. Not only is that not challenged, but it is at an important fact that was not even referred to by AMCo's witnesses.

I just want to give you an example of why this matters in terms of the approach. This is just an example. But you will recall that Mr Brealey began his closing arguments by making submissions about Project Guardian. His submission was that Project Guardian was, and I am quoting his words, "the antithesis of the CMA's finding of an agreement".

Mr Brealey took you to several documents from the start of 2014. I just want to remind you of a couple of them.

THE PRESIDENT: I have just highlighted what you said a moment ago on evidential findings that are not challenged and you said one of them is the finding that AMCo suspended the Aesica project as soon as it entered into the Auden supply agreement. Right, so let us take that as a fact.

MS DEMETRIOU: Yes.

THE PRESIDENT: What do we get out of that? Presumably you are using it to infer the nature of the understanding that crossed the line --

MS DEMETRIOU: Yes.

THE PRESIDENT: -- between the two entities.

MS DEMETRIOU: That is correct.

THE PRESIDENT: What actually do we get from that? Because I think it means much more than we are simply not going to enter the market tomorrow or next week or next month. It means we are putting ourselves in a position where we cannot enter the market for the foreseeable future unless we change something.

MS DEMETRIOU: Yes.

THE PRESIDENT: So this is quite closely wrapped into the positive case that I think you are going to have to unpack for us.

MS DEMETRIOU: Yes, I will.

THE PRESIDENT: Which is that this is evidence that points towards a "we are not going to enter the market, full stop, because what they are doing is they are putting themselves out of the running to bring themselves to market.

Now, of course we know, because we have heard evidence, that it is rather more nuanced than that, but I am just taking this as an example of the kind of back bearings that one takes from later facts to infer an agreement that is not present on the face of the written documents.

MS DEMETRIOU: Sorry, sir, what -- I am not clear. I am sure it is my fault. I am not clear what the question

is to me.

THE PRESIDENT: What I am saying is that you are going to have to tie the knot between the bits of evidence that are, as it were, extraneous to the agreement and tie those back to assist us in working out what the non-written agreement was.

MS DEMETRIOU: I see, yes.

THE PRESIDENT: So what I am saying is, look, let us take this little fact. You have said it is not challenged. Okay, let us accept it is not challenged. Let us proceed on the basis that there was an AMCo suspension of the project. Let us take a really extreme case, which I know does not arise here. Let us say that AMCo killed off a rival product and just did not revive it. They had the opportunity to do so. They just did not for no explicable commercial reason.

MS DEMETRIOU: Yes.

THE PRESIDENT: Now, that would be quite interesting evidence in working out what is going on, because what you see then is the beneficial supply, the reduced rates on which the CMA places so much reliance. You can say, well, yes, we see that there must be some kind of promise never to enter the market, because you have actually put yourself in a position, for reasons that are inexplicable, not to enter the market. In other

words, one sees a correlation between the naughty agreement that you are alleging and the performance of that naughty agreement.

MS DEMETRIOU: Yes.

THE PRESIDENT: So that is why I am suggesting to you this particular fact is significant, but you need to go far more beyond saying, well, look there were all these uncontested facts. They have to be locked back into the allegation.

MS DEMETRIOU: I understand that. I am going to come to that. I entirely accept the point. I understand now. I am sorry. Forgive me.

THE PRESIDENT: No, not at all.

MS DEMETRIOU: I understand the point you are making. I am going to come to our positive case. At the moment, what I am trying to unpick, as it were, are we say misconceptions that have been floated at various times by the appellants about the proper approach.

So it is really a question of approach and I threw that out as an example, but of course I completely accept I need to come back and show how it fits in and I will do that.

Can I just give you another example of why this matters, this point about approach and really why -- I guess one of the reasons I am making this point is out

of concern. I know the tribunal has read the Decision probably more than once and it is a long Decision, but what I am facing is having to deal in a short amount of time with a large number of appellants who have had longer time to put their points and so I cannot hope, in the time afforded to me, to go through every part of the Decision and remind the tribunal of it. So I know that this is in a way a cheeky request, but I am relying in a sense on the tribunal going back and looking at the Decision. I am highlighting the key points. I am going to come to the key points we say are important.

The reason why it matters, let me just give you an example. You will recall that Mr Brealey started his submissions -- his first point was to make a submission about Project Guardian, which you will recall is Auden sending out messages to pharmacists that they should not be dispensing the skinny label product. The reason why he made those submissions, which form an entire annex of his written closings and indeed opening arguments or notice of appeal, was his submission is that Project Guardian is the antithesis of the CMA's agreement, somehow disproves it.

He took you to a number of documents from the start of 2014 and I am just going to remind you of a couple of them, because I am making the point about approach now,

rather than dealing with all of the detail of the documents, which I do not have time to do.

If we go to {IR-H/553/5}. So Mr Brealey took you to this document and you will see the date. It is 12 February 2014. The reason why he took you to it was number 5, point 5. This is an Auden internal document:

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

The point he sought to make was: "Aha, here they are, Auden is feeling threatened by AMCo coming in to the market. That must disprove the common understanding.

Then another document he took you to is at {IR-H/429/1}. This is April 2014, a letter to the pharmacy bodies dated 14 February. Again, this was part of Project Guardian. In a way the detail does not matter too much of what the letter says, but it is why he took you to these documents. Because his submission was that they somehow disprove the CMA's case. The problem with that submission is that he made it without grappling at all with what the CMA has actually found in relation to Project Guardian and these very documents. I just want to take you to the Decision to show you this.

If we go to {A/12/789} and it is paragraph 6.822 to

6.828 and so you see the submission made by AMCo at 6.822, which is very similar to the submission made by Mr Brealey on this appeal. Then you see what the CMA says, so at 6.823:

"This representation shows no recognition of the nuances in the relationship between Auden/Actavis and AMCo over time - of the ebb and flow of their negotiations and continuing assessment of whether the ... agreement was in their best interests. When Project Guardian is considered in context it is entirely consistent with the CMA's findings."

Then we see at 6.824, which refers back to other more detailed sections of the Decision, that Auden launched Project Guardian in early 2014, which is when all the documents Mr Brealey took you to came from, early 2014, at a time when the relationship between itself and AMCo was deteriorating. By this time, both sides were beginning to question whether the 10mg agreement would continue.

Then you see references to an internal AMCo email and then:

"The implication was that Auden might terminate the 10mg agreement. Amit Patel made this threat in his telephone call to Guy Clark on 14 January, in which he implied that he would not sign a renewed supply deal and

'would then take action to protect his product by advising all parties ... that our product should not be dispensed against generic prescriptions.' Auden then launched Project Guardian...

"However, when Amit Patel launched Project Guardian he soon appreciated that the orphan designation might not shield Auden's full label hydrocortisone tablets from competition in the way he had hoped."

So there is a reference there to you will recall the response from the chief pharmaceutical officer, which Mr Brealey did not go to, which was not helpful to Auden, saying these are bioequivalent products.

Then, alongside Project Guardian, Mr Patel returned to the negotiating table and you then have the email where AMCo is saying, well, we do not think he actually wants a fight on the issue.

Then at 6.827:

"Auden/Actavis did not in fact continue Project Guardian throughout the remainder of the 10mg agreement, as AMCo submitted..."

Took no further steps after the supply agreement was concluded until November 2014, which was prompted by the grant of an MA to Alissa. So it returned to Project Guardian in response to a new threat from another potential entrant.

The point I make, sir, about approach is that what you get, or what you have had a lot of, in this appeal are potshots taken by the appellants about pieces of evidence. So Mr Brealey says look at this stuff in 2014. It shows that Mr Patel was very worried about competition. Ergo, it must be inconsistent with the CMA's case. But in fact the CMA has grappled precisely with the point and has shown in the Decision why these documents are in fact consistent with the CMA's case and the tribunal will remember that Mr Beighton and Mr Sully said that at the beginning of 2014 the supply deal looked like it was dead. Mr Patel wanted AMCo to buy Auden and AMCo were not interested and, in fact, what then happened was Mr Beighton picked up the baton after April 2014 and got it over the line.

But none of that is inconsistent with the CMA's case. The CMA has dealt with the points in detail, but, listening to Mr Brealey, he made his submissions untroubled by any of these findings. He did not attempt to grapple with any of the findings in the Decision.

That is really the point I make. But I am conscious, as I say, that I do not have time to place in context every submission and every assertion made by the appellants on the basis of the evidence, but we do ask the tribunal to look at how the Decision deals with all

of these various points.

Before leaving Project Guardian, I must also correct a factual error Mr Brealey made in his submissions, because he said that the CMA had proposed in an SO to find that Project Guardian constituted a competition infringement. That never happened. There was never any case that the CMA has put, in an SO or otherwise, saying that Project Guardian was a competition infringement. So that is just a factual error I need to correct while I am on the point.

THE PRESIDENT: Ms Demetriou, maybe it will assist you, and hopefully the other parties, if we give you an insight into how we are minded to deal with this when we come to reach our conclusion on this point.

It goes without saying, we will be revisiting pretty much the totality of the record, but, on this particular point, it seems to us that we are going to have to set out in chronological order and in extenso the material facts which all parties rely upon. Now, we will be drawing, to the extent appropriate, on the facts found in the Decision, as well as the facts and documents referred to by the appellants, as well as the oral evidence that we have heard.

We will be minded to do that in a more or less neutral way, but make findings as to what is going on

throughout the chronological history.

There then comes the question of what those facts enable us to infer and I think it is pretty clear from what we have been saying to the appellants that our starting point will be the written agreements. The appellants say that nothing went beyond that and you are saying there is something going beyond that. We are going to have to decide, first of all, whether there is something beyond that and what that something is.

Now, we will have to reach a reasoned conclusion on that and what we will be doing is we will be identifying -- we have put to the parties what we have spotted so far -- a series of points which we have called oddities. They may be less or more than that, but we will be looking at those with a view to seeing what we can infer as to what actually happened in a conversation, which you hypothesise existed, but for which there is no documentary material.

That is the hardest area of factual conclusion that any commercial lawyer has. We know that we like documents. But that is how we are going to deal with it.

So you do not need to worry, I think, about our not looking at the facts. The facts are going to drive this. What we are interested in is the articulation of

the oddities that arise out of the facts that we need to think about to see whether the agreement that exists over and above, or that you say exists over and above the written agreement, did in fact exist.

So I would not worry too much about specific points going unanswered by the CMA in the course of oral submissions, because we are going to be setting out the whole run of chronological history in our decision. I do not see any way of avoiding that. We will then be asking ourselves where does it take us? So it is the latter end, the bits that we ought to be really looking at, that we are going to be most assisted by in your submissions.

MS DEMETRIOU: Sir, that is very helpful, thank you. I would just say, just to pick up on a point you have just made, that of course the fact that these documents from early 2014 exist, that is not disputed. But we are grateful the tribunal will set all that out.

THE PRESIDENT: Of course they are not disputed but we are going to have to set them out. It is what you draw from them.

MS DEMETRIOU: I am grateful for that indication, sir. But there is a question that you say, well, what do you infer from these documents that were sent in 2014? The point I am making is that Mr Brealey's submissions on it

proceeded, if I can say so without appearing too rude, proceeded by way of assertion. There are these documents which show that Auden was worried about AMCo. Therefore, this must disprove the agreement. What he did not do was grapple with what the CMA found about how that actually fits into the CMA's case and it is that point that I wish to guard against, as it were, because there are a number of assertions that have been flying around but actually the CMA has grappled with the inferences to be drawn and why particular things are consistent or not inconsistent with the CMA's case in the Decision at some length.

I do understand the point you make about oddities and I am going to come to this, but of course the biggest oddity in this case is the fact that there was this supply at such a low price. So that is the biggest oddity that the tribunal has to grapple with, and I will come to that.

I just want to make one last point in relation to, if I can put it this way, the straw men that I have been seeking to dismantle. That relates to Aesica. I just want to say that it is not the CMA's case and it has never been the CMA's case that there was any deliberate conspiracy on the part of those involved in the Aesica product to go slow or to somehow mask the existence of

a common understanding.

The CMA's case is that the evidence relating to the Aesica project supports the existence of the 10mg agreement in two related ways. I am going to summarise them now but I will come back to these in more detail when I look at our positive case.

The first is because the evidence establishes that the Aesica product was seen by AMCo as an alternative to supply from Auden or, to use a word that crops up frequently in the contemporaneous documents, as a back-up to the Auden supply. The second point, related point, is because the evidence establishes that AMCo pursued the project with greater or lesser urgency depending on how the negotiations were going with Auden.

I will come back to those points. In other words, the CMA has never suggested that there was some deliberate decision to go slow in 2013. Nor is it the CMA's case, to be clear, that the Aesica project was problem free. That is not the CMA's case. Or that these problems were fabricated or cooked up. Again, that is not the CMA's case. What the CMA has found is that during 2013 when the supply agreement with Auden was in place AMCo did not pursue the Aesica project with urgency because it did not have to because it was getting supply from Auden and that that stands in stark

contrast to its approach in early 2014 when the negotiations with Auden broke down and the project became an urgent priority.

In other words, AMCo viewed the Aesica product as an alternative to supply from Auden and when it concluded the second supply agreement with Auden did not need the Aesica product so it cancelled the project and, as I say I am going to return to all of this but I just want to dismantle the strawman.

THE PRESIDENT: I am grateful you will return to it but let me, so you can deal with it later, put to you a concern that is running through my mind, namely that the strength of the inference that you get out of the point you have just made regarding the nature of the side agreement, if I can call it that, is rather weakened, is it not? Because if you have got a position where you are, without making any kind of promise, or giving any kind of assurance, assured of your supply, why spend lots of money getting the alternative up when you do not really need it?

MS DEMETRIOU: Sir, the short answer to that is that in 2013 when it was -- so I think there are two things going on. First of all, in 2013 when the supply agreement was in operation the evidence is not that AMCo spent lots of money getting this product up. In fact, not much

happened. So there were problems with the assay limits and stability and so on and not much was done to fix those.

What you see in 2014 when it looked like the supply from Auden would dry up is suddenly money was spent and you will recall that the witnesses agreed that at that point, and the documents show, that at that point the stability issues were fixed very, very quickly and indeed, AMCo asked Aesica to manufacture at risk, so manufacture batches on the assumption that the stability issues -- so they did spend money at that point.

That is because the supply agreement looked like it would not happen. The negotiations had collapsed. Then when the supply agreement was entered into in June, it on the same day cancelled the project and so it stops spending money. We say that is consistent with the CMA's case.

THE PRESIDENT: No, I accept it is consistent with the CMA's case, but is it not also consistent with the history given by Mr Beighton where he says, look, something very odd was going on on the Auden side. We were getting a gift horse but we did not look it very much in the mouth because it was a gift horse and we proceeded on that basis. So every time the gift horse is available you go slow on production. When it is of a concern that

the gift horse is going to be taken away and you are deprived of it, why then you look for an alternative.

But all the facts you are relying on there, are they not consistent with the Beighton view of the world and not the CMA? They are equally consistent with the two.

MS DEMETRIOU: Sir, you have raised, if I may say so, it is the point I am going to come on to next but it is an extremely, if I can say so, pertinent point that you make and it is a point I am going to make next.

THE PRESIDENT: I am so sorry.

MS DEMETRIOU: Can I just summarise what it is because I do agree with -- I do not agree with all of what you have said but I think you have alighted on something very significant in the case, which is that when the appellants speak about an alternative explanation they are not really talking about an alternative explanation. They are positing exactly what you have just described, sir, which is that everyone is acting on the basis that this supply might help incentivise AMCo not to enter the market. The key question is: was there a crossing of the line? That is the point I am going to come on to next. Perhaps I could do it after the break, because I am looking at the time.

But just to foreshadow what I am going to say, I think that the reason, if I may respectfully say so,

that you have alighted on something very significant in terms of the scope of this appeal is that the difference between the two sides in terms of the facts is extremely narrow. So they are saying, well, everyone did this at this low price because of these incentives at play and we are saying, no, there was a crossing of the line.

But the actual incentives that are at play are common ground and that is why we say the difference between the two sides, and one could be excused -- we did not have oral opening submissions in the case, I am sure for good reason, and one could be excused when listening to the appellants over the last few days from thinking that we are on other sides of a very large ocean, but we are not for the reason you have just given.

We are very, very close together on the facts and the question is the narrow but critical question: was there a crossing of the line? I want to come back to that after the break, if I may.

THE PRESIDENT: Very good. We will resume at 25 to, in ten minutes. Thank you very much.

(11.28 am)

(A short break)

(11.38 am)

MS DEMETRIOU: Sir, so as I foreshadowed before the break,

I am going to just look at what the appellants say happened, but I want to start by saying that there are two important things that are common ground in this case that form the starting point for the analysis.

The first relates to the key term of the supply arrangement, the price at which supply was made. In particular, it is common ground that Auden had been or was supplying the whole market with 10mg hydrocortisone and was making substantial profits.

But before Waymade obtained its marketing authorisation, Auden supplied Waymade with the 10mg product at market price for some 14 months, I think, which was around £35 a pack. So that was the supply price before the MA.

But from October 2012 Auden supplied Waymade and then AMCo with the 10mg product at a vast discount, so £1 a pack, as we have seen at the beginning, and then £1.78 when we get to the second supply agreement. By which time, when we got to the second supply agreement, the market price was of course £53. It had gone up further.

It is common ground that Auden could have supplied those packs, so 12,000 by the stage of the second supply agreement, to wholesalers at the prevailing market price, rather than selling them to AMCo.

So, by supplying those packs to AMCo, Auden was foregoing substantial profits it would otherwise have made, absent the supply to AMCo. In effect, as you see, the CMA characterised that as transferring profits to AMCo and the CMA found in its Decision that the total profits transferred by Auden in this way exceeded £20 million.

Both Mr Sully and Mr Beighton accepted that this arrangement was to Auden's clear commercial disadvantage and the reference -- we will not turn it up now, but we cover the references in our written closing submissions at paragraph 114. Just for your note, the bundle reference is {IR-L/7/56}.

THE PRESIDENT: Just to take that further, the point you are making goes a little bit further than commercial advantage. What you are saying is that there is a correlation between the price at which Auden was prepared to supply and AMCo's ability to go to market.

MS DEMETRIOU: Yes.

THE PRESIDENT: In other words, you are saying pre MA it is £30 odd.

MS DEMETRIOU: Yes.

THE PRESIDENT: Post MA it is £1 odd.

MS DEMETRIOU: That is right.

THE PRESIDENT: Now, is that something which is -- by all

means give us the reference later on or over the course of this week -- but is that something which is articulated in the Decision as something that is a fact from which one can draw inferences and, if so, what are those inferences?

MS DEMETRIOU: Yes, it is and I am going to come to that when I talk about our positive case. But it is and I will give you the references in the decision.

At this stage, I am just establishing -- I want to look at what the appellants say happened, but I am just establishing two areas of common ground which form the starting point. The first is this: these are the essential facts which are uncontested. Both Mr Sully and Mr Beighton accepted that this arrangement on its face was to Auden's clear commercial disadvantage.

The second issue that is unchallenged is that AMCo was a potential competitor to Auden. In other words, it had real and concrete possibilities to enter the market. The CMA's conclusion on that issue has not been appealed, subject to the question of market definition, which Mr Holmes will deal with.

Focusing on the first issue, so the fact that on their face the supply arrangement with Auden was to Auden's significant commercial disadvantage, we say this is a matter which plainly calls for explanation. So why

would Auden do this? It is a question which obviously arises, because what it has done is foregone £20 million worth of profit when it was supplying the whole market and whereas it could have sold these products, these quantities, the 12,000 packs to a wholesaler at the market price, which is what it did before Waymade got its MA, it is now selling them to AMCo at a 97% discount and allowing AMCo to achieve those profits instead of Auden.

Why did it do that? It is obviously a matter which calls for explanation.

Now, as the tribunal knows, part of the evidential foundation for the CMA's Decision is indeed an inference drawn by the CMA that AMCo must have agreed to do something in return. That is part of the CMA's case. It is an inferential case, because otherwise, had AMCo not agreed to do anything in return, then it would have been completely against Auden's interest to supply AMCo on these terms.

Now, the CMA does not rely, and I am going to come to this for my positive case, but does not rely solely on this inference and, as I say, I am going to return to the other evidence on which it does rely, but it is undoubtedly part of the evidential base for the Decision and of course the tribunal is well aware, and I took you

to a summary of the case law in *Durkan*, of the fact that it is open to competition authorities. Sometimes it is all they can do is to draw inferences from things that look odd on their face.

So it is well established that it is open to the CMA to draw inferences from pieces of evidence that plainly call for explanation.

In this case what the appellants seek to do is to challenge the inference drawn by the CMA by putting forward alternative explanations for Auden's otherwise commercially irrational conduct.

I want to turn in a moment to what these alternative explanations are, but before I do that, I just need to pick up one legal point made by Ms Ford, because she said several times -- let us just look at the transcript. If we go to transcript {Day11/182:1} top of the page, she said:

"It is accepted at paragraph..."

I am looking at line 4, if the tribunal has that:

"Paragraph 103 (f) of the CMA's closing that if another plausible explanation exists then no anti-competitive practice can be inferred. In our submission, there is such an alternative plausible explanation."

If we turn up the bit of our written closing that

Ms Ford refers to, 103, that is at {IR-L/7/52}, and so what we say there at (f) is:

"Indeed, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules."

What that is saying is that a case can be based solely on inference, if there is no other plausible explanation, but it does not say that if there is another plausible explanation for an inference there can be no finding of infringement. That will depend, amongst other things, on whether there is other evidence in the case that goes beyond inference.

The true position we say is really straightforward, quite straightforward. The tribunal must look at all the evidence in the round. The CMA relies in part on the inference it draws from the transfer of value, but its Decision is based on other evidence too, which I am going to come to shortly.

But what I want to do first is turn to the alternative explanation for the transfer of value that Ms Ford was getting at proposed by Auden. The alternative explanation is that Auden was seeking to

maintain its volumes by competing with Aesica on a CMO basis. If we go to transcript {Day11/166:1}. So we see that submission made there and if we look towards the top of the page, Ms Ford said:

"It is common for generic companies to supply other generic companies... in order to keep costs of goods down."

If we scan down, we can see that is what is being said.

The tribunal will remember we explored this point with Mr Sully and Mr Beighton in their evidence to the tribunal and both agreed that it did not make sense on the facts of this case for Auden, because it was supplying the whole market anyway. So it simply did not stack up this idea of keeping costs down by maintaining volumes. In any event, Auden was supplying the whole market.

Ms Ford then addresses that argument at lines 18 and following. So she says there:

"The CMA says this cannot explain Auden's conduct and the reason why it is said it cannot explain Auden's conduct is because Auden was supplying the whole market anyway and so it had no need to keep its volumes up."

It is very interesting to see what she says. It is in fact important, because she says:

"It is also said at the same time that if AMCo were to enter with its own product then Auden's volumes would decrease. So there is a scenario where Auden would perceive a risk that its manufacturing volumes might fall. It cannot assume that it is supplying the whole market and it will continue to supply the whole market; there is a plausible scenario where its volumes might fall. In that scenario Auden has a choice. It can either lose those volumes altogether or it can compete for those volumes on a CMO basis."

In that scenario, Auden has a choice. What does that mean? It means that Auden can either lose volumes to AMCo if it enters or it can supply AMCo instead and thereby in a sense not lose those volumes, though of course it would be losing the profits on those volumes.

But, obviously, that must mean that such supply is on the basis, at least from Auden's perspective -- I am not dealing with the crossing of the line now -- at least from Auden's perspective that AMCo will not itself enter independently with the Aesica product. Because if AMCo did enter the market independently then of course Auden would not maintain its volumes and there would be no point in supplying AMCo at all.

So this is an important point and it is really the point I think that you were putting to me, sir, before

the short adjournment. That the premise for Ms Ford's alternative explanation is that Auden is supplying AMCo at such a low price so as to avoid the position that AMCo enters the market independently. That is all she can mean. So she is saying here, well, the CMA says that Auden is supplying the whole market, but of course it will not be supplying the whole market if AMCo enters. It will then lose volumes.

So what it is trying to do is maintain those volumes. That is the point.

The only difference between Ms Ford's case and the CMA's case is that, on our case, this premise was something which crossed the line, the parties both appreciated that there was a crossing of the line.

THE PRESIDENT: Well, I am not sure it is quite as simple as that. My reading of the preservation of volumes point was that Auden are causing to have produced, let us say 80,000 units per month, it is a bit less than that, but we will stick with 80,000, and they will sustain a loss if they have to order a supply of less. In other words, if they say, we will produce or have produced 60,000 rather than 80,000, the marginal price for each unit will go up because you are producing or causing to have produced less.

MS DEMETRIOU: Yes.

THE PRESIDENT: So the competition becomes, assuming there is a belief in Auden that AMCo have got an alternative supply from Aesica, that if Auden believe that AMCo are going to be getting their supply from Aesica, they will enter the market and one may as well preserve what one can out of the situation by supplying at Aesica price volume to AMCo so that at least you get the preservation of the volumes and the revenue yourself of the cost of producing the matter, the £1.78. So you make a turn of, well, 20,000-odd a month plus maintaining the cheap rates of supply between 60 and 80,000 or 80,000, and 68,000 and that is why you are doing it.

So I do not think it is quite as market preserving as you are suggesting. I think there is a more subtle point there.

The difficulty with it of course is that you are giving up a revenue, a profit revenue, of nearly half a million a month, if you are looking at 12,000 volumes, against a revenue of £21-odd thousand payment for the supply from AMCo. So there is undoubtedly an oddity there, but I am not sure that the way Ms Ford was putting it was quite as you have characterised it.

MS DEMETRIOU: Sir, I think she put it in both ways. I will take you to another part of her submission. But let us just accept the more subtle way in which she put it that

you have just put to me. Let us take that as her submission.

My point still stands, because the premise for that analysis, as it were, for that explanation, which is well we might as well compete for those volumes and keep our cost of goods down, we do not want to be producing 60,000 rather than 80,000, if I have understood the point, the premise for that is that if we do this thing, so if we supply AMCo, then that will be instead of AMCo entering the market, because otherwise there really would be no point in losing all of the profits that you have just adverted to.

So the very premise for the argument is we are doing this in order to carry on producing the volumes for the whole market. Obviously --

THE PRESIDENT: And gaining the revenues that those volumes imply.

MS DEMETRIOU: Gaining some tiny revenue compared to what they would have got if they had sold them at market price. But the premise for it is that we are doing it and AMCo will not enter the market with its own product. That is really what I am getting at at the moment.

So the difference really, and this is -- I think it is important to zone in, as it were, on what is the point the tribunal has to decide in this case. The

difference between Ms Ford's case and the CMA's case is that that thinking, as it were, well, if we do this then that will be instead of AMCo entering the market so we will keep all of our volumes, that the difference between Ms Ford's case and the CMA's case is that Ms Ford's case is that that was Mr Patel unilaterally deciding to do that.

The CMA's case is that that was jointly understood by the parties. So it is this crossing the line that is the critical thing. The actual underlying thinking is really no different.

Now, Cinven makes the same point several times. If we go to its opening submissions at {IR-L/3/15}. This is an example of where it makes it, paragraph 24.

So they say:

"The first difficulty is that the critical inference which the CMA has drawn (that there is no other credible explanation for the low supply price) is contradicted by its own previous assessment of the evidence."

I am going to come back to that point, but let me go on:

"But the point stands that it nonetheless provides another explanation for the supply price [this is the explanation Cinven has been putting forward] on which the CMA bases its case: namely that Auden, unilaterally,

hoped to incentivise AMCo but, crucially, there was no agreement or meeting of minds on AMCo's part that it would not enter."

So this is the point that Mr O'Donoghue is pressing as the alternative explanation. So he is saying, well, the alternative explanation is that Mr Patel was hoping to incentivise AMCo not to enter by this extremely advantageous deal, by transferring these profits, but it was never agreed. That is the point he is making.

Now, just to pick up the point about the SO that they refer to in the middle of the paragraph. Cinven has made the point that in its original SO the CMA ran a more modest case. So it was saying that these incentives were themselves -- the agreements seen in the light of these commercial incentives was anti-competitive, because of the way, the context of the agreement. So do not need to show any further understanding.

But that was before the CMA obtained warrants and raided Advanz and Mr Beighton's premises and obtained further evidence. The fact that the CMA planned at an early stage to run a more limited case based on the parties' incentives is not a point against the CMA. It then obtained further evidence and took the view that there was actually a meeting of minds here that AMCo

would not enter.

In fact, the point reinforces, the point I am making at the moment, that the issue between the appellants and the CMA on this appeal is a narrow one. So Auden and Cinven are saying that Mr Patel's plan in making these payments to AMCo was to incentivise it not to enter the market with its own product to maintain Auden's volumes. They say that was the premise of the agreement for him, but it was not something which ever crossed the line with AMCo. That is their point.

Turning to Advanz, I just want to look at what Advanz says. Advanz has made submissions about how AMCo approached the arrangements. If we can go to its written closings at {IR-L/8/256}. So they take a similar line, but from the AMCo perspective. If we look at what is said there, Mr Brealey says:

"Mr Beighton adopted a very clever and pro-competitive negotiating position ... There was no consensus on his part of a reciprocal promise not to enter independently ... The market perception at that time was that there was no demand ... "

And he says that:

"As Mr Beighton said when cross-examined there was a negotiation. This was the leverage we had. We bluffed him. We definitely had a strategy of bluffing

Auden McKenzie that we were ready to launch our own product and we were hoping that he would respond by giving us product."

So Advanz's position for its part is that AMCo sought to persuade Auden to supply it on such preferential terms by threatening to enter the market itself if Auden did not supply it. So that is Advanz's position.

Having shown the tribunal what the appellants' case is on these counterintuitive -- the basic counterintuitive nature of the supply agreement, the very low price, the transfer of value, I will now advance three short propositions, which we say are fundamental to the task before the tribunal.

The first submission is that the alternative explanation for the low price put forward by the appellants is very close to the CMA's case. It is the same substantive explanation as that put forward by the CMA, namely that Auden was seeking to achieve a position whereby AMCo stayed off the market with its own product. Second, the critical difference between the CMA's case and the appellants' case is that the CMA contends that the substantive premise for the supply arrangement, i.e. keeping AMCo off the market, was a common understanding between the parties, whereas the appellants' case is

that both sides were acting unilaterally: Auden to incentivise AMCo not to enter the market and AMCo to leverage market entry in the negotiations.

Thirdly, we say that this critical issue is also a narrow issue. Once you have swept aside the false hurdles which the appellants have sought to erect for the CMA, the only question for the tribunal is whether the evidence in this case, on the balance of probabilities, supports the CMA's conclusion that there was a crossing of the line, that there was a common understanding that AMCo would not enter the market if Auden supplied it on these preferential terms, as opposed to both sides acting purely unilaterally.

That, we say, when you drill down to basics, that is the narrow question the tribunal needs to decide on this part of the appeal.

With that I am going to turn to the evidence and why the CMA is right on that narrow question. Before turning to the evidence, I just want to remind the tribunal of what the case law establishes about the relevant test for distinguishing unilateral conduct from a common understanding. I know the tribunal knows all of this case law so I am going to take it swiftly, if I may, from our written closing submissions.

If we go to {IR-L/7/50}, paragraph 102. We have set

out some well-established principles in the subparagraphs under 102. The first is that:

"The common understanding need not be recorded formally or in writing; it can be informal."

The tribunal has already averted to that this morning.

The second is that an agreement can exist even though there is nothing to prevent either party from going back on, or disregarding it.

Over the page, please, the third is that:

"The question 'whether the undertakings in question considered themselves bound -- in law, in fact or morally -- to adopt the agreed conduct is irrelevant.'"

Just pausing there, I am going to come back to this point, but it is important to bear this in mind when considering the submission that Mr Beighton was bluffing. We are going to say he was not bluffing, but, in any event, it is legally irrelevant. I will come back and look at that point in more detail, but I am just flagging it now while we are on the test.

Then (d):

"It is not necessary for the common understanding to be discussed expressly between the parties. A common understanding may 'go without saying' since it is understood, accepted and implemented by the parties

without the need for an explicit discussion; such a situation is all the more likely where the common understanding consists of a commitment not to do something rather than to carry out a positive act."

Again, we rely on that. I posited for illustration purposes a conversation between Mr McEwan and Mr Patel. But we do not actually need to show that such a conversation took place, such an explicit conversation took place, if it went without saying. Here we do say that there was more than -- that there were some explicit discussions and we have Mr Beighton's evidence to the tribunal, supported by the contemporaneous documents, that he expressly threatened Mr Patel he would enter the market in order to get the supply deal over the line. But it is important to bear in mind that a common understanding can go without saying, particularly when it comprises, as here, a commitment not to do something.

This principle, we say, is particularly important in a case such as the present where it is common ground that the parties had the same thing in mind. So Mr O'Donoghue's case is, well, my alternative explanation is that Mr Patel was incentivising AMCo not to enter and Mr Brealey says, well, my case is that Mr Beighton was extremely clever in his negotiation.

That is how he achieved the very low price by threatening to enter.

Where you have got a case where what is being said by the appellants is that these were the operative things in each parties' mind, they were both thinking the same thing, then this particular principle is extremely important, because one has to ask, well, how likely is it, really, that these people would have been thinking exactly the same thing, but never actually shared the same understanding, never had a common understanding, never had a concurrence of wills?

Now, the test, as the tribunal might expect, just returning to what we say and we have:

"A common understanding does not require 'the elaboration of an actual plan' ... The competition rules accordingly preclude 'any direct or indirect contact ... with the object or effect to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they have themselves decided to adopt or contemplate adopting.'

"A common understanding may be found where one party tacitly acquiesces in a practice or measure apparently adopted unilaterally by another party...

"It is sufficient for ... a concurrence of wills or

common understanding on the principle of a restriction of competition, even if the specific features have not been agreed or hammered out."

The question in this case is not so much the test, because I did not really hear any big dispute about any of these principles which are all well established. The question in this case is the application of the test and I just want to take you back to Ms Ford's submissions in closing. So if we can go to transcript {Day11/149:1}. I think I can establish some more common ground here. She says at line 5:

"It is not enough to change your prices in anticipation that that might cause your competitors to respond in a particular way. What is required is a coordinated course of action where any uncertainty as to the way in which your competitors will respond is eliminated."

With the caveat, which I think she would accept, of adding "reduced" to "eliminated", because that is what the case law says, and she is nodding and she did say that to be fair to her elsewhere, we agree with that proposition. So there is some more common ground now there.

Then reading down, Ms Ford then seeks to show how this principle applies to the facts of the present case.

In particular, she deals here with the fact that -- you can see this from lines 11 onwards -- from July 2011 to September 2012 Auden supplied the 10mg product to Waymade at market price, which, as I say, was around £34, £35 a pack. But then after Waymade obtained its MA the parties agreed that the supply should be at £1 pound a pack. If you go to line 16, she says:

"It is not enough that Auden changed its prices, taking into account in doing so that it was now competing with Aesica to supply Waymade, and that offering a lower price might make independent entry less commercially attractive. It is not enough for Auden to take into account anticipated conduct in that way."

So what she is saying there is on all fours with Mr O'Donoghue's submission. It is not enough for the tribunal to take the view that Mr Patel was seeking to make, to incentivise, to make entry by AMCo less commercially attractive. There needs to be a common understanding, coordinated conduct, she says, between the parties that reduces uncertainty between them as to how AMCo will behave. Again, we agree with that. So we agree with what she says there. That is the proper approach.

Now, if we go to transcript {Day11/154:1}, a few pages on, you see there Ms Ford is dealing with the

Hitachi case, which is the case we referred to for the principle that I just took you to that sometimes things go without saying, that you do not need an express agreement, verbal or otherwise.

Ms Ford, again, does not dispute the principle. So she is dealing with the *Hitachi* case and she agrees with the proposition that a common understanding can go without saying, but what she is seeking to do, at lines 8-12 of this part of her submission, is distinguish the position on the facts. So she says it is very different. *Hitachi* was different. It could go without saying there, but it cannot go without saying here. She says the current case, the present case, is a very different situation to *Hitachi*.

But the tribunal has my point that this is not a very different situation, particularly because the appellants' own case is that each side was operating according to the very same incentives, that what each side were doing was hoping to utilise -- AMCo for its part was hoping to utilise the threat of its entry to secure the low price in the supply deal and Auden for its part was hoping to maintain its volumes on the basis that the supply would mean that AMCo did not enter the market: as Ms Ford put it in this part of her submission, was hoping to render entry less attractive

for AMCo.

So where they are both thinking exactly the same thing, then it is not a very different situation to *Hitachi*. It might very well be a case where this went without saying, because both parties understood that that was the deal. That was the deal.

THE PRESIDENT: Just pausing there. I wonder if we could bring up your closing {IR-L/7/54}. I think this is the summary statement of the killer facts that justify the conclusion, on the balance of probabilities, that there was a side agreement. You are majoring, and I quite understand why you are majoring, on the 97% discount. The words that I am interested in is "a limited volume of 10mg hydrocortisone tablets", because when you are talking about maintaining its volumes, by which you meant Auden's volumes --

MS DEMETRIOU: Yes.

THE PRESIDENT: -- obviously there are two parameters here. It is maintaining volumes at a certain price. You do not want to maintain volumes at £1.78. You want to maintain volumes at £35, £45, £55. That is the plan.

Does the CMA have any case, or is it simply an irrelevant factor, that the volumes that were agreed to be supplied changed from 2 to 6 to 12 over the course of the period we are looking at? If there is something to

that, what does one get from those changes? Because it seems to me it is quite hard to say things go without saying when one has got something being said about volumes supplied.

MS DEMETRIOU: Sir, yes, I understand the point and it is a very important point. We do say that there is a lot to be said about that and it is something which is addressed in depth in the Decision. What we say is that those increases in the volumes were negotiated and they were negotiated on the basis of the threat of market entry. So what we see, and I am going to come to this in terms of the evidence, what we see is that Mr Beighton for his part, when he negotiated the increase from 6,000 to 12,000 packs, he had in mind that if he could enter himself, he would be selling 10,000 packs. So he wanted to beat that.

So what AMCo were doing, they were saying, well, we need more. So we need more from you, otherwise we will enter. So it is a very important part of the evidential piece that these increases took place and one has to ask, and the CMA did ask and answered the point in the Decision, did ask, well, why on earth would Auden increase the volumes from 2,000 to 6,000 to 12,000, giving away all of those millions of pounds worth of profits in so doing? They did it because AMCo was

saying if you do not increase, we will enter the market. That is why they agreed the increase in volumes. That is a very important plank of the CMA's Decision.

Otherwise, no rational commercial reason why Auden would drop the price in the first place from £34, £35 to £1 and then increase the volumes, thereby giving away lots more of its profit, unless it did so on the basis that this would stop AMCo entering.

THE PRESIDENT: Except we have the evidence of Mr Beighton in exchange to questions that we put to him regarding the death spiral and the volume that AMCo would supply to the market once they were in a position to enter.

From recollection, I put to Mr Beighton, look, surely the price would go down to just above cost and he said, well, no, because we would not supply 100% of the market. We would supply a proportion and he put it at 50%. So he would unilaterally stop at 50%.

Now, my understanding is that provided it would have been unilateral, and of course we are talking hypotheticals here because at the time of these figures there was not any ability in AMCo to enter the market, but I was hypothesising with Mr Beighton what would happen if they did, and his line was, we would maintain price by restricting supply, unilaterally deciding that, because we know that provided AMCo have their head in

the right place, they will see that we are only supplying 35,000 units per month and they will not change their price, enabling us to price at a couple of pounds below the Auden price and, therefore, everyone is happy, or at least Auden and AMCo are happy, because they have got 50/50 of the market at the high margin that they want.

Now, nothing wrong with that in competition law terms, provided they do not discuss the level of supply and reach an agreement on that. So the question is: is the increase from 2K to 6K to 12K simply an anterior reflection of each side's unilateral assessment of the risk of entry by one party? So they do a deal. You can see that Mr Beighton will be saying, you know, we are ready to go, we are ready to go. Mr Patel will be thinking, well, actually, if they were ready to go, they would have gone. So they do a deal at 12,000, but based upon their unilateral assessment of risk of entry.

If that is the position, the first question is, is that wrong in competition law terms? But secondly, if it is not wrong in competition law terms, what additional points do you make to shunt the unilateral understanding of both sides into the crossing the line naughtiness?

MS DEMETRIOU: Sir, so first of all, if they are both acting

on the basis -- it is really, I think you are in a way crystallising the point I was seeking to make in terms of what is the question for the tribunal. So I think you are right, first of all, to say that the appellants' case is that they were unilaterally acting on that basis based on risk of entry and what AMCo might -- their assessments, so unilateral assessments of what AMCo might sell if it entered.

So this really goes to fortify the point I was just making, which is actually the factual position between us and the appellants is not very significant. The key question, I think you are absolutely right, sir, is: was there a crossing the line or was it purely unilateral? I am going to now address you on that so I have not forgotten that at all. That is really the key question, as I say, that the tribunal has to determine, because we say that the CMA's case is that the evidence amply establishes a crossing of the line, a common understanding, that AMCo would not enter the market as a quid pro quo for Auden supply.

I want to take this in stages, because we say, first of all, that that common understanding is established on the basis of the uncontested facts as they have emerged, as they are reflected in the Decision as they have emerged at trial. I am going to start with those

uncontested facts, if I may, because we say the tribunal can stop there, before turning to further evidence which bolsters the CMA's case and which also establishes, helps to support, the finding that there is a crossing of the line.

I want to start with Mr Beighton's evidence to the tribunal, because that is what we were just discussing and this point you just put to me, sir, about twice securing these increased volumes of product. As you have said, in January 2013, Auden agreed to increase the volumes, to triple the volumes from 2000 to 6,000 packs, and then from June 2014 the volumes went from 6,000 to 12,000.

As I have said, those increases reflected a very substantial loss of profits for Auden. Mr Beighton handled the negotiations, as you know, in relation to the increase from 6,000 to 12,000. Before that, it was Mr McEwan. I just want to remind the tribunal of Mr Beighton's evidence as to how he secured that deal from Auden.

If we can take it from our written closings. So if we go to {IR-L/7/68} if we look at (d) first of all:

"Mr Beighton sought at first to suggest that he did not engage in horse-trading... 'sometimes you just asked and he said yes'. However, when it was put to

Mr Beighton that he wanted Auden to understand that AMCo could enter the market easily in order to negotiate more volumes, he accepted that he had engaged in a 'bluff' to convey to Mr Patel that AMCo was ready to enter. He said:

"We wanted -- we bluffed him. We definitely had a strategy of bluffing Auden McKenzie that we were ready to launch our own product and we were hoping that he would respond by giving us product."

And then said:

"But the bluff you were conveying to him was that you were ready to enter, yes?

"Answer: Yes, we definitely gave him that impression."

So just pausing there. This is not a unilateral thing. This is Mr Beighton giving directly, using in his negotiations, the threat of entry with Mr Patel.

THE PRESIDENT: Yes, but in a sense, Mr Beighton failed.

MS DEMETRIOU: I do not know what you mean by that, sir.

THE PRESIDENT: Yes, we definitely gave him that impression. Well, clearly not, because if he had, they would not have stopped at 12. I mean, this is what I mean about different, but-noncommunicating, siloed impressions about what the risk is. This goes to one side negotiating hard with the other about getting volume at

a very advantageous price.

Now, if Mr Beighton had completely succeeded in bluffing Mr Patel that they were ready next day to enter, then why would the negotiations stop at 12?

MS DEMETRIOU: Sir, for this reason: so first of all, Mr Patel understood the orphan designation issue. So he knew -- he had some negotiating clout too, so he knew that AMCo could not come in and just take 50% of the market. He had that knowledge and you could see that he was leveraging that. We saw that through Project Guardian. So he is not entirely stupid. He understood that there was a limit to the clout that Mr Beighton had.

Then also the other point is that Mr Beighton asked for 12,000. He was not asking for more. They had, and this is important, in 2013 they had asked for 18,000 and that was swept aside by Mr Patel. He did not agree to 18,000. They ended up at 6.

But Mr Beighton asked for 12,000. They had failed at 18. He asked for 12. Why did he ask at 12? Because the evidence establishes that he pitched it at 12, because his internal assessment at that stage was that if they entered with their own product they would sell 10,000. So he wanted to achieve at least that.

So that is why, sir, they did not go further,

because this was not negotiation in a vacuum. It was negotiation against the backdrop of the orphan designation. So the parties had made a realistic assessment as to what AMCo could achieve if it entered.

THE PRESIDENT: Fair enough, Ms Demetriou. I will buy that for the moment. But if each side is unilaterally making an assessment of what damage they can do in competition and there is an offer by Auden at a level which is acceptable, given his subjective and uncommunicated appreciation, that is Mr Beighton's, as to what he can achieve if he goes in, well, purely on a unilateral level without communication, why should not Mr Beighton say, snap yes?

MS DEMETRIOU: He could. If that had happened, that would not be an infringement. I accept the point you put to me. That is not the CMA's case. The CMA has not found an infringement based on unilateral action.

THE PRESIDENT: No.

MS DEMETRIOU: But what I am putting to you here, this is the first of the points I am putting to you, but it is a very important point, because what Mr Beighton accepted in his evidence, leave aside at the moment -- sir, I think we need to distinguish two things, if I may. One is the volumes, whether it is 12,000 or 8,000 or what the individual assessment was of the risks

of market -- not the risks of market entry, because Auden plainly perceived a risk, but how much of the market AMCo could contest if it entered. It is quite conceivable that both parties were unilaterally considering that and did not discuss their assumptions. In fact, the CMA has not found that the parties expressly discussed how much of the market was contestable, aside from, I will show you some emails in a minute, where there is some contemporaneous evidence.

But let us assume that they did not discuss how much of the market AMCo could seek to achieve and, therefore, what the right place to pitch the supply was in terms of volumes. That wasn't discussed. That was unilateral.

That does not prevent there being an agreement, because the key question is: in return for this supply on these hugely advantageous terms, was it understood by both parties, both parties, was there a common understanding that, did both parties understand that, in return for this advantageous supply AMCo would not enter with its own product? The answer to that is yes. You can see that it is yes, because Mr Beighton is not here acting unilaterally. He is expressly leveraging the threat of entry to Mr Patel in the negotiations. He is not doing what you just put to me, sir. He is not saying, well, there is a lovely gift horse. I am going

to accept it and not say anything. He is doing the opposite. He is using the threat of entry to obtain these very preferential terms.

What does that mean? One only has to think about it for a few minutes, in our respectful submission. If he says, well, we gave him the impression that if you did not give us these volumes, if he did not give us these volumes, we would enter. What does that mean? What could Mr Patel have understood from that? Obviously, the other side of the coin is if you do give us the supply at these volumes, we will not enter. Otherwise, that threat is entirely, entirely vacant. It means nothing.

So when he says, if you give us the 12,000 -- if you do not give us the 12,000, we will enter. We are ready to enter. If you do not do this, we will enter with our own product. What is he saying? He is saying if you give us the 12,000, we will not enter. That is obviously the inference of what he is say. There is no other way of understanding. It is not leverage. If it is not understood in that way, it is just not leverage.

THE PRESIDENT: Yes, so just to be absolutely clear. You are saying that if there is communication crossing the line regarding ability to enter the market, whether that be true or false, that is enough to found the agreement

not to enter the market if the agreement is entered into.

MS DEMETRIOU: We are absolutely saying that is enough. I am going to deal with the bluff, but we are absolutely saying that is enough. That is why I am saying that on the basis of the uncontested evidence, because I just took you to Mr Brealey's written submissions where he quotes this bit of Mr Beighton's evidence. On the basis of this, which is uncontested, we say the proper characterisation of this is a crossing of the line and we say it is just blatant, because it does not matter about volumes. What he is saying to Mr Patel, he is giving -- we definitely gave him that impression we are ready to enter. We are going to see it later with his threaten to enter email, which is the internal email.

He is saying we definitely give him that impression. If you do not supply us these volumes at this price, we will enter. That can only be understood, could only have been understood, by Mr Patel as, well, if you do not give us the supply, if we do give you the supply, we will not enter.

THE PRESIDENT: Right. So what we have got is express words "crossing the line" the articulation of ability to enter, which we see here quoted by Mr Beighton.

MS DEMETRIOU: More than that. Linking the entry, their

entry, with the supply agreement. So essentially saying --

THE PRESIDENT: Certainly discussing these matters in conjunction with the supply agreement I think you have got.

MS DEMETRIOU: I am going to go further than that, I am afraid.

THE PRESIDENT: I know you are going further than that.

MS DEMETRIOU: Yes.

THE PRESIDENT: But what I am unpacking is that your case is actually that there is an implied understanding arising out of the express words that we can infer that is crossing the line. So you are not saying Mr Beighton said: look, we can enter the market. There are certain problems we have got, but we can enter the market. We will not if you give us 12,000. All he said was we have the ability to enter the market and we will agree this deal.

MS DEMETRIOU: No, he said more than that. I want to look at what else he said. What he is doing, and this is important, sir, so he is not just associating the two things. He is using as leverage in the negotiations AMCo's ability to enter the market. So what he is conveying, the impression -- he says "definitely gave him that impression". The impression that he is

conveying is if you do not supply us, we will enter. So he is leveraging the threat of entry to conclude the supply agreement. That can only be understood -- it is not very implicit. It is really the obvious consequence of what he is saying is, well, if you do supply us, we will not enter. Otherwise, the leveraging would be entirely meaningless.

Just moving on, because there are other pieces of evidence which are again uncontested. This is why I have spent some time in a way clearing, stripping away, some of the straw men, because the point is a very narrow one and it can be decided on the uncontested evidence.

Then if we look at (e) in our closing submissions:

"Mr Beighton also accepted that the premise of negotiations with Auden was that if Auden agreed to supply AMCo then AMCo would not enter the market with its own product. At first, Mr Beighton said that he was not 'not saying that to [Mr Patel]'. However, he accepted that this was at least the implication of his (and Mr McEwan's) 'bluff' to Mr Patel."

Then you see I said:

"But you were telling him that if you did not do this supply deal you would come on to the market and you could contest 100% of the market, which is what Mr Clark

is saying?

"Answer: I do not think I told him that, but clear that was the implication of this.

"Question: But that was the impression you sought so give him?

"Answer: That he thought we had a product that was about to launched.

"Question: Yes, so when you spoke to him on these various calls, you would have been keen to give him the impression that if he did not do the deal you would come on to the market with your own product and you wanted him to believe you could contest the whole market with that product?

"Answer: I think that we wanted to put ourselves in the best light, generally, and clearly we were not in best situation.

"Question: So when you say 'put yourselves in the best light', you mean you wanted to give him the impression that you could contest the whole market and you were not inhibited by the skinny label, is that what you mean?

"Answer: I suppose what we were really trying to do is give him the impression we had some alternatives.

"Question: The alternatives being that you were launching your own product?

"Answer: Yes, of course."

What we say is that he has now clearly accepted in cross-examination that his leverage in the negotiations was: if you do not supply us, we will enter the market, if you do not supply us on these preferential terms.

Of course, he handled the negotiations on AMCo's behalf in 2014, remember from April 2014, leading to the second written supply agreement the increase from 6,000 to 12,000 packs. I just want to remind the tribunal of his evidence as to how specifically he managed to secure this deal from Auden. Sorry, I want to remind you of the contemporaneous, some of the contemporaneous documents as to how he managed to secure this deal.

But I want to, first of all, just remind the tribunal that, as you are aware, the negotiations in this case first between Mr McEwan, who of course is the person who initially concluded, agreed the supply arrangement when he was at Waymade with Auden and then he was the person who negotiated the increase from 2,000 to 6,000 packs in January 2013. So those negotiations and Mr Beighton's negotiations leading to the second supply agreement were all undocumented, all undocumented.

I took Mr Beighton to documents indicating that there were various calls, texts and a lunch that took

place between him and Mr Patel during the spring of 2014 leading to the conclusion of the second supply agreement.

Of course what we do not have in this case is a record of precisely what was said during those conversations, which were undocumented, contrary to the competition advice that the firm had received.

But there are contemporaneous documents that show quite clearly that Mr Beighton was right when he told the tribunal what I have just shown you, that the leverage he used was that otherwise if Auden did not supply AMCo on these preferential terms, AMCo would enter the market itself.

If we go first to {IR-H/509/1}. This email is from mid June 2014 when Mr Beighton was trying to get the supply deal for 12,000 packs over the line and he emailed Rob Sully, amongst others, and you can see here that he was hoping to get the deal started in June, because of course every month was a huge amount of free profit for AMCo and he said:

"As for the start date yes it is for delivery this month so Jane can get the sales this month. I told him that if not we would launch our own."

You can also see in this email by the way why he went in at 12,000, just to return to the question, sir,

that you put to me, why he went in at 12,000 packs, because he said:

"I went in for 12K per month when I knew that Jane had forecast 10K per month [that is for his own product] with the view that we would have to negotiate -- I suppose at that stage I thought I would settle for 10K."

So you can see why he went in for 12,000, but really what you are seeing here is a contemporaneous document supporting what in the end Mr Beighton accepted in his evidence before the tribunal, which was that this was the leverage, threat of entry was the leverage he used.

Let us look at what he said when he was questioned about this email. So if we go to {Day3/29:1}, towards the bottom of the page. So I asked him, if you look at line 18:

"So what you told Amit Patel, we see here, if he did not start supplying you with 10mg tablets that month in June, you would launch your own product, yes?

"Answer: Yes.

"Question: They did supply you in June, did they not?

"Answer: Yes.

"Question: The new two year deal was signed on 25 June, was it, about a week after this email exchange?

"Answer: Yes.

"Question: Again, both you and Mr Patel understood that Auden was doing this deal, because if it did not AMCo would launch its own product?

"Answer: I do not know what Mr Patel understood. As I have said on a number of occasions, I do not really know why he did this, because it just did not seem to make sense.

"Question: But I think you have accepted already that it is the impression you tried to give him and you said it expressly, did you not?

"Answer: That was a bluff, yes.

"Question: You said it expressly to him. Even though you say you were bluffing that is what you told him. You said if we do not get this over the line, we will launch our own product.

"Answer: It looks like I said that, yes."

That is his evidence. Then let us look at what Mr Beighton said in his interview with the CMA and if we go to {H/1086/2}, line 22, if we scroll down. So this is discussing the same email, sir, and Mr Beighton says:

"That we would launch our own Aesica which we could not, I knew we could not ... so my discussion was ... always 'we are going to launch our own product.'"

That was his discussion "always". It was not simply a one-off threat. This was the basis on which the negotiations were conducted: supply us on these terms or we will enter.

There is further contemporaneous evidence that this was the case. If we go to {IR-H/300/1}. This is the email from Mr Clark to Mr McEwan dated 2 January 2014:

"Hi Brian.

"Thanks for sending this. FYI ... According to the data on IMS, only 22% of prescriptions are specifically identified as Adrenal, with a long list of others. That gives a bit more strength to say to Amit that we do not mind having limited labelling. Pharmacists will use it anyway, regardless of labelling. Therefore, we should still be arguing using 100% of the market as our negotiating position for supply volumes!"

It really could not be clearer. They are going into the negotiation with Mr Patel saying: give us this supply and actually we can contest 100% of the market. We see that he is saying, "We should still be arguing using 100% as our negotiating position."

This shows it was well known and accepted that the negotiation was conducted on this basis: supply us or we will enter and this is the threat we are posing to you.

An email on the same day, {IR-H/303}.

THE PRESIDENT: Again, supply us or enter in what time frame or do you say it does not matter?

MS DEMETRIOU: It does not matter. They were regarded by Auden as being a competitive threat. It is not contested. One thing that has not been appealed in this case is the finding that they are potential competitors, that they had real and concrete possibilities of entering the market. That has not been appealed.

A further contemporaneous evidence, {IR-H/303/1}, an email on the same day from Mr Clark to Mr Beighton. Can we scroll down, please. It is to precisely the same effect. So:

"I have just received the prescribing data ... It shows that only 22% of prescriptions are specified as adrenal ... not the 90% of adrenal insufficiency that Brian was once referring to. That means labelling should not be that important, hopefully. Pharmacists will dispense our product regardless of label, and Amit's claim that we have an inferior product is irrelevant anyway, when it can be shown to be bioequivalent. It just does not have the labelling for one protected indication. Therefore I think we can push back a bit harder! I have sent an email to Brian suggesting the same."

So Mr Beighton, if we just scroll up says:

"Very interesting!!

"Thanks."

So pausing here, what we have is strong evidence that the express basis on which AMCo negotiated with Auden was supply us with the volumes we want at this heavily discounted price or we will enter the market ourselves.

That is clear first of all from these contemporaneous documents which record that that was the negotiating strategy and what was being said. Secondly, from Mr Beighton's evidence to the tribunal he said that is what he did. Thirdly, Mr Beighton's evidence to the CMA when interviewed.

In the context of the negotiations, that leverage, so if you do not supply us, we will enter, could only have been understood by both sides as meaning if you do supply us on the terms we want, we will not enter. Otherwise, the threat would have been meaningless.

Now, as I say --

THE PRESIDENT: That may be the central question, because of course you cross-examined Ms Lifton on the basis that, to the extent there was fault in terms of failing to get the product to market, it lay on AMCo's side rather than Aesica's and the evidence of Ms Lifton was very much that was not the case. It was Aesica's fault not AMCo's

that the manufacturing problems were what they were.

Now, the threat of we will enter the market ourselves is somewhat more cogent when you can actually enter the market. That is why I am interested in the question of what was being promised, because certainly for some periods in time, if there was a promise by Mr Beighton not to enter the market next week, next month, that was not actually a promise he could quite easily keep, because in fact there was no ability in AMCo to enter the market at that point in time.

Does that not lead to the suggestion that in fact Mr Beighton was taking the gift horse, because there was a misapprehension on the part of Auden as to what in fact AMCo could do and, therefore, he was threatening something which in fact he could not do?

Let me just pause there. Obviously the history, the factual history, is of acute importance here. What was in Mr Beighton's mind in these conversations is going to be informed by the ability or inability to produce. But I would be interested to know your answer to my question on the premise that at the time of the conversations that you say are creative of the promise not to enter the market, does that promise arise by necessary implication from the negotiations if it was Mr Beighton's subjective state of mind that they could

not enter?

MS DEMETRIOU: Sir, it is a very good question, if I may respectfully say so, and the answer is yes. The bluff, as it were, is legally irrelevant and factually wrong. I am going to come to that really shortly.

Just to take stock at the moment of where we are. So we say the evidence I have just taken you to is uncontested. So it is what Mr Beighton said in his evidence. We have the plain words of the contemporaneous evidence. None of the appellants are saying Mr Beighton did not say this or these documents do not mean what they say on their face. In fact, Mr Brealey appears to have embraced Mr Beighton's words. We say that this evidence establishes the CMA's case on crossing the line. Going back to this narrow but critical issue between the parties, it is obvious from this evidence that there was a mutually understood position and that the parties were not acting unilaterally, because it was said. It was said in the negotiations.

So there was an express conveying between the parties of this understanding. I make two observations, further observations at this stage, before turning to the bluff point.

The first is that the CMA does not have to rest on

the *Hitachi* it goes without saying. We could. This is a kind of case where that 'goes without saying' point I think would be very pertinent, because where both parties are thinking exactly the same thing, then it was something actually that went without saying, because the premise for the arrangement was very clear to both sides. But in fact it was expressly said, as we see from the evidence.

The second point I make is that the submissions of the appellants, again for understandable forensic reasons, are peppered throughout with the assertion that the CMA's case is purely one of inference, but that is wrong. It is wrong because we have got this evidence which is not inferential evidence. It is evidence. It is cold hard facts and there is more that I am going to show you.

But what do the appellants say -- and this is the bluff point -- about this evidence that I have been addressing so far. They say and their only response to it is to say it was a bluff. Mr Beighton was bluffing. He said he was bluffing. AMCo could not have entered the market anyway. There are two answers, as I have foreshadowed, to that point.

The first is that whether or not Mr Beighton, and indeed Mr McEwan, because there is a whole earlier part

of the agreement that Mr McEwan was responsible for, whether they were bluffing when they told Mr Patel what they did is legally irrelevant: irrelevant as a matter of law.

The second answer is it is wrong as a matter of fact. AMCo did not stay out of the market because it could not enter. It stayed out of the market because it preferred the certainty of the supply agreement over the risks of market entry with the skinny label product.

I am going to address the tribunal on each of those points in turn. So legal irrelevance and wrong in fact, take them in order.

THE PRESIDENT: That is very helpful. When you do so, you will probably have in mind, but I will remind you anyway, of the exchange that I had with Ms Ford about what is communicated when one is negotiating about price. I put to her the point that simply arguing and agreeing about price, or quantity of supply, terms generally, where you end up in agreement acts as a kind of signal. You know what the other side value or do not value simply by the communication of the terms.

Now, you are coming quite close, I think, to suggesting that the terms agreed and the negotiations purely relating to those terms, I appreciate you say it goes further than that, but let us assume there was

purely negotiation in relation to those terms, which is where the bluff about ability to supply comes in, that is enough, without anything more, to get you over the line.

MS DEMETRIOU: Let me be clear about what I am saying. I am saying that what the evidence establishes is that the basis, the way in which Mr Beighton negotiated the increase from 6,000 to 12,000 was by leveraging the threat that otherwise, if Auden did not supply it with those volumes at that price, AMCo would enter the market with its own product.

So it is expressly tying the supply by Auden on those preferential terms to the question of market entry with its independent product. So it is saying, if you do not do this, we will enter with our own product. That is the leverage.

The other side of that coin, the only way that that could be understood, is to say, well, if you do supply us on these terms, we will not enter. That is what he was conveying expressly to Mr Patel and that is the crossing of the line. That is all we need. That is all we need. We do not need anything else.

We do not need a side agreement. We do not need a duration agreement as to duration. What we need is a conveying of: you supply us on these terms and we will

not enter. That was understood by Mr Patel. That is why he did it. He was told it.

PROFESSOR MASON: I am sorry, is there any distinction then between a situation where following your construction supply or we will enter and a situation where it is supply and we might enter or entry might be possible?

MS DEMETRIOU: I think that what is clear is that he was being told supply or we will enter because we see that from the email: I told him we would enter, the threat to enter email. So I think on the facts what we see from the contemporaneous documents and from what Mr Beighton said is not, well we might enter. That would not have been a very forceful piece of leverage perhaps, but they were trying to leverage their own product as much as possible.

PROFESSOR MASON: Understood, but it might be something that that is inferred by the process of the negotiation and the terms that are close to being agreed. So accepting your point that you dispute whether the facts bear this out if you could just run with it. Legally if it were supply or we might enter is that still problematic?

MS DEMETRIOU: Yes, it is still problematic because what it does it is reduces uncertainty. It reduces uncertainty as to a competitor's behaviour. What you are doing by conveying that point. So if you are saying, supply us

or we might enter, what you are conveying really is, well, if you do supply us we might not. That is the other side, the necessary other side of the coin.

So what you are doing is, and what the case law establishes is, that is problematic if that leads to reduction of uncertainty of what a competitor might do, so that is also problematic.

PROFESSOR MASON: Thank you.

MS DEMETRIOU: I am going to deal first of all with legal irrelevance, why the bluff, even if it were a bluff, why that is irrelevant as a matter of law which is a related point to the point that I was just answering really.

We say that it is enough for a common understanding that both sides understood that the basis on which Auden would give the supply and the transfer values, the transfer of profits, was that AMCo would stay out of the market. Auden did understand that the reason that it was willing to give the supply was that AMCo would stay out of the market if it did because that is what Mr Beighton told him in the negotiations, and AMCo also understood for its part that this was the basis on which Auden was willing to give the supply.

So there is a common understanding even if Mr Beighton believes subjectively, well we cannot enter the market anyway, there is a common understanding that

this supply is being provided in exchange -- on the belief that if it is provided AMCo will stay out of the market.

One can draw -- I am always hesitant to think of analogies, but take a price fixing cartel where company A agrees with company B that they will both sell their products for £10 each and company A was going to sell its product for £10 anyway, that is what it always intended to do. Whether or not -- so it was always going to sell its product for £10 whether or not it reached agreement with B but it would quite like B to sell its product at £10 anyway because that makes things easier.

That is no less an anti-competitive agreement. That is still an anti-competitive agreement even though A would have done that anyway. So even though A might be going in saying, well, you know, I was going to sell my product at £8, why do we not both agree to sell it at 10? So if it goes in with a bluff like that because it was always going to sell it at 10, and they agreed to sell it at 10, that is an anti-competitive agreement.

There is a further analogy with the case law on cheating in the cartel context. So an undertaking that cheats on a cartel has still reached an agreement with its fellow cartelists even if it had no intention of

complying with the cartel rules.

It is obvious, even if Mr Beighton had been bluffing, the conduct is still prohibited under competition law. Because, as I say, it is common ground that AMCo was a potential competitor to Auden and so even if Mr Beighton was bluffing, the common understanding that AMCo would not enter the market if Auden supplied it restricted that potential competition and it did so in two ways. First of all, because it reduced uncertainty for Auden as to what AMCo, its potential competitor, would do in the market. So the tribunal has seen that Auden was very worried about competition from AMCo. Mr Brealey has been at pains to emphasise Auden's efforts through its Project Guardian to seek to persuade, for example, the MHRA to take action and to persuade pharmacists that they should not dispense the skinny label product. It clearly saw AMCo as a competitive threat. And the consequence of the agreement even if Mr Beighton was bluffing was to reduce Auden's uncertainty.

What Auden did was it responded to Mr Beighton's bluff by increasing its volumes and its payments to AMCo and in so doing what it did was it was substituting the certainty of continuing cooperation with AMCo for the uncertainty of competition, using the words of the case

law.

Secondly, because the consequence of the agreement was to restrict the constraint imposed on Auden by AMCo, its potential competitor, and that is because AMCo responded to the conclusion of the supply agreement by taking its foot off the gas in terms of bringing its own product to market. We saw that most starkly in the suspension of the Aesica project on the very same day that the second supply agreement was concluded.

On this point I just wanted to take the tribunal to two authorities. I think I can do that very quickly before the lunchtime adjournment and then I am moving on to why it is not a bluff in fact.

If I could take you first to *Lundbeck*, first of all to the General Court. So {M/126/72}. Paragraph 471:

"It must be recalled that Article 101 ... is intended to protect potential competition as well as actual competition ...It is thus to no avail that the applicants again submit that there is no certainty that the undertakings would have actually entered the market during the term of the agreements at issue, since that argument disregards the distinction between actual competition and potential competition."

If we skip down to 474:

"Accordingly, even if some generic undertakings

would not have entered the market during the term of the agreements at issue, as a result of infringement actions brought by *Lundbeck*, or because it was impossible to obtain an MA within a sufficiently short period, what matters is that those undertakings had real concrete possibilities of entering the market at the time the agreements at issue were concluded with *Lundbeck*, with the result that they exerted competitive pressure on the latter. That competitive pressure was eliminated for the term of the agreements at issue, which constitutes, by itself, a restriction of competition by object."

What the General Court is saying there is even if in fact an undertaking which has reached agreement not to enter the market could not do it because it does not have an MA, something as serious as that, as fundamental as that. An agreement to stay out of the market is still anti-competitive because it is reducing the potential competition between the undertakings.

Then if we look at the Court of Justice on appeal. {M/181/38}. Paragraph 135:

"So:

"The General Court definitively found, first, that even though the agreements at issue did not contain any no-challenge clause, the manufacturers ... had no incentive to challenge *Lundbeck*'s new process patents

after concluding the agreements at issue, since the reverse payments broadly correspond to the profits that those manufacturers expected to make if they had entered the market or to the damages which could have been paid to them if they had succeeded in litigation ... and, second, that even if those payments were of an amount less than the expected profits, they nevertheless constituted a certain and immediate profit, without those manufacturers having to take the risks that market entry would have entailed."

Again, what you have here is a recognition that certainty in place of the risks of competition from AMCo's perspective -- AMCo undoubtedly saw -- we heard Mr Beighton say that he saw entry as risky because of the skinny label. That is not an answer to whether or not there is an infringement of competition because what he is doing is substituting certainty for uncertainty but that uncertainty is uncertainty caused by competition.

Then also I just want to show you *Sumitomo* which is at {M/53.1/18}. If we scroll down, paragraph 47. So:

"As regards in particular, agreements of an anti-competitive nature reached, as in the present case, at meetings of competing undertakings, the court has already held that an infringement ... is constituted

when those meetings have as their object the restriction, prevention or distortion of competition and are thus intended to organise artificially the operation of the market ... In such a case, it is sufficient for the Commission to establish that the undertaking concerned participated in meetings during which agreements of an anti-competitive nature were concluded in order to prove that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward indicia to establish that its participation in those meetings was without any anti-competitive intention by demonstrating [and this is important] that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs."

Then 48:

"The reason underlying that rule is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it."

So again, by analogy you can have -- the situation in the present case is that Mr Beighton did the opposite

of distancing himself, so even if he were bluffing he did not say to Mr Patel, well, actually do not worry, we are not doing this in return for staying out of the market because we cannot enter the market anyway. He did exactly the opposite. He deliberately represented to Mr Patel that he would stay off the market if Mr Patel supplied AMCo.

So this is an analogous situation to *Sumitomo*. Where you have an undertaking that appears to reach agreement with another competitor, the fact that they say, well we did not really mean it, we had no intention of doing X, Y and Z is not enough in competition law terms. They have to publicly distance themselves and that has not been done. Indeed we say the opposite has been done.

If that is a convenient moment I was proposing then to go on to say why as a matter of fact there was no bluff.

THE PRESIDENT: Yes. Let me leave you with this thought. I do not want an answer now, but in the course of your submissions.

The question is this: is there any way in the circumstances of this case that Mr Beighton could have entered the agreements as written and negotiated for them in a manner to avoid infringing competition law?

MS DEMETRIOU: Thank you, sir, I will take that away as my homework and I will come back after the luncheon adjournment.

THE PRESIDENT: Thank you very much. We will resume then at 2 o'clock.

(1.03 pm)

(Luncheon Adjournment)

(2.00 pm)

MS DEMETRIOU: Sir, just before resuming where I was in terms of Mr Beighton's bluff, I just want to go back -- and I am going to answer the tribunal's question just before lunch -- but before I do that, I just want to take you back to one document because you put to me earlier, sir, the question, why did Mr Beighton not just go for more volumes than 12,000 and I gave you an answer to that, but there is one more document that is quite helpful on that point, which is at {H/444/1}.

This is from Beighton to Mr Clark:

"I have asked Karl what our Aesica cost and volume expectations are and I would say if Amit could get close to them it would be worth having a long term supply agreement with him.

"I am also not keen on having a fight over the status, [that is the orphan designation, the skinny label status] or indeed having customers that see our

product as somehow risky."

So that is, again, supportive of the answer I gave you, which is that the orphan designation issue was looming large for both parties and what Mr Beighton was trying to do was secure supply for at least what he envisaged he could sell in the market with his own product. So I just take you to that, because it is another document which helps on the issue you raised.

Then just turning to the question which you asked me before lunch, which is: is there any way that Mr Beighton, I guess also Mr McEwan, could have concluded this agreement in a lawful way? We say that the question here is whether there is an agreement not to enter. That is the question that the tribunal is faced with. The supply agreement on its face does not include an agreement not to enter. We have established that. That is common ground.

So if one is asking at an abstract level: could you enter into this written supply agreement in a way in which it is lawful, so without an agreement not to enter, in abstract terms, yes, you could. It would be possible in if abstract to do that. So you could have in principle, theoretically, a supply agreement that looks like the written supply agreements and does not have any common understanding that there will not be

entry.

THE PRESIDENT: Yes, but that is not really what I am asking, is it?

MS DEMETRIOU: Well, what we say -- I wonder if this is what you are asking. If you add the factual context here, so if you add the factual context which is the low price --

THE PRESIDENT: Well, let us start one stage back, because we all know agreements do not come into being without some form of communication. You just do not have the second written agreement emerge deus ex machina imposed on both parties. They have to talk.

MS DEMETRIOU: Yes.

THE PRESIDENT: So my question was: given the circumstances and given the need for some form of communication about all sorts of terms, is there any way in which the hypothetical counterparty to Auden could avoid the consequence of behaving in an anti-competitive way?

MS DEMETRIOU: Sir, we say that, yes -- I think this is an answer -- yes, in the abstract. So if there were no agreement not to enter, so if that had not been the common understanding, then, yes. But given that the context is that there is this extremely low price, which is on its face to Auden's commercial disadvantage, that raises a serious question as to why Auden was doing this, because otherwise it would have been commercially

irrational.

THE PRESIDENT: Okay, if it was less of a gift horse. Suppose they did a deal at a price that was materially less than what Auden could itself get, suppose they split the difference, so that the sale price Auden offers to the market is £30 and the deal with AMCo is £15. Would that make a difference?

MS DEMETRIOU: I think that, again, the tribunal would be asking itself and the CMA would first be asking itself, well, is there anything? Is there a quid pro for this? Obviously, if the price is not as low, then the inference that there must be a quid pro quo is less of a strong inference, so we accept that.

But I think in those circumstances where Auden could still supply the product at market price and was supplying the product at market price, that it would be question begging and so that the CMA would have to look at this to see whether or not there was a common understanding.

If genuinely there was not because, for example, it was explicable for other reasons, then, yes, we do accept there needs to be a common understanding of non-entry. So we are not saying that in theory this is not something that could be done in a lawful way, but we are saying that given the facts of this case there is an

inference, a strong inference, that there must be a quid pro quo, which is the agreeing not to enter and the parties would -- that that is a strong inference emerging from the facts of this case.

So one asks oneself, to turn it around, if in fact there was -- say there is no evidence at all of the type that I have taken you to, because obviously we say there is evidence here of crossing the line, but say there was no evidence of that at all, then the CMA would still be asking itself, well, why has Auden done this commercially irrational thing and would be asking itself, is there an agreement not to enter that has gone without saying? So it would be looking at the facts and it would be asking itself the same question.

Whether it could establish on the facts that there was an agreement is dependent on the evidence it would have in that hypothetical case.

THE PRESIDENT: Yes, but in this case it is simply the combination of the very low price offered by Auden to AMCo in combination with the communications by AMCo to Auden regarding their bluff or non-bluff about supply.

MS DEMETRIOU: No, there is more evidence, but we say that the evidence we have summarised so far is enough.

THE PRESIDENT: I am trying to work out what is enough.

MS DEMETRIOU: That is enough.

THE PRESIDENT: If there is more that is great, but let us proceed on the basis that you do not succeed on every point. I am trying to work out what you need to establish.

MS DEMETRIOU: You are exactly right. So our case is that you have the very low price, so it is a very low price, which on its face is a commercially irrational thing to do. Mr Beighton and Mr Sully both accepted it was not in Mr Auden's -- Mr Patel's interests. So the question is asked: well, why would they do such a thing? Then what you see is the direct evidence of Mr Beighton saying, if you do not supply us, we will enter the market. So he accepted that he used as leverage the threat of market entry if there was not supply. What that meant, everyone understood, was that if they did supply, he would not enter the market. We very clearly say that is enough. That is the crossing of the line.

THE PRESIDENT: Presumably it could not be rescued by incorporating into the agreement an express term saying that: if it wished, AMCo could enter the market.

MS DEMETRIOU: There is a term like that. That is one of the points that the appellants make. So they say, clause 2.2 expressly gives them the right. It is one of their two alternative arguments they make on clause 2.2.

We say what you do not see from clause 2.2 is that

that gives them a right in principle to enter, but you do not gain from that. What the common understanding that the CMA has found adds to that is: give us this supply and we will not enter.

THE PRESIDENT: Okay, so that is not enough.

MS DEMETRIOU: Yes.

THE PRESIDENT: Would AMCo have to promise to enter the market then? How does AMCo enter into a transaction -- it seems to me there are three options that they have got. One is to increase the price so that you do not have the -- in other words, you say against yourself, I do not want your £1.78, I will pay 38.

Secondly, you do not enter the deal at all.

Thirdly, you do something with the terms that puts you in the clear, but I am not sure what that something could be.

MS DEMETRIOU: Sir, with respect, we say that is looking at it the wrong way round, because one starts with, you have got this agreement, this is the agreement we are looking at, the supply at this very, very low price, and one asks oneself: this is very odd. On any view, this is a very odd transaction, because Auden were supplying the whole market at the market price and has foregone lots of profit in order to supply AMCo. Why would have it done that?

One reason why it might have done it, and this is where the cases of the CMA and the appellants are very close together as we have identified, one reason why it might have done it, in fact, the only plausible reason that has been put forward, is that it was hoping that by doing it AMCo would not enter the market. That is really the point we all make. So the appellants say that that was Mr Patel's unilateral hope and we say it was a shared understanding.

So then one is asking yourself -- so we are agreed as to why he did it. You are then asking yourself, was that truly unilateral or was there a crossing of the line? That is the next question. We say the evidence establishes a cross of the line, because of what Mr Beighton said.

If what you are putting to me is: let us say Mr Patel unilaterally hoped to do that and he came and presented the gift horse to Mr Beighton. Mr Beighton said nothing and said thank you very much and entered in into the agreement, would that be anti-competitive?

If there was truly no common understanding, no crossing of the line, then we accept that that would be lawful, but we say it is just not a rational thing to have happened on the facts of this case.

PROFESSOR HOLMES: Can I test that one other way? Would you

say that if a generics company were to use the threat of getting its own product to obtain a deal from an established supplier or to get better terms from an established supplier, is the fact of using that threat something which amounts to an infringement or does your case depend on the extra facts in this particular case?

MS DEMETRIOU: I think I am hesitant. I am not trying to shirk or not answer the question, because I think it is -- I am hesitant to answer hypothetical scenarios, because I think it would all depend on the facts and so let us say that there was, for example, a true generic entry and the prices had all been competed downwards, so there was very healthy competition in the market, there were other generics on the market, and let us say a generic company at that stage said to one of the incumbents, well, why do you not supply us? I think what was the point you put to me, sir, was it --

PROFESSOR HOLMES: I am exploring really how easily you infer from using the threat of entry, how easily you infer that there is an understanding that you will not enter if you do not get what you want?

MS DEMETRIOU: May I just answer the question directly rather than by reference to hypotheticals. We say in the context of this case then Mr Beighton accepted that the leverage he used was: "If" you do not supply us on

these terms, we will enter the market and we see that from the documents. That caused, as we know, Mr Patel to conclude the supply agreement and in fact to ramp up, as we have seen, three times the volumes. That was AMCo's leverage. No other leverage has been put forwards for why it might have persuaded Mr Patel to have done this deal.

When we go back to the origins of the agreement, it was Waymade that approached Mr Patel in the first place, because they had done the deal on 20mg. I am going to come back to this. But they approached Mr Patel and said let us do the same deal on 10mg. So it was that way round.

The point is that in circumstances where in the negotiation Waymade and then AMCo is saying, well, if you do not supply us with these volumes, we will enter, that can only be understood as meaning the other side of the coin of that proposition, which is if you do supply us, we will not enter. Otherwise, it would be a completely redundant and meaningless threat.

Now, it is quite possible, in all of these multitude of calls that Mr McEwan and Mr Beighton had with Mr Patel that are undocumented, that they did actually explicitly say, well, supply us and we will not enter, but it does not matter we say.

PROFESSOR HOLMES: Thank you.

MS DEMETRIOU: Now, moving back to not a bluff. So I have dealt with why it is legally irrelevant that it is a bluff. I want to now look at the facts, because we say it is factually wrong.

Mr Beighton's position is he said he was bluffing, because AMCo was not in a position to enter the market in June 2014, both because of problems with the Aesica product and because of lack of demand for the skinny label product. Those were his two points.

The first of these points relating to Aesica is simply wrong as a matter of basic fact, because AMCo had pushed the Aesica project forward at the start of 2014 when the negotiations with Auden had collapsed and Aesica in fact delivered batches to AMCo in August 2014. The reason why those batches were not sold was because AMCo suspended the project and quarantined the batches on the very same day it signed the second supply agreement.

So it is fair to say that in the end Mr Beighton did not place much weight on the issues with Aesica. Just to pick up a point you put to me before the break, sir, it is not the CMA's case that all of the problems were AMCo's fault rather than Aesica's fault. So the CMA I think very fairly in the Decision recognises that

there were faults on both sides, but essentially the point is that none of those problems stood in the way of AMCo entering the market with its own product and, indeed, they did not prevent it, just looking at it in legal terms, did not prevent it being a potential competitor, which is not in dispute.

So Mr Beighton's main point was there was a lack of demand for the skinny label product and, again, the CMA fully accepts that Mr Beighton saw market entry as commercially risky because of the orphan designation issue. But the orphan designation issue did not constitute an insurmountable barrier to entry, using the language of the cases on potential competition. That is no doubt why Advanz has not appealed against the CMA's finding that AMCo was a potential competitor to Auden.

I remind the tribunal in terms of the facts that there is no documentary evidence at all of any market research having been carried out by AMCo into customer demand. Both Mr Beighton and Mr Sully told the tribunal that it was Jane Hill who told them that there was limited customer appetite for the skinny label product. But Jane Hill, who again was another witness that the appellants have not called, made clear to the CMA in her interview that her enquiries were very limited indeed. I just want to take this from our written closing

submissions.

If we go to {IR-L/7/36}. So paragraph 74 we say:

"The absence of documentary evidence is likely to reflect the fact that the exercise was in fact not a significant one. Mr Sully and Mr Beighton confirmed that the market research in question would have been carried out by Jane Hill ... But in her interview ... Ms Hill described a very limited exercise. She referred to conversations with just two customers -- Day Lewis and Alliance -- and Ms Hill recalled that both of them suggested that they would not use a skinny label product. This was not, on my view, the sort of market research exercise which a business might have been expected to carry out if it wanted to form a clear and comprehensive view of potential demand for skinny label tablets. Advanz has not called Ms Hill and so there is no witness before the tribunal to gainsay the conclusion that the so-called market research was a scant exercise. Moreover:

"The evidential picture before the tribunal is at best unclear in relation to Day Lewis... "

Can I just ask the tribunal to read the rest of subparagraph (a). (Pause).

THE PRESIDENT: Yes.

MS DEMETRIOU: Then importantly at (b):

"Ms Hill did not speak to any independent pharmacies, despite recognising herself in her interview that they would have been the most likely source to have demand for a skinny label because they are more price sensitive."

Then at (c):

"Ms Hill also did not speak to Waymade about whether it would be willing to purchase skinny label product ... despite the fact that Waymade was purchasing Auden's product from AMCo. Nor did Ms Hill approach Mawdsleys to whom AMCo sold significant volumes of the Auden product after June 2014 when it negotiated an increase in its supply from 6,000 to 12,000 packs per month."

So the skinny label issue, we say, was not a barrier to AMCo's entry and AMCo had certainly not carried out the information gathering necessary to conclude it was a barrier to entry. On the contrary, AMCo's estimate, as the tribunal saw, was that it would sell 10,000 packs per month and we have seen the contemporaneous document showing that.

We say that the truth of the matter is that AMCo saw market entry as commercially risky. The CMA accepts that. It realised, as Mr Beighton told the tribunal, that it could not contest half the market, which is what it would normally hope to do with a full label generic

product.

So the upshot is that it preferred the certainty of the supply agreement over the risks of entering with its own product. That is why there is a raft of evidence, which I am going to come to, in which AMCo internally refers to its own product as "back up" to the supply agreement.

But before moving on, there are three more short points on the orphan designation that I wish to cover. The first is simply to draw the tribunal's attention to the fact that the appellants' arguments about the orphan designation issue are all focused on the middle of 2014, this period when the limited market research exercise apparently took place and allegedly changed AMCo's view of things.

But of course the 10mg agreement was formed, the CMA has found, in October 2012 and there just is not any suggestion on the part of the appellants that there were major concerns within Waymade, or subsequently AMCo, about the fact that the product would be a skinny label product.

In fact, Mr Beighton said that earlier in the chronology he was more optimistic about it all.

The second point is that the appellants seek to rely on some evidence from later on in the period in 2015.

I want briefly to address two emails that Mr Brealey showed you.

So at {H/6662/1} Mr Brealey showed you this newsletter from February 2015, which sets out on page 3, if we go to page 3 {H/6662/3}, some guidance for pharmacies specific to Pregabalin.

As Mr Palmer explored with Mr Beighton, the issue in relation to Pregabalin was a specific one which arose out of patent litigation. Just for your note, that is transcript {Day3/195:1}.

In terms of AMCo's understanding at the relevant time, first of all, I make the obvious point that this issue cropping up in 2015 obviously did not inform AMCo's position in relation to supply from Auden before that date, even if we are to focus on the 2014 period.

Secondly, if we go to page 1 of this document, you can see that Mr Clark's concern -- sorry, Mr Duncan, so if we go to the top:

"This is not of major importance to us. However, should be noted for our UK promotional activities in case, for example, we started to promote hydrocortisone and some of the use is off label in some instances (obviously we will never promote in this way but clinicians can decide to use this way)."

Then if we look then at the email just below that:

"Pharmacies are instructed -- discussed this last week. They may ignore the guidance but it is an issue we may need to think about, particularly if supply of the AMCo product dries up now that it is been acquired by Actavis."

So what you are seeing there is that the concern about it is first of all limited, because they recognise that pharmacies can choose to dispense it and, secondly, that they only think it is an issue if supply dries up from Auden.

Then the other document is at {IR-H/806/4}. This relates to the market research carried out by Focus in late 2015 and Mr Brealey referred to the bit about, if we can scroll down a bit, referred to the bit about Alliance and AAH. You see that in the middle of the page "not using skinny label products" and then relied on Mr Duncan saying this is in line with our own historical assessments. You can see that further up.

But it is important for the tribunal also to note that Mr Brown referred to independent pharmacies. We see this under number 1, the subparagraph, independent pharmacies being willing to use the product and suggests their market share is less than 30%.

Of course Jane Hill made exactly the same point about independent pharmacies, albeit suggesting a market

share of about 40% in her interview with the CMA.

So the point about "in line with our own historical assessment" is consistent with the point that AMCo understood back in 2014 that there was scope for independent entry with the skinny label product focusing on sales to independent pharmacies.

Again, for the tribunal's note, in light of the time, the Jane Hill transcript on this point was explored with Mr Beighton on {Day3/122-124:1} and this email chain was also explored with Mr Beighton and he accepted that what Focus said was consistent with Ms Hill's evidence. That is {Day3/171:1}.

The third and final point on orphan designation relates to Dr Newton and, as we have said in our written closings, the vast majority of Dr Newton's evidence concerned legal and quasi-legal issues and was therefore irrelevant.

So far as common understanding is concerned, her evidence is also largely irrelevant for the obvious reason that it is not evidence about the beliefs of the parties at the time. But there are two points related to her evidence that I want very briefly to pick up on.

The first is that Dr Newton agreed that there was no prohibition on pharmaceutical companies selling a skinny label product which was then dispensed off label,

provided they did not promote it for that purpose. She agreed that pharmaceutical companies would have understood the distinction.

Her evidence on that point is consistent with the evidence about AMCo's understanding at the time and it is worth just bringing up {IR-H/501/1}. This is the email chain which contains the thoughts of Pinsent Masons on potential competition. The tribunal may recall I took the witnesses to it in cross-examination.

Mr Brealey spent some time on it, but he didn't draw the attention of the tribunal to Mr Sully's response to Pinsent Masons, which you see at the top of the page. He says:

"Pharmacy bears the responsibility to ensure that the correct product is dispensed (which is why Auden has been writing to pharmacy, not us, to point out the fact that we do not have this indication). So long as we make sure that our product does not misrepresent itself as covering additional indications that are not on its licence (which will not happen), our medical team consider that we would be OK. The issue would be how Auden react -- I suspect we would end up in the OD dispute that we are now facing, but I do not think there is much we can do about that, unless we decide to

abandon the product market which we really do not want to do."

You can see that Mr Sully did understand the distinction between the promotion of the product for indications which it did not have, which was AMCo's responsibility, and the rules on dispensing, which was a matter for pharmacy.

Second, the tribunal is aware that one of the things that the CMA has said is that of course AMCo's understanding at the time, that I have just adverted to, was borne out by what actually happened, because of course Alissa did enter the market with its own skinny label product and it was dispensed off label and for far more than the 2% of the market that Mr Beighton kept referring to.

The appellants have responded to that by saying Alissa only got so much of a market share because its promotional flyer was misleading. The CMA does not accept that. The reasons why were explored with Dr Newton in cross-examination and are summarised at paragraph 66 of our written closings and the reference to that is {IR-L/7/32-33}. But I would just remind the tribunal of the fact that in particular the MHRA actually considered a complaint about the patient information leaflet and did not require any changes to

it. We do say against this background that Dr Newton's opinion on this point can be given no weight by the tribunal.

So it is an ex-post point that Mr Beighton was making. He was saying with the benefit of hindsight Alissa entered, but that is because its promotional leaflet was misleading. We really do not accept that. The MHRA looked at it and gave it the all clear.

Sir, what I am going to do now is turn to some of the other evidence in the case. So you have my submission that what I have shown you so far on the crossing of the line is enough. But I want to show you some of the other evidence in the case that is additional, as it were, that supports the CMA's case on the 10mg agreement.

THE PRESIDENT: That is helpful. Are you going to come across a point that was majored on by Mr O'Donoghue, which is the fact that the agreements were at least looked at by AMCo's legal advisers, and I will not quite say given the all clear, but certainly no warning was sounded at the mismatch between market price and price at which AMCo was acquiring the product?

MS DEMETRIOU: Sir, I think the short answer to that is that they were never asked to consider that point. So they were asked simply to consider the agreement on its face.

If the question is, do we allege some sort of dishonesty or conspiracy on the part of the advisers, of course we do not.

THE PRESIDENT: I know you are not alleging that. What I am really trying to gauge is the extent to which there is traction in the point that Mr O'Donoghue made with some force that AMCo had at least got the benefit of an absence of a warning from its solicitors. Why there might be no warning, there may be reasons for that, but, to be clear, one would expect the solicitors to at least have understood the oddity of the pricing.

MS DEMETRIOU: Sir, so if you will recall, I think the short answer to that, or one short answer to that, is if you recall Pinsent Masons did consider the agreement. They said, well, we do not think there is a problem with it because you are not potential competitors and that was based on what AMCo had said to them.

What AMCo had said -- they got the wrong end of the stick. We can go back to the documents if you like, but you will remember that in the note of advice, or in the email from Pinsent Masons, they talked about the orphan designation being akin to a patent and so, therefore, you are not a potential competitor to Auden.

In fact, we deal with it in our closings. So if we go to {IR-L/7/39} in our written closings from

paragraph 78. So we deal with the point here and I think it is quicker to take it from here.

The first strand of advice that was sought from Pinsent Masons is "can we challenge the orphan designation?" and they found there was not any legal basis for a challenge. There is no dispute about that.

The second strand of advice was that AMCo and Auden were not competitors, actual or potential, due to the orphan designation. Of course, that is a legal question, which, as I have said, is not challenged in this appeal. The CMA has found they were potential competitors and that is not challenged and on which the tribunal of course is well able to take its own view or would have to take its own view, if there were a challenge.

The CMA also says that the evidence discloses at least two reasons why the advice should not be given any weight. The first is Mr Sully's evidence that he told Pinsent Masons that AMCo would not be able to sell a single pack of its skinny label product. If we can go to the next page:

"If this evidence is accurate, it follows that Pinsent Masons were operating under a misapprehension about the extent of potential customer demand for skinny label products ..."

Secondly, and this is the point I was just making to you:

"The documentary record makes clear that the Pinsent Masons advice was based on a misunderstanding as to the effect of the orphan designation [being akin to an IP right]."

We say that it did not, for all the reasons we have given, prevent AMCo supplying its product on to the market.

Obviously, if they were not potential competitors, so if they were not acting at the same level of the supply chain, then you would not have a horizontal market sharing agreement. So Pinsents had reached the wrong conclusion on potential competition. So it is not a question of them somehow endorsing it. They just got the wrong end of the stick on potential competition and that led them astray.

THE PRESIDENT: Right, I accept it is clear that there is no appeal against the objective statement that Auden and AMCo were potential competitors.

MS DEMETRIOU: Yes.

THE PRESIDENT: But what I am exploring with you now is, accepting that being the case, to what extent does it matter that there was a misapprehension on the part of, let us say, AMCo as to their ability to compete. It is

going back to the bluff question. If you, in AMCo's position, recognise that your competitor to the extent that you are producing pharmaceutical products, but you are of the view that actually you have a dud product, let us say, because it is skinny label rather than full label, so you see what you can do and you are successful beyond your wildest dreams in instilling fear in someone who really is not a competitor, but who also seems to think that you are, is that enough to bring you home or not?

MS DEMETRIOU: Sir, yes, because it is, because when you -- just picking up on what you just said, someone who really is not a competitor, who seems to think that they are, of course this comes back to the potential competition analysis and you will recall it is something that I think Mr Jones might deal with in more detail. But you will recall from the cases that even, and I took you to one of the relevant parts of *Lundbeck*, so even if someone actually cannot enter, as it turns out, because they could not get their MA, they are exerting a competitive constraint if they are a potential competitor, so if there is no insurmountable barrier to entry.

The threshold for that, insurmountable barrier to entry, is very high, because you might think, standing

back, that if you cannot get an MA that might be an insurmountable barrier to entry, but all the courts have found that all the preparatory steps are capable of exerting a competitive constraint.

So if you have a position such as here, obviously we are a million miles away from not having an MA, they had an MA, they had a product at this stage, and Mr Beighton was concerned that it would not be as successful, because of the skinny label, as it might have been if he had a full label product.

So those are not insurmountable barriers to entry. They are just the risks inherent in competition.

If what you are saying we will take your supply, which is certain for us and does not have those risks because it is the full label product and we will not enter, then what you are doing is you are substituting the certainty of the supply agreement for the uncertainty of competitive entry and that is reducing the constraint of a potential competitor on Auden. So we do say that is how it should be analysed.

Just relating that to the Pinsents advice, it is neither here nor there. So Pinsents got the wrong end of the stick on potential competition. That was the advice they gave. But the question is an objective one for the tribunal. In fact, the tribunal does not even

need to be troubled by it, because, as I say, it is not a question that is appealed in these proceedings, so it is accepted, subject to the point about market definition, which Mr Holmes will deal with, that they were a potential competitor to Auden. Of course you have the point that AMCo's belief was that it would sell 10,000 products. We see that on the documents at the time. It was concerned it could not supply half the market, because of the skinny label, but it still thought it could sell 10,000 packs.

THE PRESIDENT: There are a lot of facts in play here and I am trying to work out which ones may matter, which ones do not.

MS DEMETRIOU: Yes.

THE PRESIDENT: What I think you are telling me here is that provided the objective label of potential competitor is met, it does not matter what your subjective thinking is.

MS DEMETRIOU: It does not matter, no.

THE PRESIDENT: Whether your legal advisers say that or whether you say that.

MS DEMETRIOU: That is right. That is what I am saying. I made the submission about legal irrelevance before the lunchtime adjournment by reference also to the *Sumitomo* case, which is you are reducing uncertainty. By

apparently reaching agreement, you are reducing the uncertainty for your competitor or potential competitor.

Now, turning to some of the other evidence in the case, and I am just going to deal with it thematically, so the first theme that I wish to emphasise is the consistent evidence that, in terms of its internal perception, AMCo saw the Aesica product as back up to the supply from Auden, in other words an alternative to supply from Auden. That is helpful because it shows that AMCo was proceeding on the basis that it could not do both simultaneously. It could not both take supply from Auden and enter the market itself.

Indeed, both Mr Sully and Mr Beighton accepted that they were alternatives in their evidence to the tribunal. I am not going to turn it up, but we have given the references to their evidence on that point at paragraphs 136 (c) of our written closings and the reference, so you have it on the transcript, is {IR-L/7/66}.

What we see in the contemporaneous documents and what was found by the CMA in the Decision is, first, that AMCo itself perceived the Aesica product to be back up to supply from Auden and, second, this perception was reflected in its actions. By that what I mean is that AMCo pursued the Aesica project with more urgency when

it looked like the supply from Auden might fall through. By contrast, when the supply arrangements were in place, the Aesica project was, in Dr Pattrick's words, just rumbling on.

I want to start with what some senior people at AMCo were saying at the time and take you back to {H/368/2}. You have seen this document a number of times. It is the PPRM recommendations for board approval in January 2014. Can we go to the next page, I think. Right, thank you. So see "Rationale":

"Rationale. Back-up product to ensure continuity of supply in case our existing distribution agreement with Auden McKenzie for Hydrocortisone is not renewed. Also more beneficial to be the IP owner... "

"Back-up product". So it could not be clearer in our respectful submission.

Then if we go to {IR-H/303/3}. Mr Clark to Mr Beighton in January 2014. If we look at the middle paragraph, second sentence:

"He also said that we need to get our back-up option moving, which has been a bit of a ham-fisted effort to date, and I've just asked Nicky [that is Nicky Pattrick] to chase up."

Then if we go to {IR-H/530/1}. Scroll down, please. The formatting is a bit unfortunate, but it is an email

from Mr Clark on the 25 June to Mr Beighton. So that is the date of the supply agreement. If we look at letter (b):

"The Aesica product gives us an excellent back-up for a very valuable and important project ... In the event that our new supply agreement partner defaults on supply (hence we are going to pack our 3 batches and leave it in quarantine):"

Then if we go to {IR-H/802/1} November 2015. We have if you go down:

"We have our own product MA which we source from Aesica and we have stock but we do not sell it. This is a back up in case Auden pull our supply (it is not as good a product as it does not have the orphan indication but it is a reserve)."

Then {IR-H/831/1}. These are the texts which I took Mr Beighton to in cross-examination. So if you look halfway down.

"Any restriction or deal...

"Are we selling ours or Auden McKenzie?

"Still Auden.

"Any restriction or deal agreed.

"Graeme has asked me to fast track future release.

"How do you mean?

"Thought we may have said not to release ours while

still selling Auden stock???

"Something from the past.

"That is correct. Ours has always been a back-up until now.

"It may change if Auden do not renew the agreement which seems likely and that is why we are stocking up on our own MA."

So these documents give a very clear indication, a very clear picture, contemporaneous picture, of the internal perception of the Aesica product. I would like to remind the tribunal now of what actually AMCo did, so how it treated the Aesica project.

What we see, and what was found by the CMA, is a pattern. So consistent with the Aesica product being a back-up, it rumbled along while the supply agreement was in place, but AMCo pursued it with much more urgency when the supply arrangement was at risk.

The two main stumbling blocks encountered by Aesica were the assay limit, stability issue and the packaging issue which you heard about during the course of the evidence.

What we see is that in early 2014, when the negotiations with Auden had collapsed, AMCo resolved these problems very quickly with Aesica. I just remind the tribunal of some of the key points. First, because

the evidence is consistent with the CMA's case that the Aesica product was seen by AMCo as an alternative to supply from Auden, but, secondly, because the tribunal has seen that the evidence on Aesica is a major plank of the appellants' case. They say that the Aesica product disproves a common understanding between Auden and AMCo, because they say, well, if there had been such a common understanding then AMCo would not have bothered with Aesica at all. It would not have spent the money on it, but that point is wrong.

I just want to remind the tribunal in that context of the packaging issue. The tribunal will recall this: that the MA did not cover 30 tablet bottles and Mr Middleton's witness statement blamed the whole thing on Aesica, but he then accepted when cross-examined that he shared the blame as it was obvious on the face of the MA itself.

The upshot of this is that the issue did not prove to be a major roadblock, because in 2014 AMCo simply asked Aesica to package the product in 30 tablet blisters, which were covered by the MA instead. But the way that it was handled by AMCo is consistent with the CMA's case. Perhaps we can take it from our written closings at {IR-L/7/43} paragraph 88 if we go down.

We see here we talk about the origin of the problem

and if we go to the next page, please. We have made the point there that it was not a major roadblock, but we say the delay in reaching the decision, so how it all evolved, is consistent with the CMA's case, because what we see is a picture. I am not going to read it all out, but I would ask the tribunal to revisit this paragraph. We see a picture of, first of all, Aesica flagging the issue with packaging in September 2013 and then delays on the AMCo side, delays on the AMCo side in terms of giving instructions, and we saw, if you look at (b), I put this to Mr Middleton, there is a chaser from Mr Ross at Aesica in November having heard nothing. Mr Middleton forwarded the email to Mr McEwan on the same day and asked:

"Please can you advise what direction you wish for us to take with regards to this product?"

He said:

"He would very much appreciate your providing guidance on if we are to continue with request manufacture and are we to market the Aesica product, if so what is the strategy to switch from Auden and what would be the marketing strategy be?"

So you see there that Mr Middleton does not even know whether there is a plan to launch the product. He is asking the question.

THE PRESIDENT: What exactly do we get from this?
MS DEMETRIOU: What we get from this --
THE PRESIDENT: You say it is consistent, but perhaps we should reframe that test and ask ourselves: does it support the agreement that you say was made between Auden/AMCo? In other words, there is an awful lot of things, including an awful lot of totally irrelevant things, which are consistent with that hypothesis, but really what we are interested in is material that either supports or is adverse to --
MS DEMETRIOU: I understand.
THE PRESIDENT: -- the contention that you are advancing.
MS DEMETRIOU: I understand. So I am going to make two points. One is a defensive point, which is that the appellants say, well, the Aesica product disproves the CMA's case. What I say about that is that it does not, because of the reason I have given, that when you look at what happened when the supply agreement with Auden was in place, the Aesica product was not pursued with very much urgency. In fact, you see these internal emails saying, well, are we doing something with it or are we not?

As soon as the supply from Auden is at risk, so take the beginning of 2014, you see a very urgent response from AMCo to push the Aesica product forward. So the

defensive point I make is that the appellants are wrong to say that the existence of the Aesica product is somehow inconsistent with the CMA's finding of an agreement. That is the defensive point.

The positive point I seek to make about it is that this all demonstrates that AMCo was viewing the Aesica product as an alternative. So it was not right that AMCo were chomping at the bit, gagging as Mr O'Donoghue memorably put it, gagging to enter the market at all times. They were not doing that, because what they were doing was they preferred the supply agreement until it looked like the supply agreement was at risk.

So we do say that these facts are -- they are not facts which by themselves -- I am not trying to put the case too high -- they are not facts which by themselves would prove the common understanding, but they are consistent with the CMA's case, not against the CMA's case. Those are the points I make.

THE PRESIDENT: Let me put it to you in a sort of series of examples which are, I freely accept, entirely hyperthetical.

Let us suppose that AMCo had pressed Aesica to move with massive expedition to produce the rival product. Had Aesica done so, much more efficient than the facts showed, and the product was produced, once capable of

manufacture, was produced to market right away, so no delay at all. That would be a major point which you would have to deal with as inconsistent with the contention you are advancing. Would you accept that as fair?

MS DEMETRIOU: It would depend on the facts, sir. Because the other thing that is going on here, and we see this in the contemporaneous documents, is that AMCo was aware that there would be genericisation, at some point somebody else would enter the market. We see that in a number of contemporaneous documents where they talk, especially, for example, when they talk about why we do not want to buy Auden. So do you remember that? The beginning of 2014, Mr Patel --

THE PRESIDENT: So just to be clear, even if the evidence showed, and I appreciate it does not show this, but even if the evidence showed a remorseless move to market by AMCo and the bringing on to market as quickly as possible of a rival product, that, you say, does not damage your case.

MS DEMETRIOU: It might not. It would definitely be a more difficult case for us. I am not trying to shirk that. But what we do say happened here --

THE PRESIDENT: Let me give you another example of one where I anticipate your answer will be a resounding yes.

Let us suppose that AMCo move with remorseless efficiency to market, pressing Aesica all the time, get its product and then simply do not do anything with it. They do not go to market. Is that something which one would have Mr Brealey and Mr O'Donoghue saying this is a problem for us and you would be saying this is something which really does enable us to infer the sort of agreements that you have got?

MS DEMETRIOU: Yes, and that is what we say happened. So what you have is in 2014, when the supply agreement looked like it was at risk, because you will remember Mr Auden -- Mr Patel wanted to sell Auden and there is that email where -- there is an email, I will find the reference, but there is the email which demonstrates that certainly Mr Patel was not offering this supply without any quid pro quo.

So at that point in time, he was saying the quid pro quo is you agree to buy Auden. You saw the email, the internal emails within AMCo where Mr Beighton said, well, we are not interested in buying Auden, but Mr McEwan will not tell him that because we want to get this deal over the line.

So what happened then was that the negotiations collapsed essentially at the beginning of 2014. They were then picked up again after April 2014 by

Mr Beighton. But in that period of time there was a remorseless urgent pushing forward of the Aesica product. The assay stability issues were resolved. The packaging issues were resolved. The order was put in. Yes, Ms Lifton said there was some delay then, but she agreed that it was three months' delay. The order was put in for June. It was delivered at the beginning of August. The batches were delivered at the beginning of August.

What you have is very far from AMCo saying: right, great. We have got our product. We can now enter. They did exactly the opposite. So they signed the supply agreement and suspended the product. So they pressed pause on their own product.

THE PRESIDENT: Right.

MS DEMETRIOU: They quarantined the batches.

THE PRESIDENT: Again, we do not want to get too much in the facts, because we will be dealing with that -- I know you have an awful lot to get through. But what you are saying is if we unpack the facts and correlate the pressure being put on Aesica by AMCo with regard to producing an alternative, if we correlate that with the willingness, or otherwise, of Auden to supply AMCo, one will see an increased effort when the supply is more perilous and decreased effort when the supply is

assured.

MS DEMETRIOU: Precisely so. The other piece of the jigsaw -- let me deal with that piece of the jigsaw first and, again, I do not have much time so I am not going to go through all the facts.

THE PRESIDENT: We will be looking at all this after the event. What I am trying to ascertain from you is what we ought to be looking at in order to infer the agreement that you say was made.

MS DEMETRIOU: So, sir, you exactly encapsulate one of the points we make. Let me just show you where in our written closings we deal with that. If you go to {IR-L/7/41}. If we go down to paragraph 86, we see if we look at the end of 86:

"The evidence shows that AMCo took some steps to resolve this issue [that is the stability issue] but did not do so with any degree of urgency until early 2014 (at which point the issue was quickly resolved)."

If we go over the page, we set out all of the steps that were taken there and then we see what happened was in January 14 they sprung into action, as it were.

If we go down a bit further, there are internal emails saying that the project had become a strategic priority at that stage. Mr Beighton accepted that.

Then there was the investigative work that was

carried out in February and that, as we say at (h), was carried out in parallel so there was production manufacture at risk.

What we say about that at 87 is that the assay limits issue was not a material problem. AMCo was able to resolve it when it made a concerted effort to do that.

Then we deal with packaging. So we deal with all of this in our written closings and I would just ask the tribunal to go back that.

Sir, essentially the point you put to me, which is, well, what is the positive point we draw from this, as I say, there is a defensive point and a positive point, is that one half of the equation, as it were, is that when the supply agreement was at risk AMCo pursued the product with more urgency and we say that is clear. That is all set out in the Decision and in our written closings.

The other part of the equation or the second part of the story is the suspension of the project. So on the very same day that AMCo signed the second supply agreement, it suspended the Aesica project. At that stage, and this is important, at that stage AMCo believed the product was ready to launch.

Now, the appellants say, oh, well, there were some

other problems in September and the following year, but that is not relevant to what was going on in AMCo's mind in June. In June it thought it had a saleable product I just want to show you some of the documents. If we go to {H/529/1}. This is all relating to the suspension. This is on the same day that the supply agreement with Auden was signed. So:

"Summary of agreement from today's PPRM meeting.

"Why

"New supply agreement signed with Auden.

"Will not be able to sell our own product (produced at Aesica) in the UK.

"We will advise Aesica that the project is now parked due to delays but may be restarted in the future (we do not mention the Auden agreement)."

It says:

"We will continue with the packing of the three available batches...

"We will cancel the order for the 4th batch and any other subsequent orders ..."

Then you see:

"Stock.

"The packed product will be held in store as a contingency against failure to supply from Auden."

So they are holding it in quarantine.

Then if we go to {H/539/3}, this is the email to David Ross at Aesica from Karl Belk of AMCo:

"It is with disappointment and regret that I must write to inform you that our ... project will be suspended for UK territory."

They say it is down to "unfortunate delays", but at that stage the project was nearly ready. It was delivered in August and then it says:

"If circumstances change, we may resurrect the project in future."

Then further down:

"Close off this project in a neat and mutually acceptable way. To that end, the following is proposed:

"The three validation batches should be fully completed and prepared for delivery..."

Wish to compensate you:

"Please cancel your plans for the manufacture of further batches."

Then if we go to page {H/539/2} on the same chain, we see there:

"I have heard from our project team that there is going to be no future requirements for the Hydrocortisone ... can you please confirm if this is correct?"

If you scroll up:

"Yes, I am afraid it is, I will attach the email sent to David."

Then if we go to {H/530/1}. So if we go down to:

"Hi John.

"Just been speaking with Jane, we are a little concerned that the Projects team [this is within AMCo] may be very demotivated after hearing today at PPRM that all their efforts to get Hydrocortisone ready for launch have been 'wasted' because we are now not planning to sell the product."

This has a real effect on their pay:

"All their hard work facilitated the Auden McKenzie deal, and the main commercial benefit is that we now have long-term supply secured of a product with the full range of indications. This would not have been possible without being launch-ready with our own product (or words to that effect)."

So first of all, "launch-ready", they believe they were launch ready at that stage and they were. That is what they are saying and:

"The main commercial benefit is to secure the supply agreement with Auden McKenzie."

Then we see at (b), we have seen that already:

"The Aesica product gives us an excellent back-up."

Then if we go to {H/534/1} what you see is

John Beighton responding to that by emailing the team and that is at the bottom:

"I just wanted to drop you a note to thank you for all the effort that you have put into bringing the Aesica product to a position where we are able to launch."

Obviously, if they were not able to launch, this is an email to the team that were in charge of managing it, they would have known they would not have been able to launch. He would not have said that to them if that was not their belief:

"As you know we have subsequently signed a deal with Auden McKenzie to source product from them and therefore our own product will not be launched in the UK. The rationale for this arrangement is that their product has an indication."

Again, they preferred it because it was less commercially risky and so:

"Hence selling their product removes a competitive disadvantage."

Yes, we agree:

"What I would like to stress though is that the work that you did to provide certainty of launch of our product gave those of us who were negotiating with Auden McKenzie confidence to achieve the best deal

possible for AMCo and I am sure that, at a result, Auden McKenzie felt that they should agree to our terms."

It is as clear as day.

Then if we go to {IR-H/582/1} this is 21 August 2014:

"No intention to market the batches ... No need to place any of these batches on stability."

No intention to release to the market. Can we just go down:

"In answer to your queries ...

"The batch manufactured at the end of last year is now packed but there is no intention to release it to the market due to contractual reasons."

Mr Beighton accepted in cross-examination that was due to the arrangement with Auden, due to the supply from Auden.

Then if we go to {IR-H/591/1} so top of the page:

"Batches are on hold. Batches will not get released for sale as we are not going to market our product ... as per our agreement with Auden McKenzie.

"It is a management decision."

Then {IR-H/702/1}. If you look at what is in green:

"The CRF refers to these batches never being intended for commercial use -- why, and what are they

for? Never is not quite right but about a year ago we struck a deal with Auden McKenzie to market their product rather than our own and the project was effectively stopped."

Now, Mr O'Donoghue's submission was that Mr Beighton was gagging to enter the market. It is absurd.

So we say that it is telling that the appellants have not really addressed any of these findings by the CMA. None of the Advanz witnesses -- remember their case is we are pursuing the Aesica product. That disproves the CMA's case. That is their case. None of them, none of them refer to suspension of the project in their witness statements. None of the appellants have sought properly to grapple with the issue in their submissions.

What it shows, what the suspension of the project on the very same day shows is that the appellants' reliance on pursuit of the Aesica project as somehow disproving the CMA's case is misguided. On the contrary, it is supportive of the CMA's case, because far from gagging to enter the market, AMCo stopped pursuing its own product, because it had secured supply from Aesica.

It supports the common understanding, because AMCo was doing what it said it would do. It was not entering the market with its product, which was launch ready.

Now, Mr O'Donoghue did say two things about this issue in his closing submission. So he said, first, that the reference to not releasing the Aesica product for contractual reasons is a reference to the second written supply agreement and the three months' notice clause. But of course that clause did not preclude AMCo from commercialising its own product or from selling it. It just had to give notice if it did.

This point simply does not grapple with the flaws in the manner in which the appellants have put their appeals that at all times AMCo was pressing to get its own product on the market and that this somehow disproves the CMA's case.

Mr O'Donoghue said, second, that in 2014, he said, AMCo never in fact had a commercially saleable product. Again, that point goes absolutely nowhere, because, as the tribunal has just seen from the documents, at the point when it suspended the project, they believed they did have a commercially saleable product: "launch ready" they kept on saying.

The issue that Mr O'Donoghue was referring to, a minor issue about the thickness of the foil of the packaging, cropped up later in 2014 and when push came to shove, it too was easily dealt with.

The Decision also makes the further point, which is

also consistent -- supports the CMA's case about 2015. If I can take you to {A/12/767 } this is the Decision and it relates to 2015. Because what happens is there is then some urgency again in 2015 with pursuing the Aesica product. The reason for that is that the news comes about that Auden is to be acquired by Allergan and so they are concerned that the supply agreement might not stay in place.

So what you see there is that the CMA finds that this caused concern within AMCo and it returned to the batches of its Aesica product it had received in August and considered once more whether or not it should get them ready to sell in the UK.

As the CMA says there:

"This evidence clearly demonstrates, the link between AMCo's decision on whether or not to enter the market and the 10mg agreement and AMCo's understanding that it would only launch if the 10mg agreement collapsed, if the supply dried up."

We see there a reference -- I am not going to go to the documents in view of the time, but they are summarised here. So Guy Clark emails Mr Beighton to raise a concern as to whether Actavis will continue to supply AMCo following the transaction. Therefore, enquiring whether AMCo should get ready to sell their

own product just in case.

John Beighton says he agrees:

"We may bring back our own product as we are concerned that Actavis may pull the Auden product from us."

So what you are seeing here is all consistent with the CMA's case. It is consistent with the picture of them pressing -- of them viewing the Aesica product as back up in case the supply does not work and them pursuing it, reviving it, when there is a concern that the supply might dry up.

So that is really what I want to say about Aesica. I am going to move on to Focus, because the evidence really shows the same. It is a different theme, but it shows the same sort of thing.

Again, the Focus product, looking at the appellants' submissions, they say, well -- this is something they emphasise. So they say that the Focus product was another product which demonstrated AMCo's efforts to enter the market itself. Again, they say that is something which therefore disproves the common understanding identified by the CMA.

But once again the documents establish that the purpose of the Focus project was to leverage the supply arrangement with Auden to get more volumes.

So the evidence on Focus actually supports the CMA's case and not the case of the appellants. Can we go to {IR-H/771/1}. You see Mr Beighton saying there:

"The most important job they have to do for us is negotiated with Actavis/Auden and get the highest level of monthly volume (and keep it there ongoing):"

So although in his witness statement Mr Beighton presented the Focus product as being evidence of AMCo pushing to enter the market itself, when cross-examined, he accepted that in fact he regarded the Focus product as leverage vis à vis Auden.

If we look at {Day3/165:1}, please. If we start at line 4, I took him to that email and I say at 11:

""So your view at the time was it not, Mr Beighton, that the most important job for Focus was to negotiate with Auden to get more supply, more volumes?

"Answer: At that time yes.

"Question: They would do that, would they not, by telling Auden they had a product close to launch?

"Answer: I guess so.

"Question: That is what you had in mind, is it not?"

So he accepted there that that really was the purpose of the Focus product. So, again, it is not something that can possibly help the appellants. What

it does do is support the CMA's case, because it is consistent with the common understanding that AMCo would not enter the market if Auden supplied it with the volumes it wanted. If it had sufficient supply from Auden, AMCo was not interested in assuming the commercial risk with its skinny label of entering itself and it knew full well it could not have the supply and enter as well.

The next theme I want to explore is really the tribunal will be aware that the live evidence before the tribunal in this trial has very much focused on the 2014 period and, particularly, the 2014 negotiations leading to the second supply agreement, because those were the negotiations conducted by Mr Beighton who came to give evidence.

The initial negotiations by Waymade, which resulted in the supply of 2000 packs per month at 1 pound per pack, were conducted by Mr McEwan and Mr Beighton's evidence was that it was Mr McEwan, who of course moved over to AMCo, who conducted the negotiations at the beginning of 2013 which resulted in the tripling of volume from 2,000 to 6,000 packs. That is also consistent with what the CMA has found in the Decision.

I am going to come to adverse inferences a bit later, but before we even get to any question of an

adverse inference, the appellants are in difficulty because the CMA's found in its Decision that Mr McEwan and Mr Patel had a common understanding that the value transfers were in exchange for non-entry by AMCo and the appellants have not called either Mr McEwan or Mr Patel to dispute the CMA's conclusion.

In fact, they have not adduced any evidence at all in relation to that early part of the agreement.

So the consequence, we say, is that the appeal for the appellants in respect of this period, October 2012 to spring 2014, is very difficult indeed. The appellants' argument has to be that the CMA's case, as set out in the Decision, does not stack up, that the CMA has not adduced sufficient evidence of the concurrence of wills to discharge its burden of proof. But we say that that is obviously wrong and I am going to break down why into nine propositions, if I may. That is I think going to take me through the remainder of the evidence.

My first proposition is this: the CMA has found that the very same individuals, Mr McEwan and Mr Patel, concluded an anti-competitive market sharing agreement in respect of the 20mg hydrocortisone product. The agreement was to precisely the same effect. Auden transferred substantial profits to Waymade by supplying

it with 20mg hydrocortisone at a substantial discount, 87% on that occasion, to the market price. The common understanding was that in return Waymade would not enter the market with its own product.

Now, neither Waymade nor Auden has appealed against that decision on the 20mg agreement. The CMA is not of course, just in response to something that Ms Ford put, but I think it was resolved in the end following questions from the tribunal, the CMA is not of course asking the tribunal to speculate as to why the parties have not appealed. It cannot possibly do that, but it is just not the point.

So the point is that there is an unchallenged finding that the same individuals reached precisely the same type of agreement in respect of 20mgs, as the 20mg hydrocortisone, as the CMA says they did in respect of 10mg hydrocortisone and those findings of fact in respect of 20mg have to be assumed by the tribunal to be correct, because there is now a valid Decision which has not been appealed.

We say the 20mg agreement constitutes compelling circumstantial evidence, because it is the same individuals, the same arrangements, same result, happened around the same time.

If we turn up the Decision at {A/12/711} paragraph

6.554. I just ask the tribunal to read that paragraph. (Pause).

So the reason why this is relevant, as the CMA said there, is that when the tribunal was asking itself the question, well, when Waymade approached Auden for a much better deal, so having been supplied at £34 to £35 a pack for over a year, it then had an MA and approached Auden for a much better deal, the tribunal has to reach the decision as to whether or not all of this was just unilateral or whether there was a common understanding between the two. It is obviously relevant when you are asking yourself the question, well, did they have opportunity to conclude an agreement or to decide that this would be an exchange for Waymade not entering the market, did they have that sort of relationship? How often did they meet? Was there opportunity for this? Is it likely that this would have happened? Obviously relevant, that they did do exactly the same deal in respect of the 20mg product. That is highly relevant.

I want to look at the basis on which Ms Ford said that the 20mg agreement is irrelevant. So if we go to {Day12/78:1}. She accepted in the end that the tribunal does not close its mind to the factual findings. She said what we are disputing is its relevance, so that is where she ended up.

I just want to look at what she says. So she raises a number of points and we see the first point at line 14. So she says:

"As we have been debating at length, the 10mg agreements have been formalised into written agreements and that is in contrast to the position in relation to 20mg where there has not been that process of formalisation in writing."

So the distinction appears to be the 20mg agreement was not in writing and the 10mg agreement was reduced to writing. But that is obviously a bad point, because the 10mg agreement between Mr Patel and Mr McEwan was not in writing either, because, as the tribunal will recall, no attempt at all was made to reduce it to writing until February 2014 when you have the retrospective first written supply agreement.

So there is no material distinction between the two agreements. It is Mr Patel and Mr McEwan reaching a deal in respect of 20mg and not writing it down and Mr Patel and Mr McEwan reaching a deal in respect of 10mg, not writing it down. There is just no distinction.

The second point that she makes, if we scroll down, is she says:

"Secondly [that is the top of the page] we have been

discussing the fact that the 10mg agreement provided for minimum volumes."

Then she says:

"As the tribunal has been told, the 20mg agreement involved a buy-back provision ..."

It is true that the 20mg agreement also involved a buy-back provision where you will recall that there was an arrangement whereby the goods never left Auden's warehouse and they were bought back by AMCo, but part of the arrangement was exactly the same as the 10mg agreement; namely, monthly supply of the product to Waymade for onward sale at a vast discount to the market price.

So that is not a point of distinction. There was an additional feature of the 20mg agreement, but otherwise it was the same.

Her final point is that the 10mg product had a skinny label, but that is not a material distinction either because the key point is that Auden still perceived the Waymade/AMCo product to be a competitive threat, as Mr Brealey has been at pains to explain by his reference to Project Guardian.

So they perceived it to be a competitive threat, despite the skinny label and so there was the same incentive to enter into the agreement. So that is not

a relevant material distinction at all.

So, again, we say when the tribunal was asking itself the questions it has to ask itself, so were Mr McEwan and Mr Patel acting unilaterally here, was Mr Patel simply offering a gift horse, just trying to incentivise Mr McEwan not to enter the market? Did Mr McEwan simply accept the gift horse, no questions asked? What is the likelihood of that? That is something which is going to turn on the relationship between the two individuals, the sort of thing they were likely to have discussed. In deciding what it is likely they discussed, it is obviously highly relevant that the same two individuals did not act unilaterally in respect of the 20mg product. They reached an agreement that Auden would transfer profits to Waymade in exchange for Waymade not entering the market with its own product.

So that is the first point that we make.

THE PRESIDENT: So you are going beyond asserting that a propensity in case one, or a propensity to do something in case one, can automatically be read across to say that there is a propensity in case two of the same sort?

MS DEMETRIOU: It is not so much a propensity -- one can describe it as propensity. What we say is the question for the tribunal to decide is: were Mr Patel and

Mr McEwan acting unilaterally or did they reach an agreement? Was there a common understanding? We do not have Mr McEwan here. That is something I will come on to.

THE PRESIDENT: There are a number of issues about evidence, including absence of witnesses, I agree. But here you are saying --

MS DEMETRIOU: I am going to come on to that.

THE PRESIDENT: -- in some way the 20mg agreement and the findings that the CMA made in respect of that, but not the failure to appeal, are relevant, are probative, of what occurred or what we have to find occurred in relation to the 10mg agreement.

MS DEMETRIOU: We do. We say it is highly relevant circumstantial evidence and the reason it is is because the tribunal has to ask itself, well, on the balance of probabilities, were they acting unilaterally or would there have been a common understanding about not entering the market? Of course when in relation to a very similar product they have reached unchallenged binding finding, reached an agreement that was an agreement that was not unilateral, then when the tribunal was asking itself, well, is it likely that Mr Patel and Mr McEwan would have reached an agreement about these things, the answer is, yes, because they did

exactly the same thing in relation to the 20mg agreement. So they had that sort of relationship. They had done the same thing before.

THE PRESIDENT: Yes, this is the points that I did raise with Ms Ford, which is the test for admitting this evidence, if there is such a thing.

MS DEMETRIOU: Yes.

THE PRESIDENT: And dredging up the little criminal law that I have, and it may not be liable to be read across, but I will put it to you anyway so you can tell me if it is not to be read across, is that evidence of a propensity to do something is not admissible to show that I did something in a given case, unless that evidence is strikingly similar and, in the criminal context, it is Joseph Smith and the brides in the bath, where one has got these three unhappy wives of Mr Smith who all drown in a locked bathroom where no one can work out how he did it.

The first time it happens you say that is unfortunate. The second time it happens, well, that is a little bit more than unfortunate and the third time it happens well it is a pretty swift guilty verdict, because the circumstances are so strikingly similar.

Now, are you going so far as to say that 20mg is strikingly similar to 10mg and we therefore look at it

and use it to assist us on the decision in respect of 10mg or are you saying that the test is somewhat more loose in these proceedings, being only quasi-criminal and regulatory, such that we can adopt a rather more, well, let's let it in and see what it means the kind of approach?

MS DEMETRIOU: The latter. We say you do not import the rules on criminal evidence into a civil case. So the rules do not apply. The criminal rules do not apply here. Even if they did and, again, I am now dredging up distant memories, there is a difference I think between, for example -- I am not going to get into it. I am not going to be drawn into it, because I am going to say something wrong. But I think that you would be entitled to look at evidence to ask yourself a question, is it likely these individuals would have met? Is it likely they would have had a discussion? That is not looking at propensity. So even if one were in the criminal cases --

THE PRESIDENT: Yes, I accept that. If you were simply relying on this to say, look, Mr McEwan knew Mr Patel, they had conversations, it is not in any way surprising that they did not speak on this subject matter, then that is no problem. It is inferring something which is on the scale of culpable.

MS DEMETRIOU: Sir, I think --

THE PRESIDENT: You may say competition infringements are not culpable, and that is something we will bear in mind that they are in a sense strict liability, but what I want to be clear is that if we are importing material, which you say is probative, we are doing so on a clear basis.

MS DEMETRIOU: So, sir, two responses to what you have said. The first is we say the criminal test does not apply. All of this evidence is admissible and it is for the tribunal to decide how much weight to give it. I have made my submissions on weight. The second point is that it is not just circumstantial evidence in this case, because Mr McEwan told the CMA when interviewed that he did the same thing with 10mg as he had done with 20mg. So if we look at the Decision at {A/12/721}, 6.584 and if you just would not mind reading that. (Pause).

THE PRESIDENT: Of course that presupposes that Mr McEwan is accepting that there was a provision agreed somehow, somewhere not to enter the market.

MS DEMETRIOU: He is.

THE PRESIDENT: Because I do not understand him to have said that in his evidence to the CMA.

MS DEMETRIOU: No. The CMA has found that the 20mg agreement was on the facts, as found, that the 20mg

agreement was a market exclusion agreement. That is what was agreed. So they have looked at all of the evidence. They found that. That is binding. He is saying, well, I was trying to do exactly the same thing with the 10mg agreement.

If we go to page in the same bundle {A/12/717}. I was going to call this my second proposition, but I am going to revise, as so often advocates do, the number of propositions. It is really part of the same point.

What you see is the Decision also finds, and I am not going to read out the paragraphs, but this is at the bottom of the page, 6.567 to 71, that in fact Waymade rushed through obtaining an MA for the 10mg product so it could conclude the same deal with Auden that it had concluded for the 20mg.

Then, thirdly, and this is a point you asked me about earlier, sir, of course until September 2012 Auden had been supplying Waymade with the product at market price, the 10mg product at market price. Then in September 2012 Waymade obtained its MA and immediately with effect from October the price agreement was reached between Mr Patel and Mr McEwan that the price dropped from £34-odd to £1 per pack, resulting of course in the transfer of significant profits to Waymade.

In his interview with the CMA Mr Patel confirmed that the reason why Auden charged a higher price prior to October 2012 was that Waymade did not have an MA.

If we look at {A/12/717} paragraph 6.564. So he explained that prior to October 2012 Auden could charge a higher price, because Waymade did not have an MA for the product. It did not have an alternative.

Then we see that Mr McEwan, in the next paragraph, he gave a similar explanation. So he said:

"Until the point that Waymade had a marketing authorisation for the 10mg, then I guess it was just another customer for Auden ... until you've got the marketing authorisation, you do not have the choice as to, place an order on your own contract manufacturer or source it elsewhere. In the same way, prior to Auden becoming aware of Waymade's 20mg MA, Waymade had just been another wholesaler customer to Auden McKenzie -- Waymade only secured its substantial discount once Auden became aware that Waymade was in a position where it can, in theory, bring its own product to the market."

So fourth, Mr McEwan, and if we go down to page {A/12/719}, and this is paragraph 565, Mr McEwan confirmed in interview that he used Waymade's ability to enter the market as leverage to seek the lower price.

So this has echoes of Mr Beighton's evidence:

"Once Waymade was granted the MA, Waymade looked to get a better supply price from Auden McKenzie ... I was involved in representing Waymade in these negotiations: and I was trying to get as good a price as possible for the supply which I did by getting a slightly lower price than Aesica was quoting."

So it was leveraging its MA.

Fifth, for his part, and if we go to page 723 of the same document {A/12/723}, and this is paragraph 6.590. Mr Patel explained that the supply arrangement enabled him to maintain Auden's volumes. So he said:

"That once Waymade obtained the 10mg MA, Auden faced 'the same scenario' as it had faced when negotiating the 20mg agreement".

So, again, he is drawing the same parallel himself and:

"That it responded in the same way -- by supplying Waymade at a substantial discount in order to maintain its manufacturing volumes. Mr Patel stated in relation to the 20mg Agreement: 'they [Waymade] had their own product, they had a choice whether they wanted to supply', and went on to say in relation to 10mg agreement:

"It was a very, a very similar situation where they had said, 'look we have got a product and we would like

to take supply from you'. So again, in the same scenario as long as we, we gave them supply, which would again maintain our volumes ... that was acceptable."

So you have to ask yourself again, what is meant by maintaining volumes? It can only mean that Waymade does not enter the market, because if it did enter the market, it would not maintain its volumes.

So the leverage is the ability to enter the market and take volumes away from Auden.

The understanding was that if Auden dropped the price so significantly then Waymade would not enter with its own product. That was the quid pro quo.

Sixthly, we have contemporaneous documentary evidence showing that Mr McEwan did in fact use the threat of AMCo's entry as leverage during his negotiations with Mr Patel. I am not going to turn it up again because you have seen it already today but it is the document at {IR-H/300/1} where Mr Clark is saying to Mr McEwan: you should still be arguing 100% of the market as our negotiating position.

We say, well this shows that it was known within AMCo that this was how Mr McEwan was negotiating. He was threatening to enter the market if Auden did not supply it with the volumes he wanted.

Seventhly, we have Mr Beighton's evidence that this

was also how he negotiated with Mr Patel.

Eighthly, we have all the further evidence in the case I have sought to highlight as to how AMCo saw its own Aesica product as backup to supply and how it adopted precisely the same approach in relation to the Focus product. In light of all this evidence we say that the CMA has clearly made out its case in relation to the inception of the agreement and its continuation first under Mr McEwan and then under Mr Beighton.

Now, ninthly, I do want to talk about witness absences in this case because had the appellants called Mr McEwan and Mr Patel, then the CMA would have put its case to them in exactly the same way as it did to Mr Beighton and so, for example, we would have been able to put Mr Clark's email to Mr McEwan which said: you should still be negotiating using 100% of the market, and in all likelihood, just as Mr Beighton did, Mr McEwan would have told the tribunal, as he did to the CMA in interview, that the threat of entering the market was indeed the leverage he used during the negotiations with Mr Patel, and for his part Mr Patel would have undoubtedly, because there is no other explanation, confirmed that he would have only been able to maintain his volumes by virtue of the supply agreement if AMCo had not entered the market with its own product because

otherwise his volumes would have reduced and that his understanding was that it would not do so.

But the appellants have not called these key individuals. Now, again, I am leaving aside, I am going to come back to it, but I am leaving aside the question of adverse inferences for the moment and I simply make the point that this is problematic for the appellants' appeals because, as I have shown you, there is a lot of evidence supporting the 10mg agreement and the appellants have not called the very two individuals who entered into the agreement. They have not called them to give evidence.

At the same time the evidence establishes that the agreement was not recorded in writing when it was reached in 2012 by Mr McEwan and Mr Patel because it is common ground that Mr Sully's efforts which led to the first written agreement were wholly retrospective.

Secondly, it is clear that the negotiations between Mr McEwan and Mr Patel took place verbally and informally and there are no written records of those meetings.

If the appellants wish properly to challenge the findings of fact made by the CMA on the basis of inference but on the basis of hard evidence, then they ought to have called the witnesses who could speak to

the facts and the fact that they have not done so severely limits the plausibility of their challenge.

I just want to pick up the *Paroxetine* judgment of the tribunal. Can I do that and then perhaps we could take the break.

THE PRESIDENT: Of course.

MS DEMETRIOU: If we go to {M/144/30}. Paragraphs 70 to 71. The tribunal found there that:

"Apart from GSK, none of the other appellants put forward any factual witness evidence. We find it unfortunate that there was no direct evidence before the tribunal from any individual in any of those companies involved in either the negotiation of the relevant agreement or the selling of the generic *Paroxetine* which resulted, particularly when a relevant witness could be readily identified on the basis of the contemporaneous documents and statements given to the OFT/CMA in the course of the investigation. Mr Kon appearing for GUK urged that there was no particular need to call such witnesses, and in particular Mr Mike Urwin, who it is accepted was the key decision maker in the GSK-GUK litigation and as regards the GUK agreement, since they had given sworn witness statements to the CMA in the course of its investigation, accompanied by a statement of truth, had been interviewed by the CMA, he submitted

that such statements and interviews should therefore be given equal weight to evidence given in this appeal.

"We do not accept that submission. The prior witness statements and interview transcripts are of course admissible but they are not testimony before the tribunal and that evidence cannot be tested by cross-examination on behalf of the CMA or indeed explored by questions from the tribunal. Nor is it simply a question of the honesty of a witness: evidence can be unreliable through poor recollection or because a witness has genuinely persuaded himself of what happened many years before, without any element of recklessness. The offence to which Mr Kon referred only applies if a person either knows or is reckless as to whether the information supplied to the CMA is false or misleading."

You have heard similar submissions being advanced at least by Mr O'Donoghue: oh well, look, Mr McEwan was interviewed by the CMA and provided a witness statement, so that is enough, or the CMA should have called him. That is obviously wrong. Mr McEwan was a witness hostile to the CMA. He is a witness that should have been called by Advanz in this case and we adopt the findings of the tribunal in *Paroxetine* but they apply with greater force in the present case.

The reason why they apply with greater force in the present case is because in the *Paroxetine* case the terms of the agreement were set out in black and white in writing so there was no dispute about what was agreed between the parties. The question was how that is to be characterised in law, whether it is an infringement.

In the present case the appellants are seeking to challenge the factual findings made by the CMA without calling the people that entered into the agreement. We say that is beyond unfortunate. That is tactical. It is tactical. What the tribunal should, we say, avoid doing is giving the appellants any benefit of the doubt in circumstances where these witnesses were available and could have been called.

I am going to say more about this after the break but would now be a convenient moment to stop.

THE PRESIDENT: Yes, of course, Ms Demetriou. We will rise until a quarter to and we will give some thought over those ten minutes to how we can stretch time in the remaining days that we have.

MS DEMETRIOU: Sir, can I just ask one question about that. I am looking at the time today and I was hoping to finish by now so Mr Jones -- he has about an hour to do on object infringement. I think I am not going to -- I am not sure how long I am going to be. I hope to

finish by 4.30. But I just wonder if the tribunal could give some thought to how we might -- I think Mr Holmes was rather counting on a clean start tomorrow and it may be he has to slightly revisit his expectations, but I would be grateful if the tribunal ...

THE PRESIDENT: We will certainly give some thought to stretching times. There are certain difficulties about stretching it in certain places.

MS DEMETRIOU: Of course.

THE PRESIDENT: I fear that we need to rise ideally at 4.25 today. I have something in the Rolls Building that requires my attendance but we will give thought to what time we can find.

MS DEMETRIOU: Thank you.

THE PRESIDENT: Right, ten minutes.

(3.38 pm)

(A short break)

(3.48 pm)

THE PRESIDENT: Ms Demetriou, if it is convenient to the parties, we will get you an extra hour by starting at 9 o'clock tomorrow morning. Does that discombobulate anyone excessively?

MS DEMETRIOU: Can I just check with Mr Jones. No, that would be extremely helpful. Thank you very much.

THE PRESIDENT: Very good and we will --

MS DEMETRIOU: We are very grateful.

THE PRESIDENT: We are very keen, as I have said, to hear from everybody to a full and appropriate extent. We will also cut into the short adjournments tomorrow and Thursday.

MS DEMETRIOU: We are extremely grateful. We for our part will do our best to make as much progress as possible.

THE PRESIDENT: I am grateful.

MS DEMETRIOU: With that I am going to turn to adverse inferences, which is my tenth proposition on the evidence. Then I have got duration and then I am finished. I am hopeful I can do that by 4.25.

THE PRESIDENT: Thank you.

MS DEMETRIOU: So we do go further than I have said so far and we do say that the tribunal should draw adverse inferences from the absence of Mr McEwan and Mr Patel and indeed Mr Wilson, who I will return to when addressing Ms Ford's submission on the duration of the agreement.

The applicable test is common ground I think. We set it out in our opening submissions and in our written closing. If we take it from our written closing {IR-L/7/14}. This sets out the relevant paragraph of the *Efobi* case, which I think Ms Ford, but one of the appellants took you to it anyway. So that is common

ground. It is really a question for the tribunal in light of all relevant considerations.

If we go down to paragraph 36 of our written closings, I want to take these points in turn, because we say these are the considerations which all firmly indicate the tribunal should draw the adverse inferences identified by the CMA.

So we say, first of all, neither Advanz nor Auden/Actavis have stated that Mr McEwan or Patel are unavailable to give evidence.

Just as the tribunal said in *Paroxetine*, neither Advanz nor its solicitors nor Auden or its solicitors have suggested that they have been unable to contact the relevant individuals or they have been unwilling to testify. That is what the tribunal said in *Paroxetine* and the same applies here.

Secondly, we say Mr McEwan and Mr Patel and Mr Wilson "would plainly have been able to give (highly) relevant direct evidence".

As regards Mr McEwan and Mr Patel, they would have been able to give highly relevant direct evidence on the basis on which they agreed that Auden would supply AMCo with 10mg hydrocortisone at 97% discount to the market price. They were the very individuals who concluded that agreement and who supervised the operation of the

agreement for a significant period of time.

Moving down to the next point. We say that, third, they would have also -- and I am picking up on the relevant considerations in that passage of the Supreme Court -- they would have been able to speak to a wide range of other evidence in the case which bears on the existence of the 10mg agreement.

We explain what that is. That includes the 20mg agreement, which they both concluded. The fact that prior to October 2012 Auden was supplying Waymade with the 10mg product at the prevailing market price and then it dropped and then contemporaneous documents, if we can please scroll down, contemporaneous documents relating to the negotiations between Mr McEwan and Mr Patel, such as the email from Mr Clark to Mr McEwan that I took you to, that I cross-examined Mr Beighton on.

Can we carry on, please. Thank you. Then they could also speak to what they meant when they gave their own evidence when interviewed by the CMA and you will appreciate that as I have taken you to the excerpt from his interview set out in the Decision, Mr Patel's evidence, which is also relied on by Auden and Actavis is that the reason that Auden supplied AMCo at such a significant discount was to maintain our volumes and so we would have been able to put to him, well, that

must mean on the basis that AMCo did not enter.

Fourth, the point on which Messrs McEwan and Patel would have been able to provide evidence is of central importance in the case. Indeed, it is the critical issue on this part of the case. So did they have an understanding that in exchange for the substantial discount for the value transfers AMCo would not enter the market?

Fifth, evidence from them would have been all the more important in this case, given that there was no leniency applicant and so no admission of the infringement, that the common understanding was not recorded in writing and, thirdly, that there were plainly many conversations between Mr Patel and Mr McEwan which took place without being recorded, without any written record being produced.

Sixth:

"The effective enforcement of competition law by the regulator would be impeded if it were possible for addressees of a CMA Decision to seek to appeal against the central finding of fact made by the CMA, without putting forward the key factual witnesses able to speak to those facts who could accordingly be cross-examined and without any adverse consequences attaching to such failure."

I cannot remember now whether there is a seventh, so if we could scroll down that would be great. No, that was it.

Mr Brealey gave five reasons why he said that adverse inferences should not be drawn and I want to pick those up. They are at {Day14/15:1}. You see there in the middle of the page I have listed five. Those are five reasons why there should not be an adverse inference. His first is that Mr McEwan was under the supervision of Mr Beighton and they say we have called Mr Beighton and that is sufficient.

But this submission ignores the fact that the agreement was concluded in 2012 before Mr Beighton was involved and it is also belied by Mr Beighton's own evidence to the tribunal, which was that he made no enquiries of Mr McEwan about the basis on which the deal with Auden had been done.

The tribunal may recall that Mr Beighton first said on this point that he thought the arrangement was very odd, but he did not give any real thought to why Auden might have been willing to do it.

Just for your note, I am not going to turn it up in view of the time, it is {Day2/172:9-15}.

But, sir, the following day you asked Mr Beighton why he did not make enquiries of Mr McEwan at the time

and, in response, you may recall that Mr Beighton said that he had remembered overnight that he did discuss this with Mr Sully when AMCo acquired Waymade and he asked Mr Sully to make enquiries, including of Mr McEwan. Again, do not turn it up, but that is at {Day 3/43:4}.

We have addressed this at paragraph 52 of our written closings, which is at {IR-L/7/4}. The difficulty is that Mr Sully made no reference to any such discussions in his evidence. In fact, he said he had not even discovered -- he did not even know about the supply arrangement until summer 2013 and he actually denied knowing who negotiated the arrangement in the first place. When pressed, Mr Beighton said he did not recall these discussions with Mr Sully at all.

So we say that the idea that Mr Beighton or Mr Sully could therefore stand in the place of Mr McEwan is simply wrong and it does not take Advanz anywhere.

Mr Brealey's second point is that Mr McEwan left employment of AMCo in early 2014. It is interesting to see what he says. He says there may be a host of reasons why he is not being called, but he was very careful not to say that there are in fact good reasons why Advanz cannot call him and if you want to avoid an adverse inference, there does need to be a good reason

that you explain why the witness is not available. He is certainly not saying there that Advanz's solicitors, who represented Mr McEwan in the proceedings before the CMA, contacted him and tried to call him, but he was not available to them.

The third point that is made, if we can go down, please, is at line 14. The third reason that Mr Brealey puts forward is that the CMA has interviewed Mr McEwan, but that is not a good reason either, just as it was not a good reason for the tribunal in *Paroxetine*. Because Mr McEwan's was Advanz's witness to call, not the CMA's. He would have been a hostile witness for the CMA which would then have had to have examined him in chief, which would have been a hopeless endeavour.

Again, I am not going to turn it up, but I would just ask the tribunal on this point. We have put in the Court of Appeal judgment in *QX*.

That is at {M/195/31} and at paragraph 136 of that judgment, the Court of Appeal says that although there is no property in a witness, it is generally not the course that a party will take, because if a witness is hostile they would have to examine them in-chief and so, generally, what parties seek to do is say that failure by the other side to call a witness is detrimental to their case. That is indeed the position we take in the

present case.

The fourth reason given by Mr Brealey, if we go down, please, if we scroll down, is that he produced a witness statement. So we see that at lines 6 and 7. That is really the same as Mr Brealey's third point. The witness statement was not a witness statement for these proceedings. It was simply a summary of the evidence he had given in his first interview, in fact before the second interview had taken place. So it was just a summary of his interview evidence.

The fifth reason Mr Brealey says it is not the tribunal's practice to draw adverse inferences, but there is no practice of the tribunal either way, so far as we are aware. The tribunal will presumably exercise its judgment in the manner envisaged by the Supreme Court and if there are good reasons, in all the circumstances, to draw an adverse inference it will do so. We say that the reasons in the present case are compelling. Indeed, we say if not this case then which?

Because Mr McEwan's evidence would have been of central importance and in the absence of any other explanation, we say that the tribunal should draw the inference that Advanz did not call him, because his evidence would have been unhelpful to them.

For these reasons, for all of these reasons, the

reasons that I have elaborated, we say that the appeals against the existence of the 10mg agreement must fail.

I was going to go on to look at duration, which I think I can deal with before 4.25.

There are two arguments on duration of the 10mg agreement, advanced principally by Auden. The first is that the 10mg agreement came to an end when Actavis acquired Auden, because Mr Patel was no longer involved and, therefore, the common understanding came to an end.

The second is that the 10mg agreement came to an end when AMCo did eventually enter the market independently in May 2016. You will recall Ms Ford making submissions on both of those points.

Now, as the tribunal will apprehend, not much turns on the second argument, because, in any event, the CMA found the agreement came to an end in June 2016. So there is only really a month's difference. I do not propose to address it in any detail orally.

The short point in response is when AMCo entered in May 2016, it did not tell Auden, let alone give it three months' notice. So AMCo's conduct in that month was therefore essentially akin to cheating on a cartel and it is of course no defence to an allegation of infringement that you cheat on the agreement. We say that the same is true here.

For the tribunal's note, the relevant case law and reference to the Decision is cited at footnote 156 of the CMA's Defence, which is at {A/6/50}. I am going to focus on Auden's first argument about the Actavis period. That is Auden's ground 6. Miss Ford's submission in a nutshell was that the acquisition by Actavis created a firebreak. She made two points.

She said first the fact that Actavis continued to fulfil AMCo's orders, so continued to supply the product at the same price, was not sufficient for the CMA to find that the agreement was ongoing. Rather, the CMA, she said, must find an individual actor, find that an actor at Actavis, shared the same common understanding as had previously been shared between at least Mr Patel and Mr Beighton and Mr McEwan.

Secondly, she said that there was no evidence of a common understanding involving Actavis personnel and the latter was the point about the evidence of Mr Wilson, in particular, and how his interview transcript should be interpreted. I am going to take those points in reverse order, if I may, because if the tribunal finds that human actors at Actavis, and Mr Wilson, had the same subjective understanding as Mr Patel, then it is not necessary to consider whether there is some other basis on which to find that the 10mg

agreement continued. So that is why I am taking that evidential point first.

The starting point in this period is the same as it was in the earlier period. So Actavis knew that it was supplying AMCo at a 90% discount to market price and it knew it had the right to terminate the written supply agreements, yet it did not do so.

The tribunal, we say, can therefore infer, particularly in the absence of any witness from Actavis to attest to the contrary, that it understood that the premise for the deal was that AMCo would not enter the market independently.

Now, again, I say had Auden/Actavis put up witnesses to speak to this period, had they called Mr Wilson, the CMA would have had this point -- would have put this point directly to them. But the CMA cannot be criticised for inviting the tribunal to infer subjective understanding on the part of Actavis in circumstances where the tribunal has not heard from any of the individuals who are in fact involved.

As I say, that point applies particularly acutely in relation to Mr Wilson where Auden raises a specific issue about his evidence to the CMA in interview and where no reasons have been put forward why he could not have been called to give evidence.

Now, Ms Ford took you to the evidence that Mr Wilson gave in interview and I want to briefly revisit it. So if we go to {H/1194/16}. If we go to the bottom of that page, please. So we see Mr Wilson say at the bottom of the page:

"We were aware of the supply arrangements ... There was a forecast of orders from the customer, AMCo, for 12,000, at a price, which was ... £1.78 ... various terms ... There was a notice period, so I was aware of the sort of main terms."

So the first point is that he understood the terms of the supply agreement at the time and that ties to the point I have already made about Actavis necessarily understanding that this was a bad deal on its face. They were supplying AMCo at this very, very low price, unlike all of its other customers, and it was foregoing profits. He must have understood that. We say it is to be inferred he must have understood there was some countervailing consideration by AMCo.

Then if we look further down that page at line 20:

"Well, as I have said, we inherited that agreement, so I am not the best person to ask for where the terms of that agreement come from. That was done prior to Auden. In terms of supply, as I sort of mentioned ... we saw it as a business-to-business relationship, where

AMCo's alternative was ... what plans AMCo had -- AMCo's alternative was using their MA and getting it contract manufactured elsewhere. So, it is a different sort of ... market in that sense, than supplying to wholesalers, who do not have the ability of an MA to go and source that product themselves. That is sort of how it was understood by myself at the time."

So the second point is that Mr Wilson understood at the time that AMCo's alternative was using its MA and getting it contract manufactured elsewhere, i.e. by Aesica, for example, bringing its own product on the market. He said that is how he understood it at the time.

Then if we go to page 26, line 16 {H/1194/26}, we see the question: I am pushing on this because it looks like "a very beneficial deal for AMCo":

"I am just trying to understand the rationale".

If we go over the page, we see that he says there:

"We would have assumed that [they] had an alternative supply ... they are weighing up the two."

So he would have known that at the time he says.

So he would have known at that time.

If we scan down the page, again, we see the same theme:

"Would AMCo continue -- or does AMCo continue

sourcing or does it go and get products elsewhere?"

If we go over the page:

"We are competing for that 12,000 for that customer against another source, their own source ...

"The other source being the CMO.

"Yes."

If we just keep going down:

"That is the market that we are competing on."

If we go down a bit more:

"Come back to the CMO question."

Sorry, that is the end of the page. I think that is probably enough.

So what we are saying is that this confirms the same point that at the time Mr Wilson understood, Actavis understood, that AMCo was weighing up two alternative sources of supply: Actavis supplying it or AMCo's actual CMO supplying it.

The CMA says that it is clear from this that Mr Wilson's understanding at the time was therefore essentially the same as the understanding advanced by Auden in this appeal, the CMO justification, and for the reasons I have already given, that boils down to an understanding that this supply was in return for AMCo not entering the market. So what he is saying is, we are supplying instead of AMCo coming on the market with

its own product from its own CMO.

So the CMA says -- the CMA has found that essentially his understanding is the same as his predecessors. So he is not responsible for concluding the agreement, but his understanding is this is instead of AMCo entering the market by itself.

Ms Ford says that Mr Wilson's evidence is open to interpretation and she says that the tribunal should be very slow to find any dishonesty on the part of any individual who has not appeared before you.

Again, I reiterate we are not asking you to find dishonesty. That is not part of the CMA's case. The tribunal does not need to find dishonesty on the part of Mr Wilson in order to agree with the findings made by the CMA in its Decision on this interview evidence. It simply requires a finding that Mr Wilson's understanding, based on his honest answers in interview, was that he understood that supply from Auden was an alternative to AMCo entering the market independently, that if Auden carried on supplying it, AMCo would not enter the market with its own product.

In any event, we say any doubt in the tribunal's mind about the correct interpretation of this evidence must be resolved in favour of the CMA, because the CMA gave notice of its interpretation of Mr Wilson's

evidence in the decision. That is Decision paragraph 6.762, which for your note is {A/12/769}, and Auden/Actavis now disputes the CMA's interpretation of Mr Wilson's evidence.

Mr Wilson is still employed by the appellants so far as we understand. As we understand it, he is the vice president for West Europe for Accord, the name for which used to be Actavis. So he is still a senior employee and yet the appellants have chosen not to adduce evidence from him, chosen not to have him give evidence before the tribunal about how his interview evidence should be understood and have chosen not to subject him to cross-examination from the CMA.

We say that is a tactical decision that the appellants have made. Had Mr Wilson been called, the CMA would have been able to put its case fully to him. What we say cannot be right is that the appellants take that tactical decision and then challenge the CMA's findings of fact, the inferences it draws, without calling Mr Wilson to speak to what he meant in interview, when really the basis for their appeal is, we do not think that is exactly what he meant in interview.

So we do say that more than simply resolving the dispute as to interpretation in the CMA's favour, the test for an adverse inference that Mr Wilson understood

that he was supplying 10mg hydrocortisone tablets at this very substantial discount in return for AMCo foregoing market entry, is readily satisfied. No reasons have been given why he could not give evidence. It must be assumed that he could have done. His evidence would go to precisely the point that the appellants seek to challenge; namely, the subjective understanding of individuals at Actavis at that time, specifically his own understanding. There is no other direct evidence of his subjective understanding save for the interview transcript, which the appellants say is open to interpretation.

Now, for completeness on the question of other relevant evidence, there is contemporaneous evidence which supports the CMA's case on the understanding of Actavis. I do not have time to go to all of it, but there are three documents that I want to pick out.

So one of them is at {H/790/1}. The tribunal may recall that Mr Bailey showed these slides to Mr Stewart. They were from October 2015, so shortly after the transfer of the Auden business to Actavis.

If we go to slide 39, {H/790/39} we see there "Key Assumptions" and the assumptions indicate that AMCo, Almus and Actavis are all supplying the Actavis product, but there is an expectation of competition

from November 2015. It seems pretty clear from the bullets that that expectation was competition from Alissa.

There is "rumoured competitors", Bristol and Dr Reddy's, but no reference to AMCo coming on the market with its own product.

If we go to slide 40, "Hydrocortisone backup". Again, the tribunal may recall that AMCo is not identified here as a competitor. We see the understanding that AMCo is getting a 97.9% discount off the market price at this stage. You see that in the fifth row down or so and the forecast is that this will continue until the end of 2016.

Then if we go to {H/809/1} these are minutes from an Actavis generics commercial meeting on 13 January 2016. If we go to page 5 {H/809/5} and the bottom row of the table, "Hydrocortisone Tablets" and what we see is under "Noted":

"Bristol have an MA.

"Alissa and Bristol ...

"AMCo in the market as well (our product)."

Then "Decided:

"Can pull AMCo supply now there are more players in the market."

So they understood the reason that they were

offering this supply was to prevent independent competition. Now that there is independent competition anyway, they can pull the deal with AMCo. That is what that is saying.

As set out in the Decision at paragraph 6.779, that is {A/12/774}, the CMA's position is that this document is further clear evidence that Actavis understood that its supply to AMCo was in place of independent entry by AMCo. There was no point in continuing the deal now that other players had entered the market anyway and the CMA's interpretation of this document has not been challenged by Auden/Actavis.

Now, those documents are both internal Actavis documents, but I just want to remind the tribunal of one AMCo document at {H/720/1}. This is an email from Mr Beighton and they are saying if you see the middle:

"Will Actavis be as smart at pursuing this as Amit was?

"According to the Amit Actavis will continue his strategy."

We do not of course have Mr Patel here to ask him who he had spoken to at Actavis, but we say this report from Mr Patel is wholly consistent with Mr Wilson's evidence and the internal Actavis documents which we have just seen. All of them show that Actavis had the

same understanding as Auden had. AMCo was taking supply from Auden at 97.9% discount, instead of entering the market independently.

Standing back, the European Courts and the tribunal have spent years, we say, making this area of the law, competition law, enforceable by public authorities and the courts have recognised that documentary evidence may be sparse or non-existent even and that competition authorities can draw inferences from the material they have got. What we have here is a situation in this case where everything the appellants are saying, or a lot of what the appellants are saying, is designed to render these rules unenforceable by the public authorities, because they have approached these appeals in a wholly tactical way. They are taking potshots at the findings of the CMA and the evidence and not calling, not exposing to cross-examination, the key individuals who would be able to give evidence on what happened in circumstances where none of those individuals recorded their various discussions with competitors.

We say if that were a permissible approach the regulator's hands would be severely tied.

My final point is that the 10mg agreement continued in any event. If the tribunal is with the CMA on the evidence or the adverse inference it is not necessary to

consider this question of whether the 10mg agreement continued after the acquisition by Actavis even without any subjective understanding on the part of Actavis employees.

But for completeness, the CMA does say that the tribunal could make that finding in any event and the reason is essentially that which, sir, the tribunal canvassed with Ms Ford in the course of her submissions. So the 10mg agreement was concluded before the acquisition by Actavis. There was at various times, including in June 2014, a common understanding sufficient to give rise to an agreement. That agreement once formed then continued in existence until such time as something was done to bring it to an end. In this case until Auden ceased the supply.

It is not necessary to show that there was a common understanding each and every day. What you are looking for is a common understanding to give rise to the agreement in the first place.

We say that that is obvious from the fact that had the agreement been recorded in writing, there would be no debate about whether it continued after the acquisition of Actavis. The agreement would have been formed at the point that it was recorded in writing and it would surely have been common ground that it

continued in force including after it was inherited by Actavis until such time as it was brought to an end by one side or both.

The upshot of Auden's submission is that because the common understanding in this case was not recorded in writing it can somehow sidestep the liability and if that were correct we say it would create a perverse incentive for people not to write things down, and the reason of course that people should write things down, as the competition lawyers and courts and regulators say, is because not writing things down is often a hallmark of anti-competitive conduct.

We say that an analogy in a sense can be drawn with -- take my, going back to a price fixing cartel. Let us say you have an agreement to sell products at £10 each and then company A, that is party to this agreement, is taken over by company B and company B does not know there has been a cartel but carries on charging the product at £10 each. The infringement is persisting even if there is not a fresh common understanding or fresh signing up to the cartel by anybody in the company that has taken over the cartelist.

So that is the point we make on that. Now, just for completeness, the tribunal will be aware that Cinven and Advanz also raised some arguments in their notice of

appeal about duration and some of those arguments are essentially definitional so they say that liability should be determined by when the company, which they define as AMCo, came into existence. Really the reason I say it is definitional because they are alighting on the corporate form of AMCo which they say came into existence in March 2013 and the CMA's Decision is that the AMCo undertaking came into being in October 2012.

Cinven has confirmed that it does not pursue that point and we see that in footnote 291 of Mr O'Donoghue's closing submissions. It is unclear whether Mr Brealey pursues the point but if he does, it is a bad point because all the CMA is doing is attributing liability to the AMCo entity as defined in the Decision at the point when Waymade was sold.

Now, their other arguments about duration rest on the ebb and flow of the Aesica project, so broadly speaking they say there could not have been a common understanding during the periods in which AMCo pushed forward urgently with the Aesica project. I have already addressed that as part of my submissions more broadly on the common understanding, and we say that the evidence supports the common understanding even when they were pushing ahead with the agreement. So that is really my answer to that point.

I think that does take me to the end of my submissions unless the tribunal has any particular questions.

THE PRESIDENT: Unfortunately I do. Just one, but I will try and keep it short.

Can we open the Decision at {A/12/11} and move down so we can see the whole of paragraph 1.11. Now, I appreciate this is from the summary but nevertheless summaries are supposed to be an accurate statement of what has been decided. So we have in 1.11 a description of these agreements as "market exclusion agreements".

MS DEMETRIOU: Yes.

THE PRESIDENT: So you are putting it quite high there. Then in 1.11(b) we have the articulation of the agreement that has been found between Auden and AMCo.

MS DEMETRIOU: Yes.

THE PRESIDENT: "... a payment of 21 million in return of which AMCo agreed to stay out of the market with its own 10mg hydrocortisone tablets ... from 31 October 2012 to 24 June 2016."

Now, my understanding from your submissions today is that is not actually the agreement that the CMA has found.

MS DEMETRIOU: There are two ways of reading this paragraph: the way you have just read it and the way in

which the CMA intended it to be read which is that is a description of the duration of the agreement. So the agreement lasted in fact, that is the duration of the infringement.

THE PRESIDENT: Yes, but --

MS DEMETRIOU: They are not saying that in advance there was agreement that until 24 June 2016 they would stay out of the market. That has never been the CMA's case.

THE PRESIDENT: No, but the reason I raise it is because it does raise questions about duration and things like that.

MS DEMETRIOU: Yes.

THE PRESIDENT: I will try and unpack this. Let us suppose we have got an agreement between Mr Patel and Mr Beighton that we will stay out but no duration. What happens when one has got someone simply stepping into the shoes of, let us say, Mr Beighton, and controlling the operation of AMCo, let us suppose they understand that they are receiving bargain basement prices but they are not making any agreement with anybody, are they?

MS DEMETRIOU: We say that in a sense -- I mean I have just addressed it from the perspective of Auden in response to the analogous in response to Ms Ford's appeal. So we say two things. We say that if there is evidence the first thing the tribunal asks itself is: if there is

evidence that -- so first of all, if it is the same undertaking, then the undertaking is fixed with the common understanding. Ms Ford's point is a different point. She says, well, Actavis took over. At that point Mr Patel who was the protagonist in terms of the agreement had left and nobody at Actavis knew, had this common understanding, and the CMA says two things. We say well they did look at what Mr Wilson said. They did understand how it all operated. But, in any event, we say, well, the agreement was just continuing to be applied and that is enough.

THE PRESIDENT: But that begs, I think, the question of what is the agreement?

MS DEMETRIOU: Yes.

THE PRESIDENT: You see, as formulated in 1.11(b) it makes perfect sense. Indeed, you could frame it that we will just stay out until circumstances, namely other entrants make it impossible to maintain the market position. But the idea that one agrees to stay out from day-to-day implies a kind of revisiting of the decision from day-to-day.

MS DEMETRIOU: Sir, no. So I think, with respect, no. We say that the understanding was that supply from Auden will be instead of market entry independently.

THE PRESIDENT: Yes.

MS DEMETRIOU: So the understanding was so long as the supply continued they would not enter the market. That was the understanding. But we do not have to find that they reached an express agreement on duration. That is not what this is saying. This is in the summary. The actual finding in relation to the agreement is at paragraph 6.17 which is at page {A/12/559}. So let us just look at that.

So between those dates they shared a common understanding that "Auden/Actavis would supply first Waymade and then AMCo with 10mg tablets on terms that amounted to monthly payments (or value transfer) to them ..."

And over the page, please:

"In exchange for these payments, each of Waymade and AMCo would not enter the market independently with its own 10mg hydrocortisone tablets."

So that is what was understood.

THE PRESIDENT: Is there any need for there to be any kind of appreciation by persons later on in the AMCo history that they are aware that there is a countervailing promise for the largess being bestowed on the company by virtue of the lower prices?

MS DEMETRIOU: We say two things. We say first of all -- because this point is raised by Ms Ford in relation to

Actavis. So we say first of all there was an appreciation in fact by Mr Wilson and by the people at Actavis that the quid pro quo was that supply was at this very low price and that in return AMCo would not enter, that supply was instead of entry. We saw that from those contemporaneous documents I took you to.

But we say, in any event, there does not need to be that understanding because the agreement has been concluded and it is trundling on. So until someone brings it to an end every one is operating on the basis that we are getting this supply and AMCo is not entering while the supply is happening. So a bit like, as I say, a sort of price fixing cartel where one of the cartelists has taken over and they carry on doing exactly what the cartelists have agreed so in fact they are selling at £10 an item but they have not been privy to the cartel arrangements but the cartel arrangements are still being implemented, so the second company is fixed with the infringement.

As I say, the primary way in which we respond to Ms Ford's appeal on duration is to say that there was an appreciation within Actavis that supply on these preferential terms, the value transfer were in return for AMCo not entering. That they appreciated that the supply was a substitute for market entry. They are

alternatives and that is what they were doing.

THE PRESIDENT: Okay. You have in your submissions articulated that we have got to think about what Auden on the one side and AMCo on the other were thinking, including thinking in an objective sense and you have made very clear that as far as AMCo is concerned, you do not see this as a dishonesty case. Is that also true, so far as Auden is concerned?

MS DEMETRIOU: Absolutely. So there has been no finding of dishonesty by the CMA and in this appeal we are not alleging any dishonesty.

What we are saying, sir, standing back is that this is a very odd arrangement because obviously on its face if you just look at the terms of the supply --

THE PRESIDENT: I understand that, my reason for asking is I raised it earlier I think with one of the counsel for the appellants but why is paragraph 3.5 in the Decision?

MS DEMETRIOU: Can we go to that, please?

THE PRESIDENT: Yes, let us go back to that. It is {A/12/41}.

MS DEMETRIOU: So this is in the Decision because again, we say this falls into the category of -- this is evidence which is admissible and which the tribunal must determine how much weight to give it. What I say about it is this: the CMA is not saying here, ah, we are

therefore finding that Mr Patel has been dishonest. There is not any finding like that in the Decision and we are not asking the tribunal to make any such finding. But what they are saying is well, he has done anti-competitive things before.

Now, the relevance of that, we say it is relevant, it is obviously a matter for the tribunal how much weight to give it, but the relevance of it is when one is considering submissions such as, well Mr Patel is not here and so one must assume he is not acting anti-competitively, is that this is a piece of evidence to put into context when one is considering that kind of submission, because he has acted anti-competitively before.

Whether or not -- it is not something I am seeking to place a great deal of weight on in this appeal. It is there by the by. It is admissible. It is relevant. How much weight you give it is really for you. I am not asking you to place much weight on it.

THE PRESIDENT: Okay, thank you very much, Ms Demetriou.

We will resume then at 9 o'clock tomorrow morning. Thank you all very much.

(4.32 pm)

(The hearing adjourned until Wednesday, 21 December at 9.00 am)