IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1251/1/12/16-1255/1/12/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

29 March 2017

Before:

THE HON. MR. JUSTICE ROTH
(President)
MR HODGE MALEK QC
DERMOT GLYNN

(Sitting as a Tribunal in England and Wales)

BETWEEN:

GENERICS (UK) LIMITED
GLAXOSMITHKLINE PLC
(1) XELLIA PHARMACEUTICALS ApS
(2)ALPHARMA LLC
ACTAVIS UK LIMITED
MERCK KGaA

Appellants

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

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HEARING

A P P E A R AN C E S

Stephen Kon and Christopher Humpe (instructed by MacFarlanes) appeared on behalf of the Appellant (Generics UK Limited).

James Flynn QC (Brick Court), David Scannell (Brick Court) and Charlotte Thomas (Brick Court) (instructed by Nabarro) appeared on behalf of the Appellant (Glaxosmothkline PLC).

Robert O'Donoghue QC (Brick Court), (instructed by Clifford Chance) appeared on behalf of the Appellant (Xellia Pharmaceuticals APS (1) Alpharma LLC (2)).

Sarah Ford QC (instructed by MacFarlanes) appeared on behalf of the Appellant (Actavis UK Limited).

Ronit Kreisberger (instructed by DLA Piper) appeared on behalf of the Appellant (Merck KGaA).

Jon Turner QC (Monckton), Marie Demetriou QC (Brick Court) David Bailey (Brick Court), Thomas Sebastian (Monckton), Ravi Mehta (Blackstone) and Elizabeth Kelsey (Monckton) appeared on behalf of the Respondent

Closing submissions by MR. TURNER

THE PRESIDENT: Yes, Mr. Turner. Good morning.

MR. TURNER: Good morning.

Sir, you should have received one very slight hand-up in the form of a note on these tables in the decision.

THE PRESIDENT: Yes.

MR. TURNER: I am not going to spend any time on it. I will merely make one or two very brief observations.

THE PRESIDENT: This is in response to the note we had from --

MR. TURNER: There was a note from GSK, and for completeness the CMA's position is set out here. You have it in case you wish to deal with this in your judgment.

THE PRESIDENT: Yes.

MR. TURNER: The simple points are, if you open this note, you see on page 3 from that graph at the top of the page that when you looked at the 30mg figures in the GSK information, there was an unexpected drop and then a spike, which did not seem to be plausible.

The CMA requested information on what might explain that, whether there was a change in market strategy or anything of that kind. GSK could not explain it. That led to the reliance on the IMS data. It was used in the Statement of Objections and there is a very similar table to the one that we have been considering in the Statement of Objections about which there was not any complaint. Indeed, Dr. Stillman uses IMS data in his reports too.

So without going into it any further there is a simple difference in terms of the data source, because they say this does not tie up with our audited Unison database.

The CMA have pointed out that there seems to be a problem with it nonetheless. We cannot take it further than that.

THE PRESIDENT: Yes.

MR. TURNER: If I may then turn to the closing submissions for the CMA.

THE PRESIDENT: We will put that in our ever expanding bundle of documents handed up.

MR. TURNER: Yes, it will be uploaded to Magnum in the DHU section.

THE PRESIDENT: Yes.

MR. TURNER: I will begin with the case on object. I will then turn to the main arguments which have been raised on the effects case. Ms. Demetriou will cover the abuse of dominance issues, notably market definition, and deal with penalty. She may also touch on the vertical agreement exclusion order point if necessary.

I will begin with the object case. I begin with the observation that the very first issue that the Tribunal will need to grapple with after this hearing is a fundamental difference between the way in which the appellants, or some of them, and the CMA respectively see the question of when patent settlement agreements in a case like this can be found to have the object, the purpose, of restricting competition.

This issue is very closely related to a question that has received considerable attention in the hearing: the strength of the patent questions; shorthand for whether or not GSK was going to win the patent litigation.

You will recall that GSK says in its written closing submissions -- we can bring those up at {M/2/6} on the screen -- that the decision under appeal has a number of significant lacunae at its heart.

You see that in paragraph 22 in the second sentence.

The first of the significant lacunae at the heart is the supposed failure by the CMA to make any meaningful findings on patent strength. So that was identified as a major deficiency.

This was, at first sight, puzzling to us given what GSK had said at the outset of its Notice of Appeal, if you go to {A/2/28}, paragraph 1.51.

You will recall that that was the point they made in the first sentence, that:

> "Whether any of the generic companies could have entered with a paroxetine product was the issue in the avoided litigation. That precise question is now moot and cannot be determined in this appeal, and certainly could never have been determined by the CMA."

Then GSK claimed that the Tribunal can and should make a finding based on the witness evidence of Dr. Reilly, which it heard, and Ms. West, that the CMA has failed to prove it was reasonably likely the generics would have won the patent litigation against GSK.

That was what it said in its note on findings of fact, which you will find at {DHU/4/10}.

If you look at paragraph 12, the penultimate sentence, their case there was:

> "In GSK's submission, the evidence shows in each case that it could not be said to be reasonably likely that the Generic Companies would have prevailed in the litigation against GSK."

Now, Ms. West said that GSK, the evidence you heard, was cautiously optimistic. Dr. Reilly stood by what he had told the CMA in the previous interview, which was that the external legal advice had been the patents were reasonable and we had a fair shot at it.

When it came to the oral closing submissions, the strands appeared to come together, and it became apparent following Mr. Flynn's address on Monday what their case is, at least we

think it is this. The case that is put in their Notice of Appeal is that unless a patent settlement imposes restrictions that go beyond the relief that a patent court could grant, then you cannot have a competition law issue which arises unless the authority is able to prove one of two things: first, that the originator's patents are "indefensible" and would certainly be declared invalid in court; or else that the generics' product is manifestly non-infringing so that any settlement agreement would be a sham. One of those two things: validity or infringement.

That same argument was then supported in clear terms by Ms. Kreisberger for Merck yesterday, where she said:

> "I suggest the threshold," in the competition case, "should be along the lines of no realistic prospect of the patent being upheld as infringed at trial ..."

THE PRESIDENT: I do not think she went as far as saying a sham, but she put it in terms you have just put it.

MR. TURNER: Yes, that is a quotation.

THE PRESIDENT: That is not quite the same as a sham. She is saying that there was a strong likelihood.

MR. TURNER: Hopeless or no realistic prospect.

If we go to GSK's Notice of Appeal itself, so you can see the case that is made in these proceedings, and just follow this line through. We begin at {A/2/23}, which is their Notice of Appeal, at paragraph 1.36.

You will see at the bottom of the page, three lines up:

> "In circumstances where the CMA is unable to demonstrate that the patents in question were not valid or not infringed, it can have no objection to the 'monopoly' profits ..."

Turn over the page to complete the sentence {A/2/24}:

> " ... and it is hard to see on what basis it could therefore object to them being shared."

So unless we can show these things, the door to a competition law objection is closed.

Then if we go forward in this document to page {A/2/140}, at 6.64, three lines down, they said:

> " ... whilst as a matter of lay language ..."

This is the generics:

> " ... [the generics] could have been so described," as potential competitors, "that conclusion is not open to the CMA as a matter of competition law. That is because, given that it cannot be established that their respective products were manifestly non-

infringing, the CMA has no ability to demonstrate that they could have entered the market in the face of GSK's patents which provided a presumptively lawful barrier to entry."

Then go to page {A/2/152} and we see the heading. This is under "effects". Go forward again, please, 7.3, 7.4 and 7.5 {A/2/153}. You will see at 7.5 under the heading:

"Recap on essential features of the settlements.

"The CMA does not seek to argue, nor could any such argument be maintained, that this case is one of sham settlements. The terms of the GUK and Alpharma settlements were narrowly tailored to resolve the disputes. The CMA does not explicitly challenge them as going beyond the scope of the patents, but to the extent it intimates that the restriction on independent entry was too wide its argument fails."

If we turn over, please, {A/2/154}, 7.6:

"These points are important because they affect the comparison being made for the purposes of the competition analysis. If the patent rights were not defensible or the generic product manifestly non-infringing such that the settlement was a sham, that would be a different point of comparison. Similarly if the settlement restricted competition in ways that were not tailored to resolve the patent dispute, for example on different products, or beyond patent term, again that would provide for a different point of comparison. In both cases there would be competition to be restricted. Neither is applicable here."

Finally, page {A/2/156} a little bit further on. You see 7.15(a):

"The litigation included a challenge to the validity of GSK's patents. It is established in competition law that patents are presumed to be valid."

457, the footnote, refers to the *AstraZeneca* case as their authority and says:

"The presumption is subject to the CMA being able to demonstrate," it is therefore relevant to now, "that the patent is indefensible."

THE PRESIDENT: I think to be fair that is in the context of effect and the counterfactual that you need for effect, which may be a different point from object.

MR. TURNER: I understand that. It, however, follows through from the way they have introduced --

THE PRESIDENT: I understand that, but I think you made your point on the other paragraph.

MR. TURNER: Yes.

THE PRESIDENT: I think here it is in a particular context.

MR. TURNER: So they are saying that these are the things that stand in the way of a competition authority or this Tribunal finding a restriction by object.

We are not in the position to determine the patent issues, as they said at paragraph 1.51, and it would therefore follow that unless the Competition Authority can show that the parties to a settlement subjectively believed in the hopelessness of asserting the originator's patent rights, then no competition law problems can be raised.

In that connection, the Competition Authority is of course unable to see any legal advice which GSK received.

This, we think, is why GSK insists that the key issue is that the CMA has not shown that GSK believed its patents were indefensible.

Mr. Flynn clarified on Monday morning, in a lengthy exchange with the bench, that that is the long and short of what he feels he needs to establish on the issue of strength of patent. I will simply give you the reference. That is {TR/14/5} from line 21.

So according to them we fail because we have not been able to establish that point and do so in that way.

Now, the Tribunal knows that the CMA's approach, our fundamental approach, is entirely different from this. It is that when an originator with a patent-enabled monopoly pays for a potential competitor to induce it to cease or defer or limit its efforts at independent market entry, that type of behaviour is anti-competitive in nature. It is an agreement which has the object of restricting competition, and Article 101 has two alternative routes to finding that there is an infringement that the prohibition in the first paragraph is established, object and effect. If it is anti-competitive in nature, you satisfy the object criterion according to the CMA.

Ms. Ford for Actavis has said that she agrees with us. If you go to paragraph 41 of her closing at {M/4/9}, she now says very clearly and helpfully, 41:

> "It is accepted that an object infringement will arise where it can be shown that a generic has been induced by means of a value transfer to accept restrictions on its efforts to enter the market which it would not otherwise have accepted. This is evidence from *Lundbeck*."

So the battle lines at the first step are drawn in that way, and on this first and most basic issue for the Tribunal we submit that the CMA and Actavis are clearly right and the Tribunal should have no hesitation in finding that.

The point is not merely endorsed by the General Court in *Lundbeck*. It follows from basic principles. If you leave aside patent rights and this whole area, Dr. Jenkins, who was the

expert retained for Merck, was given the example of Ford paying Apple to stop its efforts to break into the driverless car market. They are at an early stage and their prospects depend on whether legislation is passed, and there is a 45% chance it will happen.

Dr. Jenkins agreed that such an arrangement would be anti-competitive in nature. You can see that if we go to {TR/8/56}.

If you pick that up at the bottom, line 33, that is the President coming in and saying:

> "I am sorry, I am sure it is my fault ... I have not quite picked it up. We know the chance of the legislation passing is 45%. That is, I think, the question, as I understood it. They are being paid to give up their [R&D] and not work on producing the car. We do not know whether they would ever be able to enter because there is only 45% chance of the legislation passing. That is the situation."

Dr. Jenkins {TR/8/57} then deals with that in various ways until you come down to line 19.

The President says:

> "I think we are asking you whether it has an anti-competitive object, not whether you can prove harm to consumers. Not whether you can prove any effect, but is it in its nature anti-competitive in what it is intending to do?"

She agrees:

> " ... I think that would be anti-competitive in its nature because Apple again does not have the right to -- sorry, Ford does not have the right to exclude Apple's activities from its own action because of that legislation, whereas in the patent case, the brand has the right to exclude because of the innovation it has undertaken in the past. Whether it has the right or not, it has been given a right which is to say: in order to reward you for all the difficult innovation you went through, you can have the right to have exclusivity for a certain point of time."

Those were her reasons for distinguishing the patent situation. Mr. O'Donoghue in his closing oral submissions endorsed or echoed that. But it is, in our submission, plainly not right because the very question being considered by the court in the patent litigation is whether the patent holder has that legal right or not.

If the patent holder is paying a challenger to stop the court considering that question, it is clearly anti-competitive in nature and it is not coherent to say that the patent holder already possesses the right to exclude because you go round in a circle.

THE PRESIDENT: You do not know if they possess the right to exclude.

MR. TURNER: You cannot, therefore, assume it as the basis for the distinction because that is what the court is going to be considering.

THE PRESIDENT: Yes, but it would be determined and if it is determined they did, then they would be entitled to pay anyone off just to avoid the inconvenience of fighting a case and that is why it is difficult to leave aside patent rights, as you said. It is not something that you only have the right if you are ultimately successful in court. The court establishes whether you have the right from the beginning.

That is the problem here, and we do not know, and that is why it is different from a situation where there is no possibility of a patent right, which is the Ford/Apple example. If there was no question of a patent right, it is manifestly anti-competitive agreements and everyone would accept that. That is why this becomes so complex.

MR. TURNER: We say that the patent situation is not materially different here because if the point of distinction is: they have already got a clear right to exclude and therefore paying to stop that being considered by the court is not anti-competitive in nature, then we respectfully disagree. If, on the other hand, to pick up, sir, on the remark you have just made, there is a settlement on the basis that to avoid the inconvenience of going to court, in a situation which is reasonably clear, the payment is made, let us say, at the level of avoided litigation costs, that is one thing.

We come back to the basic theory, that if you are not going on the question of the strength of the patent itself, and an agreement between the litigating parties that that gives the right, but there is an inducement based on a payment that goes beyond it, that is still anti-competitive in nature.

THE PRESIDENT: But that makes these settlements very difficult, forgetting about different perceptions of likely success and information asymmetry and all those other matters that were thrown up, but just suppose that the patentee considers they have a 70% chance they would win and the generic also thinks that they have an only 30% chance that they would win, the generic might not be willing to give up its challenge without some compensation for giving up that 30% chance.

That is the normal bargain that would be struck and the payment will reflect -- they have got a 30% chance of making a certain amount of money, so they are not going to give it up; they are not too worried about litigation costs because the costs are dwarfed by the 30% of likely profit, so they are prepared to take their chance, and the only way they will not is if they get some compensation financially for the possibility foregone.

MR. TURNER: Yes.

THE PRESIDENT: In those cases then, that is the obvious way those cases would be settled.

MR. TURNER: Let me address that specifically in a little while because I picked up from the debate that that is an issue that you would like to be specifically considered.

I will say at the moment only this, that the fact that something might be, first of all, the commercially sensible thing to do given the natural dynamics of how the parties respectively stand in that sort of dispute and the fact that it may be in a particular case the only way to achieve a settlement, bridge the gap, which was what Ms. Kreisberger was canvassing yesterday, is not a sufficient reason to prevent this being characterised as anti-competitive in nature.

THE PRESIDENT: I thought the gap was a separate point. I thought the gap was where their perception of outcome was different, where the generics think their chance is 30% and the originator thinks its chance is 70%, then you have a particular problem of that gap. But I am taking a very simple case where there is no gap.

MR. TURNER: So the gap in that case --

THE PRESIDENT: That was my understanding of Ms. Kreisberger's referring to the gap and I think that was a further refinement when one gets to consider why an early entry arrangement might not work; I am not sure about that. But I think that is a separate point, bridging the gap. I think this is simply saying how do you get those cases settled?

MR. TURNER: Yes. I was using it in the wider sense that, if it is the only way in which the parties are going to come to an agreement is by way of paying the money, does one therefore say because of that imperative, because of the importance of being able to do that in those cases, it is wrong to regard this as anti-competitive in nature? We say, no. I will come to this in a little while.

THE PRESIDENT: It is fundamental. As you say, there is a fundamental difference in approach. It may be that is the law but it has far reaching consequences.

MR. TURNER: Yes. This is right at the heart of the object case and so I am going to spend some time on it. At this point I am merely going to point out that, merely because it is the commercially sensible thing for parties to do in order to avoid a battle --

THE PRESIDENT: I agree that is not an answer. It might be commercially sensible to fix prices. We can understand that. But here it is a settlement that reflects their perception of patent strength and they negotiate and they bargain and their payment will reflect their views of patent strength.

MR. TURNER: Well, our case is that when the payment is not made as a reflection of the patent strength, which it will not be when you are paying the generic to accept restrictions on entry, which it would not otherwise have taken based on its assessment --

THE PRESIDENT: But you do not know that. It will be primarily. They will have a perception of what their chances are and that will govern the amount of money they will require not to pursue the litigation.

I thought, I have to say, your argument was slightly different. I thought that the CMA's argument and Professor Shapiro's argument, which underlies the CMA's thinking as well, was that it is anti-competitive by object if the settlement, although reflecting patent strength --

MR. TURNER: Internalises it in a way that cuts out the interests of consumers.

THE PRESIDENT: That is right. It preserves the monopoly profit and shares it between generic and patentee, as opposed to a form of settlement, whether it is a royalty or an early entry, where the reflection of the parties' bargain as to patent strength actually is reflected in the change to competitive structure on the market; that that is the vice that is said to lie in these agreements, not that there is a payment of money that may reflect patent strength, but the way in which it preserves -- as you say, it is internalised. It is kept to the patentee and the generic without any corresponding benefit on competitive structure in the market.

Here we may have some benefit because part of the agreement was this limited supply, but it is obviously not the same.

MR. TURNER: Yes. I am grateful for that because that is --

THE PRESIDENT: That is how I understood the point.

MR. TURNER: That is certainly how Professor Shapiro at one stage did express it and the discussion that we have had over the last couple of days brings that to the fore because to the extent that the generic is comparing: what are the profits that I would get through independent entry; and what are the probabilities that I will be able to achieve that, which itself depends on patent strength, and uses that to decide what is the amount of money that I will be prepared to accept as a payment; then, the question of patent strength or the probability of success in the litigation feeds into that question. Certainly. We do not demur from that at all.

But there is an alternative way of expressing the point and we would be happy also for it to be expressed in that way. The reason is because if the payment is sufficient to overcome that and to be greater than what the generic would expect to get, as the CMA has also said in the decision, one can infer from the acceptance of the payment that it is considered to be a better deal and that the payment, therefore, is made in a way which will remove that prospect.

THE PRESIDENT: Well, it is certain as opposed to an estimate.

MR. TURNER: It achieves the certainty and prevents --

THE PRESIDENT: But then one goes to the next stage that, if they can bargain in that way, clearly, the generics will say: "Well, I can get more than that because the amount that I would gain on entering is less than the amount that the patentee will lose," because the patentee enjoys the higher price and the price would come down. "So that is the minimum I will accept, but I know I can drive a tough bargain and I can get more".

I do not see why it matters in terms of object whether they get more or not. I mean, this is just a division of money as between patentee and generic. Whether the patentee gets more or less does not change the effect on competition.

MR. TURNER: So what this comes down to, and maybe we should dwell on this more, is that there are two ways of approaching the basic analysis. The first is that the originator is making a payment to remove that risk or uncertainty which may have resulted in the public benefits.

THE PRESIDENT: Yes.

MR. TURNER: The second is that, although in the way that the payment is made one may say that one is taking account of the patent strength as part of the consideration because it seems that that must be the rational way to approach it, it is being done in the way that cuts the consumer out of the result and those are to ways of approaching the same proposition.

I am sorry?

MR. GLYNN: Would it be right though just to take from this that the question of the strength of the patent is something we cannot escape being interested in because even if the settlement which was reached was one which reflected the generics' chance of making a profit from entry, that obviously depends entirely on their chances of winning?

MR. TURNER: But it is not a question that the competition --

MR. GLYNN: No. I understand that, but it means that we are in difficulties, are we not, in thinking what a payment might reflect? I mean, if there were a payment that reflected the strength of the generics' claim exactly, then would you think that was acceptable?

MR. TURNER: No, because --

MR. GLYNN: Because of the form of the --

MR. TURNER: Not the form, because it then cuts the consumer out of the deal, it replaces the uncertainty of the risk with a payment in order to achieve a result that, on the private level, is satisfactory for the two litigating parties but otherwise is a payment which excludes the possibility of consumer benefits.

So if it is calibrated, and we will come to some of the evidence which has been foreshadowed so far shortly, but if the payment is calibrated at a point where the generic says to itself: "This is now at the level that I would expect to get if I were to enter independently, bearing in mind my assessment of the probability of being able to do it", that is still a problem.

MR. GLYNN: Even though that would be the result if the case were continued in the patent court and decided in that way?

MR. TURNER: Yes, because it is a payment avoiding the possibility of the other result occurring. Yes.

That takes me on to pointing out a background consideration that the Tribunal as a Competition Tribunal should have in mind in considering this fundamental question, namely, the alarming consequences for the public interest if you do have to treat, following the Dr. Jenkins' supposition, the grant of a patent as valid and following what we have seen from GSK's Notice of Appeal, and we see this from the first case that Mr. Flynn took you to in his opening, *Servier v Apotex*, which if we call up on the screen is at {Auth-M/6/1}.

You will recall this was the Court of Appeal judgment in 2008 concerning a patent of the company Servier. If we go to page {Auth-M/6/3}. You will recall that we were looking at paragraphs 9 and 10 and Lord Justice Jacob pointed out at 9 that:

> " ... were the patent valid, Servier's monopoly in practice would last until 2020. But, as the Judge held and we confirm, it is invalid. And very plainly so. It is the sort of patent which can give the patent system a bad name. I am not sure that much could have been done about this at the examination stage."

Pause there. That is the stage at which the grant is actually made:

> "There are other sorts of case where the Patent Office examination is seen to be too lenient. But this is not one of them."

So there was not a problem in the process:

> "For simply comparing the cited prior art (341) with the patent would not reveal lack of novelty and probably not obviousness. You need the technical input of experts both in the kind of chemistry involved and in powder X-ray diffraction and some experimental evidence in order to see just how specious the application for the patent was. The only solution to this type of undesirable patent is a rapid and efficient method for obtaining its revocation."

That is the court.

> "Then it can be got rid of before it does too much harm to the public interest."

Paragraph 10:

> "It is right to observe that nothing Servier did was unlawful. It is the court's job to see that try-ons such as the present patent get nowhere. The only sanction (apart perhaps, from competition law which thus far has had nothing or virtually nothing to say about unmeritorious patents) may, under the English litigation system, lie in an award of costs ...."

On the indemnity scale.

THE PRESIDENT: That is why there is a less partial (inaudible) to the hopeless case, where it is accepted it could be by object, which I think was perhaps Ms. Kreisberger's submission, namely, that there are cases where you may be able to infer from the circumstances that it was a weak patent.

Such as the approach of the US Supreme Court where Justice Briar(?) says you can use the size of the payment as a surrogate for a view of patent strength. You could look at that.

Such as the evidence that came out, I do not know how it came, in *Lundbeck* , that Lundbeck's view was their chances of success was only 40% on --

MR. TURNER: One of three patents --

THE PRESIDENT: -- a patent but that such evidence may occasionally be available.

So, in those circumstances, you could create a case by object, but otherwise the size of the payment may be more often (inaudible). Otherwise one is left with the patent system and a speedy, as he says, hearing on revocation.

That is the way of doing it. But as you say this is a very fundamental question. *Lundbeck* says that and thinks about it, but also, as we know, there are various possible factors in *Lundbeck.*

THE PRESIDENT: Just a moment. (Pause)

We have had a crash, a technical crash. We will take 5 minutes.

(11.15 am) (A short break)

(11.20 am)

THE PRESIDENT: Yes, sorry, Mr. Turner.

MR. TURNER: Sir, I am not entirely sure where the Magnum feed ran dry, but we were saying before the short break that if one unearths evidence in a case of a serious problem with a patent, then one may be able to rely on evidence that the parties knew that there was a hopeless patent and that the settlement was therefore effectively a sham.

Indeed, Mr. Flynn did seem to treat this case, as he relied on it, as an example of a case where perhaps a competition authority could realistically have detected a problem and

stepped in. But, a number of points, importantly the defect in the patent in that case, even in that case, was not obvious to everyone before the rigours of the court hearing. That is even in that *Servier* example.

If we turn to the Commission decision, please, at {Auth-F/17/1}.

THE PRESIDENT: Is the Commission *Servier* decision the same patent as in this case?

MR. TURNER: Yes, it is dealing with the 947 patent.

If you turn to {Auth-F/17/36}, you will see that the Commission's conclusion was simply that there was a degree of uncertainty as to the legal outcome both on Servier's side and the generic company's side.

If you pick it up at (125):

> "The '947 patent is one of Servier's most controversial patents. In its annulment decision the Court of Appeal ruled the '947 patent 'is invalid and very plainly so. It is the sort of patent which can give the ... system a bad name'. The EPO revoked the '947 patent by decision of 6 May 2009 – reversing an earlier decision of the Opposition Division of 26 July 2006 which rejected nine oppositions filed against the patent."

(126):

> "The '947 patent plays a key role in the present investigation. Almost all generic companies cited the '947 patent as the Servier patent which most constrained the development of their generic perindopril."

If we go to (127):

> "The investigation has not found any direct evidence that Servier internally considered the '947 patent invalid when filing the patent application. However, contemporaneous documents seem to indicate that Servier was uncertain that it could successfully enforce or defend the patent. For example, despite the favourable decision that Servier obtained from the EPO's Opposition Division on 27 July 2006 to maintain the amended '947 patent, in March 2007 Servier anticipated 'an Unfavourable decision' in the proceedings against Apotex before the High Court ... Moreover, when Servier had to decide whether to appeal the decision of the High Court (which had annulled ... patent in the UK) [someone] explains in an email ... to Servier's legal department 'I am also convinced that the revocation of the patent will be confirmed on appeal: we have almost no chance/ sorry for being so realistic!'"

(128) {Auth-F/17/37}:

"The view of many generic companies was that the '947 patent was not valid. They had a shared opinion that the '947 patent did not meet the patentability criteria. This said, a degree of uncertainty as to the legal outcome existed, both, on Servier's side, and on the generic companies' side. Such uncertainty existed before and after the intermediate decision of the EPO Opposition Division on 27 July 2006. However, despite the uncertainty, many generic companies considered that they had valid (even strong) arguments against the '947 patent and decided to start proceedings against the validity of the patent."

THE PRESIDENT: Yes.

MR. TURNER: So the point is that although one's original impression from Lord Justice Jacob's pronouncement might be that this would have been something clear to everybody, the highest that you could get, even in this quite extreme case, was that there was significant uncertainty on both sides.

If you put aside extreme cases, what if the patent is not hopeless but vulnerable? What if the precise degree of certainty is not something that can be readily calibrated? Ms. Kreisberger yesterday rightly pointed out that opinions can vary on quite a wide spectrum. The European court has made clear that there is a public interest in eliminating obstacles to economic activity where patents have been granted in error, the validity point. That is the classic case of *Windsurfing* that we do not need to go to now.

The proposition is that if an originator buys off a legal challenge to its monopoly, pays to achieve that certainty and close down that possibility, that is obviously anti-competitive, and the CMA's case is not sensitive to the precise degree of risk, only referring to hopeless cases.

We pointed out in our skeleton that the only authority that the appellants cite, legal authority, for the idea that a competition authority is obliged to assume a granted patent is valid in this context is the case of *AstraZeneca*. You might have seen that in the footnote we looked at a little while earlier and we have explained that *AstraZeneca* says nothing of the sort. I simply give you the reference, unless you would like me to take you to that point now. It is in our skeleton at paragraph 97.

THE PRESIDENT: Skeleton or closing?

MR. TURNER: No it is in our skeleton. Maybe we will go to it now and I will show you it. It is at {S/6/44}.

There, we see the reference to the only legal authority that is relied on for the idea that a competition authority --

THE PRESIDENT: Just a moment. So that is authorities, is it, G/22?

MR. TURNER: Yes. You will see in the footnote at the bottom of the page.

THE PRESIDENT: It is enough to look at your skeleton.

MR. TURNER: Yes. But the point is that they have taken a passage from the judgment in *AstraZeneca* where the court was rejecting a contention by the company saying it had not abused a dominant position by making misleading representations to the patent office to get the patent, because *AstraZeneca* said, well, you have to show that we were also seeking to enforce our patent right that we had got in order to commit any abuse of dominance.

It is in that passage that the European Court said:

> "The court rejects the applicants' argument that a finding of an abuse of a dominant position requires that an exclusive right obtained as a result of misleading representations has been enforced. When granted by a public authority, an intellectual property right is normally assumed to be valid and an undertaking's ownership of that right is assumed to be lawful. The mere possession by an undertaking of an exclusive right normally results in keeping competitors away, since public regulations require them to respect that exclusive right ..."

So in that context, the court was saying that the grant of a patent produces effects already without the need to go and enforce it, because people assume that a granted patent is going to be treated as valid or at least that there will need to be a battle over it, and therefore there was an abuse of dominance that arose from the mere fact of making the representations to the patent office to get it.

That is different from our case where they are saying that we, the Competition Authority, and you, the Tribunal, have to assume in the present context that a patent which has been granted is valid for any competition question relating to the object of a settlement agreement.

Now, that is the fundamental and first big point on the object case. It is the argument that we can only mount an object case if we can show the settlement was a dressed-up sham or if the patent assertion was hopeless, or if the generic was likely to prevail unless we are out of the scope of the patent.

We say that we are right on that and that it is something that we feel the Tribunal can make a finding on and can be confident about, and I will develop it further shortly.

But the next point before returning to that concerns the application of our test. The test that both Actavis, through Ms. Ford and (inaudible) have propounded as correct and which is reflected in *Lundbeck*.

In the closing submissions, the appellants all say that even if we are right that our test is the correct test, the CMA has applied a sledge hammer to the problem of finding that there was inducement by payment to cease efforts of independent market entry. Even if our basic framework is right, we are much too quick in our approach to condemn these sorts of settlement agreements as being anti-competitive.

This was the heavy emphasis on the reliance that we have placed on inference rather than investigation of facts. That criticism is not right and I will therefore start by taking the Tribunal back to the basic architecture of the decision on object, in section 6, where the authority found that the agreements have the object of restricting competition.

I hope to do that in order to re-anchor the case that you are considering because we are not running a case any different in this appeal from the one that is in the decision under appeal.

I begin with an observation of something of an irony, which is that GSK emphasised at the outset in their skeleton that it is our decision which is the document under appeal and it is not Professor Shapiro's opinions on patent settlement agreements.

So if we go to {S/2/146} on Magnum, you have their skeleton and you see what they said at paragraph 6.118:

> " ... the correctness or otherwise of Professor Shapiro's various writings ... [do] not require determination in these proceedings (not least as they were not referred to in the Decision)."

They then changed their appreciation of this, and if you go to {M/2/35} you have their closing submissions.

Now, if you look at paragraph 87 they see the case differently:

> "As became clear from the CMA's opening submissions, the CMA's case turns entirely on the validity and application of the [pay for delay] theory."

They then go on in that section to attack what they characterise as Professor Shapiro's opinions at some length, beginning at page {M/2/36}, paragraph 93, under the heading "The PFD theory is not valid".

You will see at paragraph 96 {M/2/37} the important point that they and the other appellants have echoed as the major theme of their closings. It is in the first sentence, and you have now heard it from all of the appellants:

> "At a minimum, it is clear that the theory is wildly over-inclusive."

Mr. Flynn developed this in his oral closing on Monday, and he said that Professor Shapiro had advanced a theory concerned with overall consumer welfare across the generality of

cases and not the particular case in front of you. He said it involves also proceeding on pure inference.

If we go to {TR/14/37} and you pick it up at line 23, you see there him saying:

> "We criticise reliance on it for the reasons I have already given ... it excludes consideration of any patent strength or proper assessment of the financial imperatives on the parties, and that it is not appropriate to proceed on pure inference."

It misrepresents Professor Shapiro and, more importantly, it misrepresents the decision.

For Professor Shapiro, I must go to the basic statement in his main expert report at {H/1/15}, which I refer to in the oral opening at paragraphs 57 and 58.

This was where he described the pay for delay inference, and he crystallises it very crisply:

> "The net result of this analysis is that one must ask just what the branded ... company received in exchange for a Reverse Payment it made to the potential generic entrant, to see if this is a deal that disrupts the competitive process. If the Reverse Payment is otherwise unexplained, then given the features of the pharmaceutical industry described above ... this points to the conclusion that the payment was made in exchange for delayed generic entry or some other anti-competitive restriction that weakens the ability of the generic firm to compete."

He clarifies in 58:

> "The ... inference applies if the reverse payment cannot be explained based on the patent holder purchasing something other than weaker or delayed generic competition, in order to pre-empt price drops to customers and a consequent loss of profits for the patent holder. The ... inference does not apply if there is evidence showing the patent holder received in exchange for the ... payment something of sufficient value from the generic entrant other than protection from generic competition."

He refers to it being undercut if it is no greater than litigation costs.

So he was very clear that he was talking about a situation where the evidence does not show anything else and it is unexplained, and then and only then did he apply the inference.

We have done the same. If you turn to the CMA's case in the decision, it was tied to certain very specific findings of fact. If you go to paragraph 6.3 at {V/1/240}, that paragraph sets out the four main elements of the case. The first, from the second sentence, is that:

> "GSK paid GUK and Alpharma to remove the risk that they would enter the UK paroxetine market independently within a certain period ..."

So payment to remove a risk.

The second, halfway down that:

> "GUK and Alpharma accepted value transfers from GSK as compensation for their agreement to delay their independent efforts to enter the market."

If I may pause there.

That phrase "delay the independent efforts" is important because it is a response to what Mr. O'Donoghue said to you in his oral closing in suggesting that the CMA's case depends on showing that the eventual outcome of delayed independent entry took place. Pay for a delay which happened, given the events that occurred.

The case that is made is that there is inducement causing the generic to delay its efforts to try to enter the market. It is at the level of potential competition on the road towards coming into the market. That is consistently stated throughout section 6.

The third element in section 3 is that here, six lines up, the value transfers include cash payments and the effective transfer from GSK of profit margins by means of the agreement.

The fourth, four lines up, last sentence:

> "The appointment of GUK and Alpharma as distributors of GSK's paroxetine provided a means of transferring value from GSK to GUK and Alpharma, with no increase in the level of competition facing GSK in the relevant market."

Then continuing, sir, with the intuition that you were exploring at the outset. 6.4 explains and relies on the harmful consequence that is to be expected from that type of coordination in the pharmaceutical sector.

THE PRESIDENT: Yes.

MR. TURNER: You have a satisfactory private deal, rational, but consumers are deprived of the potential benefits.

Then 6.5 and 6.6, beginning "in more detail", explain the reason why it can be in the private interests of an originator such as GSK to pay a potential competitor such as GUK and Alpharma to accept a value in order to achieve delay in their efforts to enter the market independently.

If you go to 6.8 {V/1/241}, you see that point developed.

THE PRESIDENT: Yes. Well, that is why I thought that was the case you were making.

MR. TURNER: Well, it is, but let me make a further observation on that issue.

THE PRESIDENT: Because that is the distinction, as I understand it, say, between an early entry agreement. An early entry agreement also deprives consumers of the benefit of litigation going through to the end because if litigation went through to trial there is the chance the patent would have been struck down and there would have been immediate entry.

But an early entry or, indeed, a royalty translates the parties' agreement as to patent strength into a consumer welfare corresponding to that.

MR. TURNER: Yes.

THE PRESIDENT: That is why it seems to me that is the critical distinction, because even there you have removed the uncertainty of litigation which might have had a chance of bringing much greater benefit.

MR. TURNER: That is absolutely right. The terms of the agreement themselves, then, crystallise the uncertainty in a way that can inure to the public benefit.

So when you were referring to early entry and royalty, I take it you meant without an accompanying reverse payment, but purely --

THE PRESIDENT: Well, maybe.

MR. TURNER: -- at higher than the level of avoided litigation costs.

THE PRESIDENT: Probably, yes, because then it does not all feed through, yes. The royalty may be a high royalty if patent strength is thought to be high, or a low royalty if it is weaker.

MR. TURNER: Yes, that is right. As Professor Shapiro said --

THE PRESIDENT: But the uncertainty it is still preserved, it just translates through to market benefit.

MR. TURNER: Yes. Professor Shapiro pointed out in -- I cannot remember if it was in the hot tub or in a form of questioning from counsel, that the point would be that there, if one has a royalty agreement, the degree of appreciation of the patent strength would then expect to be reflected in the level at which the royalty was set.

THE PRESIDENT: Yes, I think everyone would accept that. It must be right. I think Dr. Reilly accepted that as well.

MR. TURNER: Yes.

THE PRESIDENT: But as I say, it still would not have resolved the uncertainty. They would still have done a deal which might leave consumers worse off.

MR. TURNER: No, that is right.

I should make a qualification to something that was also said on the other side at times, which was that part of our case is that competition is equivalent to continued litigation and it is to be compared with settlement, which somehow we are not treating as part of the competitive process.

I made very clear in opening -- I will find the reference -- in answer, sir, to you that we do not say that at all. Settlement on the terms such as we discussed was also part of the

competitive process, it is just that it excludes this form of settlement that cuts the consumer out of the deal --

THE PRESIDENT: That is why that is a crucial element of the case.

MR. TURNER: Yes. It takes us on to a further observation about this same issue which is that the very features, sir, that you just put to me, that the originator may have much more to lose than the generic stands to gain, which is said by Merck and others to be the explanation why it is rational to reach agreements in these situations, those very same matters are precisely the reason why we say that there is a problem. Because, as Professor Shapiro said, looking at it from the economist's point of view, this explains why the incentives are such that this is something that you may consider would be likely to result in this form of problem, and why such agreements from the -- if you put your consumer protection hat on, can be regarded as inherently suspicious, although from the private point of view you would expect them to be perfectly normal.

So if we go to Merck's written closing submissions that were looked at yesterday at {M/5/10}, we looked at paragraph 27. At the bottom of the page, where they say that:

> "[Our] acid test of payment is, at its core, conceptually flawed ..."

It is at the bottom of page 10:

> " ... a payment will often represent a commercially rational means of bridging the gap ..."

She is using there "gap" in the --

THE PRESIDENT: Sorry, paragraph 27?

MR. TURNER: Paragraph 27, bottom of page 10. If we now go forward to page {M/5/11}, she is therefore using "gap" in the narrower sense, sir, that you referred to as well.

But leaving that point to one side, you have the patentee who is confident of success but has so much to lose, and the generic with a different appreciation but who has less to gain, and that creates an area where you can see that a settlement could be struck if the interests of the two parties is all that one needs to consider.

THE PRESIDENT: Yes.

MR. TURNER: Sir, the very factors that they rely on we rely on too, but for the opposing reason. Because although it may be commercially rational for parties to make agreements that maximise their joint profits in this way, that is precisely what creates the concern and why the competition rules are important to prohibit these sorts of agreements in the public interest.

Now, that is a fundamental difference of perception too, and GSK has consistently argued the same as Merck. Their case is that the profits they stood to lose if there was full generic competition were so great that it was the only prudent, rational thing for them to do to pay what, on ordinary lay terms, were potential competitors not to continue with their efforts at independent entry.

If you go to their written closing at {M/2/12}, you see the heading "GSK's downside risk" at the top of the page. You will see there that they downplay the evidence that was given by their principal witness, Dr. Reilly, in the witness box. He is dealt with in a footnote.

Dr. Reilly had told the Tribunal that the downsides his company faced from full generic competition would have been manageable and would have been mitigated by redeploying the sales force to other products and boosting their sales and so forth. The reference for that is {TR/5/26}. We do not need to go there.

They say at footnote 56 that Dr. Reilly had explained that any documents generated on this thing had been lost owing to the passage of time.

That is not, in fact, right. He did not say that, and GSK has not been able to confirm it unequivocally either.

If we go to {M/2/38}, further in the same document, the case that they build on their downside risk is now at 98(2) at the foot of that page. Their case is that the significant downside risk that they faced naturally made them cautious or risk averse in their dealings with the generics. GSK would, therefore, have placed a premium, they say, on the certainty or stability associated with settlement.

If we turn the page {M/2/39}, you see that at the top of the next page. Now, pausing there.

You see that GSK is offering the same justification for its behaviour as Merck, and you know that this is an argument we pray in aid in favour of our case precisely because it emphasises the profit incentives motivating GSK's behaviour and is not an argument undermining our case.

THE PRESIDENT: It is common ground, in other words?

MR. TURNER: It is common ground, but we each see it in a different way. I should note that the reference at the top of that page to the premium for which they would be willing to pay money in excess of the amount they would pay under a straightforward profit maximisation calculus is new. That is a new submission that has no underpinning in the evidence, and it appears to be an attempt to bring GSK's case into the category of risk aversion, which was spoken about by Dr. Jenkins.

THE PRESIDENT: Sorry, you are at the top of page?

MR. TURNER: Top of page 39 of the Magnum, 38 of the hard copy. You will see that the first sentence at the top of that page is injecting a new point, that they would have:

> "... placed a premium on the certainty ... for which they would be willing to pay money in excess of the amount [they] would pay under a straightforward profit-maximisation calculus."

That is new.

MR. GLYNN: They have stressed the value they attach to certainty and so on quite often, have they not, in various places?

MR. TURNER: Of course, but this particular approach, which is taking the Dr. Jenkins point on risk aversion, that because of that they are willing to pay a premium to avoid that risk --

THE PRESIDENT: But these are really details, are they not? These are sort of almost footnotes to the main point. There will be a commercial bargain, various things go in it. Maybe it is the full profits they would have lost, maybe it is a bit less than that because they will be aware that they could transfer their sales force to other things. So it is not quite the full profit because they can make a bit more profit somewhere else -- will go into how they calculate what is the sensible amount they are prepared to pay. But your main point is none of that matters.

MR. TURNER: Yes --

MR. GLYNN: Except -- President, if I might -- the pay for delay inference or proposition does say that a reverse payment can be justified if it is explained, and although it has not always been put in these terms I heard a lot of the discussion as being looking for what might count as a valid explanation. So in a way, this risk aversion point comes in as a candidate for a valid explanation which the Tribunal might -- I think would --

MR. TURNER: Absolutely right.

MR. GLYNN: Indeed, there are other things as well in that category which have appeared at different stages. So the question which has not yet been fully explored is what might sensibly be regarded as a valid explanation, other than the relatively trivial and easy examples that Professor Shapiro gave in passing on that point?

MR. TURNER: That is absolutely right. I entirely accept all of that, and our point here is that this notion that they were willing to do this particular sort of deal is a new point in their written closing submission, and they have not produced any evidence on this as an explanation.

MR. GLYNN: So it is a technical point about how the argument was developed through the case, rather than a substantive point?

MR. TURNER: No, it is a substantive point. I will come on to it because now I want to turn precisely to the point that in a competition investigation of this kind, I am taking our point of departure as the one that I have outlined. What one then does is go to look at what the evidence is to explain the payments, and on that basis, section 6 of this decision carried out a very, very thorough investigation. The inference, as I was suggesting a few moments ago, comes in at the end of that, and only at the end of that, to deal with anything unexplained.

May I, therefore, turn back to the CMA's decision, and now I will deal with this very point. If we go to 6.3 {V/1/240}, I was saying that the case is built on certain very specific elements. Now, the first of those -- let us take them in stages -- was the observation of sizeable cash payments and other transfers from GSK to the generics.

Sir, you are right that a part of the decision was drawing attention precisely to the size of these payments. If you go to {V/1/258} in this document, paragraph 6.57 at the bottom, and now you have to turn the page, please, to {V/1/259}, you see there the reference to the size of the value transfers, the scale, which is a part of the findings. You will see that these are figures which have not been disputed in the Notice of Appeal in any of them.

On page {V/1/259}, there you can see the reference to the annual average value being equivalent to 37% of GSK's annual UK paroxetine profits. Footnote 852, which tells you to go to another paragraph for a description of the calculation, takes you to {V/1/515}, please. That gives you the details which you will see in the two footnotes primarily, 1681 and 1682. Thank you for expanding that.

At 1681 you have:

> "This is made up of £17.9 million to IVAX, £21.3 million to GUK and £11.8 million to Alpharma ..."

You will see that the average value transfer each year was £18.9 million.

That is in footnote 1682:

> "The average annual value transfer was £18.9 million ..." in total.

So that is the scale of what one sees being paid by the originator to the generics.

MR. GLYNN: Can I just ask, on what basis do you think that that was sizeable? What is your --

MR. TURNER: Metric?

MR. GLYNN: Metric.

MR. TURNER: I will come on to it. Those are large payments in any view. They are clearly, one can take judicial notice, payments that are going to be, perhaps even in these proceedings, larger than avoided litigation costs, but one is not entirely sure.

MR. GLYNN: Dream on.

MR. TURNER: I am representing the public authority on this occasion.

But we will come on in a moment to how these payments were assessed by the companies themselves.

There you have the scale of the payments. The second stage is the observation that there were implicit restrictions accepted by the generics in the contested agreements, and these value transfers were a part of the contractual consideration.

I am sorry, yes, Ms. Demetriou and Mr. Bailey point out that I should draw to your attention in relation to your question, in B.47, it is specifically pointed out that the average annual value that they commit to transfer was also equivalent to 37% of the profits. So measuring it as a total of the profits.

THE PRESIDENT: That is in 6.57 which you read to us.

MR. TURNER: Yes. That is showing that from the company's point of view how important this was compared to the profits that they were making themselves from a monopoly position.

MR. GLYNN: Yes indeed. It does not fully answer my question about what one should really be thinking of as sizeable, or how one should conceptualise that term.

These are clear facts, and in commonsense terms of course they are sizeable, but in terms of the theory that is being used here, then, we have the notion of sizeable and we have to be quite precise, I imagine, or quite clear at least, in thinking what do we mean by that exactly?

MR. TURNER: Yes. For present purposes, and following the logic and reasoning in the decision, they are significantly above the level of avoided litigation costs, which was a line that was drawn.

MR. GLYNN: Yes, that is one of the points.

MR. TURNER: Now --

MR. GLYNN: Forgive me, we are not sure whether they are sizeable in relation to, for example, perceptions of outcome of the litigation, are we?

MR. TURNER: We do have material on that in the decision and I am coming to that very shortly now.

One point that I need to emphasise, which I failed to do in my opening, and I apologise, and may have also misspoken, is that the GUK restriction for which these value transfers was a consideration, and the Alpharma restrictions, were absolute in terms. They involved and were found to involve complete exclusion from the independent competition in the market for paroxetine.

If you go to {V/1/269} in the same document, 6.88 and 6.89 are the findings.

6.88:

> "GUK accepted an express obligation to refrain from entering and competing in the UK paroxetine market independently of GSK."

6.89:

> "The restriction was absolute: it allowed for no competition from GUK as a supplier of paroxetine sourced independently of GSK, and it extended beyond GUK to include both: (i) any company that was part of the Merck Generics Group; and (ii) any other company that sought to licence GUK's MA in order to supply paroxetine in the UK or to purchase GUK's paroxetine product to resell within the UK."

There is a parallel finding to this, which we do not need to turn up, at paragraph 6.152 for Alpharma. Therefore, it is not the case that the restrictions do not go beyond, and were found not to go beyond, paroxetine hydrochloride.

Perhaps it is useful to look at that point directly in the agreement itself at {L/8/1} for GUK. If we turn to page {L/8/2}, you have in clause 8(i) the restriction on the litigating company, GUK, relating to the paroxetine hydrochloride salt, which was the subject of the patent litigation. Then if you go to clause 8(ii), it extends to all companies in the Merck group and it prevents any of them from supplying paroxetine, any salt, in the UK during the currency of the IVAX agreement, apart from -- and there it mentions it specifically -- paroxetine hydrochloride manufactured or marketed by SB, SmithKline Beecham, or SB's consent.

THE PRESIDENT: So what is the point you are making? Are you saying this goes beyond the scope of the patents?

MR. TURNER: Yes.

THE PRESIDENT: But that is not a point taken in the decision, is it?

MR. TURNER: It is not taken as an additional point in the decision, no. It has arisen because subsequent to the decision, we had *Lundbeck* One of the points of distinction raised by the parties when they saw *Lundbeck* was that our case is not one of restrictions that go beyond the scope of the patent, after the decision. I am, therefore, merely clarifying for you that if that is their point, you do need to see this finding in the decision, although it was not relied on in the reasoning.

THE PRESIDENT: Well, it was not relied on in your opening either.

MR. TURNER: No, I accept that.

THE PRESIDENT: This is a point of potential significance.

MR. TURNER: Yes. I do need to show you the finding, therefore. (Pause)

MR. O'DONOGHUE: Sir, I hesitate to rise. It is not just that this decision was not made in the opening, but in fact a concession was made by Mr. Turner that he was not taking a scope of patent for it. I would like to understand clearly if that is now being withdrawn and, if so, on what basis.

MR. TURNER: It is not a concession being withdrawn. I misspoke in opening. I am very happy to say that.

THE PRESIDENT: But you are making a substantive point that the word "paroxetine" in 8(ii) is broader than paroxetine hydrochloride?

MR. TURNER: Which it must be, because paroxetine hydrochloride in the same subparagraph is mentioned.

THE PRESIDENT: Well, unless it is a mistake.

MR. KON: If I may just point out that in 8(i) there is a reference to paroxetine hydrochloride.

THE PRESIDENT: Yes.

MR. TURNER: We know that, and that is the point.

THE PRESIDENT: That is the distinction being drawn, Mr. Kon, I think. There is in 8(ii) as well. But that the word "paroxetine" is not qualified in 8(ii).

MR. FLYNN: Since everyone is getting up, sir, I should say it has always been our case that the restrictions were narrowly tailored to the scope of the patent. This has always been in our representations. It has never been something inspired by *Lundbeck*. Furthermore, it has been explained to the CMA before that it is considered simply that the lack of the word "hydrochloride" in one part of this paragraph is simply an oversight.

MR. TURNER: Has it been explained?

THE PRESIDENT: Perhaps you can consider that overnight. If that point is really being relied on, it is not something that anyone, I think certainly on the bench and it appears also in the appellants, had appreciated and it is a point that is potentially of significance because all the appellants have stressed the distinction, or at least the reliance placed at various points, in *Lundbeck* on the scope of the patent.

I raised a separate but not wholly dissimilar point, which is not a mistake in the agreement, it is very clear: namely, that the duration of restriction goes beyond patent validity, potentially. But that is a different point to this one.

I do not know, if this had been raised, it might be said that this is a drafting error, and it is slightly curious the way it is phrased, I have to say, having just looked at it now in those terms for the first time. So you might want to consider that. But it does seem to me that it is a point that had every opportunity to be made earlier on in this hearing.

MR. O'DONOGHUE: Can I give you the reference, sir, to the transcript. It is {TR/4/61}, lines 17 to 19.

Mr. Turner said:

> "Finally, the presence in those agreements of restrictions going beyond the scope of Lundbeck's patents, the scope of the patents point. That does not arise in the present case ..."

THE PRESIDENT: Yes, I mean, not only that, Mr. Turner, but various people drew that distinction with *Lundbeck*, and I know you say it is not critical to *Lundbeck*. I understand all those points. But at no time did you intervene and rise up and say, as you could have done, "I would like to make clear we are taking that point".

MR. TURNER: No, I understand that. I am not -- if one is going to defeat it on forensic grounds --

THE PRESIDENT: Well, not on forensic grounds.

MR. TURNER: However, I am pointing out to you that it is on its face a very clear restriction which arises and should be brought to the Tribunal's attention given the distinction with the *Lundbeck* case, which is now relied on by the appellants.

MR. MALEK: If you look at 8(iii):

> "GUK shall not assign or transfer its ... marketing authorisation for paroxetine ..."

Now, that is a hydrochloride version, and so one could say, well, when they are talking about supply of paroxetine in 8(ii), they must be referring to the same thing.

I have never read this and never thought of it of the way you have just raised it for the first time. But I had always assumed that they were talking about paroxetine hydrochloride and not the other forms.

Now, if you are telling me that may be wrong, but looking at (iii) it seems to be something that should have been explored a long time ago if it was going to be made.

THE PRESIDENT: It is clear it is not very precisely drafted in this. If you look at clause 1, there it is called paroxetine hydrochloride anhydrate. In clause 1.1 it is paroxetine anhydrate. I am a bit concerned about a fundamental point like that being raised for the first time in closing with all the written material we have had since *Lundbeck* and what looks like a not very precisely drafted letter of agreement, albeit it is legally drafted, I accept that, and the slight odd discrepancy between the expression in 8(i) and 8(ii), where 8(i) appears to be the obligation on GUK and in 8(ii) appears to be the obligation on other members of the Merck group.

MR. TURNER: Not the litigating party, yes.

THE PRESIDENT: Not the litigating party.

MR. TURNER: Sir, I can say that I am not seeking to do more with this point than to draw to your attention that it is something we saw in preparing the closing submissions. Given the reliance that is placed on the distinction with *Lundbeck* , we wanted to draw it to your attention.

THE PRESIDENT: That is fine, but I have to say for my part I am not, just on simply the point you made, at all confident in construing that agreement as imposing a wider restriction.

MR. TURNER: Understood.

So those are the first two elements. You have the value transfer and you have the entry restriction.

The third stage of the reasoning of the CMA is critical, and this is the finding of fact that the payments and the other value transfers from GSK were made to induce the commercial restrictions accepted by the generics.

That is now, as the hearing has focused, the main area that has come under scrutiny in the closing part of these appeals.

In the closing submissions for the appellants they focused on whether the CMA has established the fact that these payments induced the acceptance of restrictions or not. So it is appropriate to start by emphasising that the CMA did not make a wildly inclusive sweeping inference that the value transfers it identified were inducements to accept restrictions on entry.

You heard on numerous occasions value transfers, entry restrictions, and an inference is applied to that.

The CMA carried out a meticulous factual examination of the evidence to see whether these payments could be explained, whether they were or were not made to induce the restrictions on entry which would not otherwise have been accepted but for the payments.

If you go further into the decision -- I will go to page {V/1/268}, paragraph 6.86. Sir, this is under the heading:

> "E. The restrictive object of the GUK-GSK Agreement."

It outlines again, over the page {V/1/269}, the components of the CMA's finding. There is a parallel paragraph for Alpharma too.

You will see the third bullet at the top recording that:

> "The objective aim of the value transfers was [found to be] to induce [the] acceptance of the entry restrictions."

The second sub-bullet recording that the CMA had investigated the reasons for the decision to make the value transfers, that the payments could not be explained by reference to their stated purposes, such as marketing allowance, nor on any basis which was not anti-competitive, which the parties had suggested in the investigation, nor that the CMA could discern.

Then if you go to page {V/1/272}, from that point forward the CMA begins a systematic survey of these value transfers and the possible reasons that were given for each one of them.

If you go to {V/1/278}, after the discussion of the cash transfers and the labels given to those, here you have, beginning at 6.103, the reference to the supply agreement.

The first sentence:

> "The arrangement permitting GUK to supply a limited volume of GSK's product, giving GUK a predictable (and indeed guaranteed) margin, also falls to be regarded as a form of value transfer."

If you turn the page to {V/1/279}, look at 6.104. You will see at the first sentence why it is described as a value transfer. It amounted to a value transfer:

> "... because, as a consequence of the volume restriction described at ... 3.1 of the ... agreement (and the impact this would have on prevailing prices in the market), GSK was, in practice, simply transferring to GUK the margin that it would have otherwise earned on such volumes."

The third bullet at the bottom pointed out that the returns for GUK associated with the value transfer:

> "... could be forecast with near certainty because, as a [result] of the volume restriction, GUK would have no incentive to set a price that was materially below prevailing levels."

The fourth point:

> "Consistent with this, GUK's entry onto the market had no discernible impact on market prices ..."

Pause there.

Because contrary to what Mr. O'Donoghue said, that fourth bullet, consistent with GUK's entry onto the market, with this, GUK's entry onto the market had no discernible impact on market prices, is not a separate part of the assessment of the agreement's purpose. It is noting that the previous point, consistent with this, which is that GUK could be expected to

price at prevailing market levels, was confirmed by the observation of what subsequently happened.

If you go to page {V/1/281}, 6.108 there is here the consideration of GUK's internal documents.

If you turn the page to 6.109 {V/1/282}, you see the last sentence:

> "For the reasons outlined above, the volume restriction ensured that in this context the transfer of GSK's product was essentially the same as a cash payment from GSK to GUK ... it provided a means by which GSK could transfer value to GUK but without providing for meaningful increases in the actual competitive constraints that GSK faced ..."

Finally, then, in order to establish the fact of inducement, that GUK was induced to accept that the deal offered to it by GSK was clinched by the payment, the authority assessed the available contemporaneous internal documents as well.

From {V/1/292}, please, there are three significant paragraphs.

6.136:

> "GUK's internal documents demonstrate that, during its negotiations with GSK, its intention was to maximise the profits that it would receive from GSK, to ensure that it received returns that it deemed sufficient given the costs it had already incurred, and that would provide for sufficient compensation (in the form of value transfers) for its agreement to delay its potential independent entry into the UK paroxetine market."

Ms. Kreisberger took you to this yesterday, but stopped after reading the first phrase, "maximise the profits". The finding was that the intention was to ensure that the returns would be enough to induce a cessation of efforts on independent entry.

6.137 contains a very clear finding that the evidence before the Authority shows GUK determines that the value transfers offered would be comparable with those it expected to earn from independent entry.

So, sir, you see there that finding made at this point in the reasoning.

You will see at the bottom of that page a reference to Richard Saynor of GUK's note that:

> "... the GSK offer 'would deliver a similar bottom line (£5.6 million vs £6 million)' ..."

That email is at {Z/155/1}. I would like to go there, please.

This is the same email that was referred to by Mr. Malek yesterday which was at the footnote on page {V/1/290}. You will see that footnote was given specific prominence in the reasoning here with this document.

This document is an email at the end of the year, 2001, from Mr. Saynor, and he says:

"Provided that we [it should say are] confident that we can win the case and seek damages on the 18th of March then we should go ahead on our own.

"Although GSK's offer would deliver a similar bottom line (£5.6m v's £6m) this does not include recovery of active and any damage such an action may have with Sumika. Also we would also expect to recover substantial damages from GSK."

So --

MR. MALEK: Do we have any evidence that shows how they reached those bottom line figures?

MR. TURNER: No. I will be told if I am wrong.

MR. MALEK: Because it is not a straightforward calculation. It can only be an estimate because if you have got independent generic entry, then the price is going to fall anyway. If you have got more than one person coming in, it is going to drop even quicker.

If that is what he was going to calculate, if he is calculating, well, what am I going to get if I am going to have independent entry, which, to me, can be relatively uncertain because it may depend in part on how much the price falls, and how much am I going to get out of this deal, I think it is easy to calculate the second half than the first half, isn't it? Is that not easy to be anyway.

MR. TURNER: We do not have -- I will be corrected if I am wrong -- evidence concerning the first part of that.

MR. MALEK: Yes, that is why I was asking about that.

MR. TURNER: For the second part of that --

MR. MALEK: I understand we have got that.

MR. TURNER: That related to certainty in terms of the prices that would be held.

MR. MALEK: Yes.

MR. TURNER: So the CMA's finding there is, if I may note, the same sort of finding, the same approach to the generic expecting to derive profits as was made in the *Lundbeck* case by the European Commission.

If I can just show you that briefly. If you go to {Auth-F/16/96}, there are various examples because it was done for various of the companies.

THE PRESIDENT: Sorry, this is?

MR. TURNER: This is the Commission's decision in *Lundbeck* to show you how --

THE PRESIDENT: The *Lundbeck* judgment?

MR. TURNER: No, the *Lundbeck* Commission decision.

THE PRESIDENT: The Commission, sorry.

MR. TURNER: But what you see here, as an example, this is GUK in the Commission, that they relied on similar sorts of evidence that they had gathered for their conclusion which fed through to the judgment concerning the expected profits.

(243):

> "An internal Merck (GUK) e-mail of 28 September 2001 labelled 'RE Lundbeck' transferred 'notes from yesterday'. Those notes indicated two possible scenarios for Merck (GUK) to follow ..."

So forth:

> " ... ('current plans') calculated Merck (GUK)'s expected profits from its sales of Natco citalopram in the UK."

The second scenario:

> " ... referred to ... 'Plan 2 ... supplied by Lundbeck' raised the question: 'How to achieve the same profit figure?'"

This is merely to show you that what fed through into the General Court's observations was based on similar sorts of appraisals by the Commission.

If we can please go back to that important part of the CMA's decision at {V/1/293}, 6.138. Here, you will see first of all the reference to the fact that GSK made increasingly lucrative offers to GUK, a point made by Mr. Kon himself, to say how difficult they were to -- before they finally gave up. We rely on it to show that they were holding out until they got something that was sufficiently profitable.

The last sentence before the bullet said that:

> "For example, GUK was not prepared to agree to limit its entry into the UK paroxetine market unless it was sufficiently 'compensated' and would receive value transfers that would provide a sufficient 'profit'."

Footnote 959 there takes you to an email string between Mr. Eddie Hart and Mike Urwin of GUK of 22nd March 2002, just before the settlement, and referring to the profit that would be made from the GSK purchase of stock.

If you go, please, to {Z/941/3}, there are a series of emails. But just before the deal is being done there, you see the email from Mr. Hart to Mr. Urwin:

> "Before I complete this calculation could you please confirm what 'profit' the group will make selling the API to GSK and where this profit will lie in the first instance. I presume this will be spread over 3 years?
>
> "Regards, Eddie."

The reply email, if we go back to page {Z/941/2}, from Mike Urwin, at the bottom of the page he is calculating the profits and what needs to be taken into account from the deal with GSK.

THE PRESIDENT: Alphapharm is nothing to do with Alpharma. It's a company of GUK.

MR. TURNER: Yes, that is right.

If we can turn the page, please, you will see the end of that email having set out a few things to bear in mind {Z/941/3}:

> "So - the simple calculation is the starting point ... and then some judgment calls on a, b, c above - to arrive at 'free and clear' profit ...
>
> "Could you start running the above numbers ... and start thinking about a, b, c - so that we can understand the real 'surplus on the API ...
>
> "Thanks Mike."

So this is the document relied on here by the CMA, and if we go back to that document at {V/1/293}, to complete it, paragraph 6.138, they run through the evidence that they are relying on for this proposition. If I can turn to page {V/1/294}, the final two bullets here are ones that should be noted.

The first is one that we have seen many times that:

> "... GUK had 'a real concern we may not prevail in the patent case - so a settlement and local distribution agreement seem the best way to go - provided the numbers are right'."

That phrase is then analysed by the CMA in the following sentence, and the implication is drawn that if the numbers were not right GUK would not agree to the restrictions.

Above 6.139 you have the email to Mr. Rosenberg of 31st December 2001 from Mr. Urwin. If we can turn to that at {Z/946/1}.

This is the email in which Mr. Urwin writes at the end of December:

> "... as long as you remain confident of winning [although there are no guarantees] ... we must push for the best deal we can ... and that means [under scenario 2 - which is the option under discussion] that we need the API covered - plus a decent profit - otherwise we should push on with the case for ultimate launch."

Standing back, there was a very precise and clear examination of the evidence that was available on the third element, the question of inducement. There was a parallel section of the decision, dealing with the Alpharma agreement, which begins on page {V/1/299} at section G.

In this section beginning here, the CMA relies on contemporaneous evidence to support the finding of inducement.

If you go to page {V/1/322}, paragraph 6.198, you will see there the reference to the email from Mr. Torben Laursen concerning his meeting with Mark Reilly of GSK, and if we can go to that it is at {Z/1061/1}.

You will see the second paragraph:

> "We started out agreeing that both parties potentially can benefit from an out-of-court settlement of the dispute, and it will be beneficial to conclude talks within the next app 3 weeks. Mark Reilly stated that GSK was very convinced that their intellectual property rights can keep generics out of the UK for the next 12 - 18 months. I challenged this long period and we agreed that obviously this was uncertain and we also agreed that Alpharma was ahead compared to the competitors."

Then the reference to the highlights of the talk at this meeting:

> "GSK prefer a settlement for 12 - 18 months consisting of a lump sum and certain ongoing (monthly) payments. We would refrain from launching in this period and acknowledge the IP of GSK and all legal activities between the two companies would be stopped. I promised to come back with a calculation of what these figures can be."

Then:

> "He understood the value of an early entry by us [Alpharma] compared to any other competitor (except IVAX who are on the market with GSK product). Consequently this must be factored into a contract."

Again, and it is not surprising, but you have the specific evidence that they are using as a lever and as a consideration in their own minds the possibility of early entry by them.

So if we return then from that to the decision and we go to {V/1/324}, moving forward to committee the position with Alpharma. At paragraph 6.201 -- it is at the top of the page but we do not need to go back -- here, they rely on one of the other documents that you have seen a number of times. This is the email about the settlement meeting with Dr. Reilly and Cynthia Robinson on 11th October.

We can go to that briefly. It is at {A49/184/81}. Here, when we go there --

THE PRESIDENT: Sorry what is your reference?

MR. TURNER: {A9 -- I am sorry, did I say A49?

THE PRESIDENT: You did.

MR. TURNER: {A9/184/81}. You will recall this document and it was gone through with Dr. Reilly also.

Here, just over halfway down the page, Alpharma's representative said:

> "We clearly have to negotiate this further and decide the minimum we can accept."

It is pretty clear from the context that he is referring to the minimum payment by a lump sum or monthly payment, which can be turned into one of two vehicles: a cross-undertaking or a promotional fee. It is not saying we decide the minimum cross-undertaking we can accept.

They say underneath that:

> "GSK consider us the only serious threat right now, but will be ready to consider similar deals if others make a similar threat."

That is worth noting, because where Ms. Ford said this is all about the cross-undertaking, in other deals there would not have been cross-undertakings. Here, it is pretty clear that they must be referring to the minimum payment and a payment to avoid independent entry from that comment.

There is one other relevant document on the issue of inducement of Alpharma, also looked at briefly during Ms. Ford's closing submissions. That is at {A9/184/127}. It was the email of 25th June 2003 at the time Alpharma was considering renewal of the deal, and it shows the comparison that is made with obtaining the product independently from GSK.

So if you look under the words "so" halfway down the page:

> "Helen, can you do a new business case Delta vs GSK volume, revenue and profit from Nov 03 until Dec 04. Look at cost price from Delta vs cost price from GSK with and without the £100,000."

Ms. Ford said, well, this shows they were conceptualising the payment in the form of part of the cost price.

We say, on this issue, that is not the relevant point. The relevant point is to show that they were weighing up whether the payment would be sufficient to mean that they should not press ahead with their efforts at independent entry.

Now, all of this is specific evidence that the amount of value that was paid over by GSK was intended to neutralise these threats as they came up and that it was the inducement. You see the very specific evidence, and that is why I must say that the allegations on the other side that a broad and sweeping inference was drawn from a mere fact of a payment observed on the one hand, entry restrictions on the other, is not right. Any inference flowed from the set of facts in this case for a payment that could not be explained.

If we go back to the decision at {V/1/269}, paragraph 6.86 again, Mr. Glynn referred implicitly to this in some of his questions to Ms. Kreisberger and Ms. Ford. It clearly says

in the finding that the decision to make the value transfers cannot be explained on the basis of the stated purpose of the transfers, nor on any basis that was not anti-competitive which the parties have suggested or that the CMA can discern.

So if one analyses the reasoning process, you have clear and specific evidence concerning the purpose of the transfers relied on, namely to induce acceptance of the restrictions.

You have separately in this document -- I am not going to go through that now -- the contextual features that were referred to, including Project Dyke, which we covered in our written closing. The CMA is simply adding at this point, since the value transfers cannot be explained on any other basis like the avoided litigation costs, the object of the transfers can be concluded as being to induce the entry restrictions.

So I turn to what was suggested might be a technical point. It is not. It is a point about the process of the investigation, which is important and substantive. The parties had full rights of defence in a very detailed and very lengthy administrative investigation. They did not give any plausible explanations for why these payments were made which could lead to a different conclusion from the one that is made here. On the contrary, the explanations that were given were refreshingly frank, and they are recorded in the decision.

Go to {V/1/260}. You have at paragraph 6.60 GSK's explanation for what it did. I referred to that in opening. It comes from the response to the Statement of Objections, 4.26.

They said their:

> " ... 'rationale for settlement of the Patent Disputes was in each instance essentially the defence of its valid patent rights and their commercial value (the status quo), and for this it was prepared to compromise based on its assessment of an uncertain litigation outcome."

Then it points out:

> "Each Generic Company sought early entry to the UK market for a paroxetine product and each had its own particular conditions for compromise which had to be accommodated ..."

Yes, and we have now seen what those were. It was the commercial bargaining comparing the commercial profits in one case against the other.

Mr. Urwin of GUK gave a similar account that GUK wanted to avoid the possibility of losing the litigation and monetise the opportunity for a settlement presented by GSK offering them payment.

If we go there to {A4/62/36}, this is part of the interview he gave to the CMA. You will see in the middle of the page, just above it, Mr. Moore says:

"We have covered some of this earlier when we have been talking about the patents situation, but can you just tell us why GUK entered into the settlement agreement that it did with GSK?"

A fundamental question.

Urwin:

"Well, at that point we were injuncted so we could not get into the market. I was concerned; I think we were all concerned, I was certainly concerned that we might not win the litigation. We had spent a lot of money, a lot of time on trying to get a product to market and it seemed that due to the injunction and the possibility of losing the litigation that we might not get one until very late in the day. So one way to monetise this opportunity was to consider this proposition."

If we turn the page, please, {A4/62/37}, towards the bottom, just above the final intervention by Mr. Moore.

Urwin:

"No. No, Eddie would have been the guy who made the decision, subject to me saying, Eddie ... Eddie would have come to me and I would have said, Eddie if it looks good to you then that is what we have got to do. Because I would not have ... you know, I would not have been close enough to the detail to say, now hold on a second, should it not have been 521 packs at 8.86 or ... I could not do that. I had to just say, in total, are we making a reasonable return on our original risk assessment of this project."

On Alpharma's side, the other generic who entered into the settlement, Mr. Torben Laursen, gave a clear and candid explanation to the authority as well at {V/1/324}, back in the decision, recorded in paragraph 6.202.

He says, now speaking for Alpharma:

"'Ultimately, in my view, the reason for entering into the settlement arrangement with GSK was not a commercial one, but more financial. Put simply, it was to remove the uncertainty of potentially winning at a later date with the certainty of getting some money now."

Now, we do not regard any of this as surprising and say that the Tribunal will not either. However, there was specific evidence addressed in order to make the findings that the Authority did. It is at this point in the investigation that one would expect the parties to bring forward an account of what they did which showed that the purpose of the payment was not anti-competitive or that it did not induce if there was something to be said.

Dr. Jenkins on behalf of Merck floated that GSK might have been risk averse in the technical sense, less willing to accept -- or willing to accept under the expected value of the uncertain outcome the litigation because they disproportionately valued removing the uncertainty.

In their drive to achieve the certainty, GSK would be willing to give away not just cash on this theory, but greater competitive opportunities to the generics than they would have expected to get from the court case.

If we go to what she said at {TR/7/73}, she summarised the essence of the risk aversion argument.

Here, at lines 31 and 32 at the bottom of the page, she said in terms:

> "The essence of the risk aversion is they are actually giving something; they are giving a less restrictive outcome."

This is in support of the idea that they are giving competitive opportunities which otherwise would not have happened but for the deal.

In her second expert report she gave two examples of how that might happen. If we can go to that, please, it is at {G/5/12} at paragraph 3.25. That is where she explains risk aversion in her second report which is when it came up.

She referred to two situations. The first was the situation where managers of a company are driven by their bonuses, not the interests of the shareholders, and would prefer a risk neutral stance.

The second is a situation, which she refers to in footnote 23, comparing the risk of loss in the litigation being so catastrophic that it is like playing Russian roulette.

In our case, if these sorts of ideas put forward as a matter of theory by the economic expert had relevance, GSK would have put forward colourable evidence to support them. They did not, because in this case they are not relevant. GSK has never said, for example, that the executive team were trying to secure their bonuses and were willing to give away more than the expected outcome of the litigation. They have never said that they were willing to give away to the generics greater competitive opportunities than were expected to result from the court case to avoid a risk of catastrophe. On the contrary, Dr. Reilly very eloquently and at length told the Tribunal that the risk of a defeat in court was manageable.

At no stage have GSK argued that the competitive opportunities against Seroxat that were given to the generics under the supply agreements were likely to be better for them than the expected outcome from litigation.

So to summarise, there was a careful intensive assessment by the Authority of the evidence, of the purpose of the value transfers. There was not a crude inference, wildly inclusive, that the mere fact of value transfers above avoided litigation costs meant that these were inducements to stand back from pursuing independent entry.

This is in line with the approach taken by the European Commission in *Lundbeck*. The Commission similarly relies on specific evidence about the purpose of value transfers such as was available to them, and otherwise and only then did the Commission draw an inference if it was unexplained, an unexplained value transfer made by Lundbeck in an agreement where the generic had accepted entry restrictions.

THE PRESIDENT: So it all goes back, really, to where we started, which is whether the basic approach of the CMA is saying where there is in settlement of litigation a payment that is the bargain for giving up the chance of challenging, you can call it pay for delay, it is just another way of saying the same thing.

MR. TURNER: Yes.

THE PRESIDENT: It is giving up the prospect of defeating the patent or establishing your product does not infringe, giving up the prospect of success in the litigation is therefore to be regarded as anti-competitive.

MR. TURNER: We say that is right.

THE PRESIDENT: That is a fundamental point. *AstraZeneca* does not -- it obviously does not address that at all.

MR. TURNER: No.

THE PRESIDENT: Not concerned with that, and that one sentence or paragraph I do not think can be taken as undermining that whole approach. *Lundbeck* says quite a bit about it, but *Lundbeck* is under appeal.

I know you say that you rely on *Lundbeck* strongly in your closing and say it is a very powerful judgment in support, and then point out bits here and there in the *Lundbeck* judgments which show that there were some differences. Whether those differences are critical to the reasoning it is difficult to tell.

But this is a very fundamental question of importance not just for this case, but for settlement of patent litigation in the pharma industry generally. There is a lot of patent litigation in the pharma industry, many of it involving parties to this appeal. It does raise this question.

I do not think one can ignore the elephant in the room, which is what is happening on a wider front today. This case is, I would have thought, very likely to appeal, whichever way

we decide it, if we finally decide it here. There could indeed, very possibly, one might say almost probably, but certainly very possibly be a further appeal to the Supreme Court. I do not think anyone can say that the position under European law is that clear.

It has not been addressed head on other than in *Lundbeck* and then there may be those differences and they may be material, they may not be.

If it reached the Supreme Court, it is not that clear that they would be obliged to make a reference. We do not have that obligation, but if it reached the Supreme Court in 22 months' time, making a reference would have certain practical problems. If it reached the Supreme Court in two years' time, making a reference may be impossible.

So it does seem, speaking for myself, that there is a lot to be said for making a reference sooner rather than later. I appreciate there is the separate point about benefits and so on, but then that is a further consideration, whether there are meaningful benefits here and how are they to be weighted in the basic consideration. But there is also the advantage, then, that it may be able to catch up with the *Lundbeck* appeal.

MR. TURNER: I will address you on that.

THE PRESIDENT: We will rise now for lunch, but it does seem to us that taking everything into account and where this case is now at its heart is quite a fundamental question.

There is a lot to be said for making a reference early. We make certainly factual findings and we may express our view and we can deal with various bits of the appeal that are not dependent on this. But on particularly the object case.

MR. TURNER: Sir, may I --

THE PRESIDENT: I would like to rise now so you can think about it, but one has to look at the reality of where we are.

(1.00 pm) (The short adjournment)

(2.00 pm)

THE PRESIDENT: Yes, Mr. Turner. Just give me a moment.

MR. TURNER: Sir, in view of your indication it is probably helpful if I briefly grapple with that directly now, although I would like to develop these points that I am going to be making in the course of my address.

THE PRESIDENT: I want to make it very clear, I am not saying we do not want to hear full argument, and even if we do make a reference, first of all, we may, and probably would, deal with many aspects of the case which do not merit a reference and we might well want to express a provisional view in any event on what the answer should be. So, yes, we want to hear all your argument and the replies and so on.

MR. TURNER: I am grateful.

THE PRESIDENT: So it is not saying we should stop now and just go away and draft a reference. That was not the point I was making.

MR. TURNER: Sir, in a nutshell we say that this is a strong and clear case that the CMA's approach is sound in law.

THE PRESIDENT: Yes.

MR. TURNER: The starting point is that paying potential competitors to cease or limit their efforts to enter a market is anti-competitive in nature, and that is something that has been well established for decades.

This is a form of precisely that. You have seen much of the evidence. You have heard the witnesses, and there really is little doubt that this is a case where GSK was making payments in order to avoid the risk that people it considered to be potential competitors, it says as a matter of ordinary language -- paragraph 6.38 of its Notice of Appeal -- would enter its market leading to a reduction in its profits and falls in prices.

So that is the situation. The question then is whether this context makes a crucial difference. We cannot say that the fact this is a settlement of litigation, sirs, as you are aware, is critical. If we can perhaps call up *Lundbeck* you will see the reference there on page 105 {W/1/25}.

THE PRESIDENT: I do not think we need to spend a lot of time on this point once you have turned to your main submission. The difference is that it is a patent and it may be a valid patent and it may be an infringing product. That is the crucial difference.

So they may have a legal right to prevent potential competitors entering the market, whereas nobody else does other than a patentee. The essence of a patent is a right to exclude. So that is the crucial difference.

As a general proposition, take away the patent, yes. So that is why this case is not so automatically equated with any other case which would merit that general description.

MR. TURNER: Save that for considerations which I will then mention very briefly now, the fact that this is patent litigation should be an additional consideration in our favour, and that is first because, as a general matter, the patent may be valid and it may not be valid.

More particularly, patent litigation is an area concerning the grant of legal monopolies. Powerful economic implications. That is a point telling in favour of the notion that there should not be a difference from the ordinary wider principle of market exclusion agreements.

The Court of Justice has very clearly said that there is a public interest in not depriving the consumer of benefits through a private deal between competitors, and where patents are concerned they have specifically said in *Windsurfing* hat one should (inaudible) eliminate obstacles to economic activities as a result of patents granted in error.

The legal point there, which arises in the patent context, also was spoken to, somewhat ironically, in this case by Dr. Stillman in his expert evidence. If we can perhaps here call up on the screen the joint statement at {I/1/18}. You may recall that this part of the economic evidence received considerable attention.

In the middle of the page, Dr. Stillman says -- and I am reading from the third line down:

> "If an incumbent monopolist pays a potential competitor not to enter, we can safely assume that expected consumer welfare and total welfare will be reduced."

So that is the general proposition from a market exclusion agreement.

He continued:

> "This is not necessarily the case with respect to patent settlements involving value transfers in the regulated healthcare sector. If an originator enters a settlement with a generic challenger, we can assume they believe their positions are likely to be better with the settlement than with continued litigation."

Then this:

> "If the total welfare 'pie' is essentially fixed and not affected by the settlement (because the total demand for pharmaceuticals tends to be highly inelastic with respect to price and ignoring avoided litigation costs), then this expected gain to the originator and the generic challenger implies an expected loss to some other entities in the 'supply chain'."

His qualification -- this, you will recall, was explored in the evidence -- is:

> "... it is not the case that final consumers [this is the NHS] are necessarily made worse off in an expected value sense relative to continued litigation. The expected effects on final consumers depend on the details of the settlement and the regulatory regime."

So that is a reference to what we had, for example, in this case where the agreement and its form, bringing in IVAX, meant that there was a triggering of a category change in NHS reimbursement.

But overall, the point that he accepted and made by Professor Shapiro, customers are worse off given this sort of situation. So we have a very particular example here of how not only patent litigation has its own concerns, but patent litigation in the pharmaceutical sector

involving reverse payments is underlined by the appellant's expert to involve further concerns.

THE PRESIDENT: Yes. Well, I see it says that.

MR. TURNER: Finally, the argument that a party should be free to pay to avoid an assessment by a court based on the strength of the patent, or else to reflect it consensually in the substantive terms of a settlement deal, will allow originators to pay for more than they are entitled to.

THE PRESIDENT: Pay generics more?

MR. TURNER: Well, to pay to receive more by way of preserving the profit stream than they are entitled to by the original grant of the patent.

For example, if you had 100 cases of patent challenges and 50% likelihood of winning in each of them, you would expect in 50 such cases, leaving aside this sort of dynamic, you would have generic entry. You would expect that. If it is possible for the originator to pay consistently to avoid that outcome, you will not.

THE PRESIDENT: That is a policy argument in which -- I mean, it might justify legislative intervention, but it is difficult to use that to say that in an individual case that individual settlement is anti-competitive.

MR. TURNER: If I may say so, it is in this way --

THE PRESIDENT: I am not saying that your approach is necessarily wrong, I am saying it raises fundamental questions which are likely to go further, whether in your favour or not, which ought to have in my view a consistent resolution across Europe, not only because we are dealing with the EU law and therefore by definition should have a consistent resolution across Europe, but also in practical terms. Because many patents are now European patents and that will continue. Even the unified patent when it comes in is something the UK will remain part of. So one wants a common approach.

Quite aside from the narrow legal framework of the treaty whereby the court of last resort has to make a reference, there seems to me all sorts of reasons why it is sensible. In which case it should be done, it seems to me, earlier rather than later, and there the practical considerations come in.

But we understand the argument you are making. We put it very clearly earlier on this morning.

MR. TURNER: The point about the 100 cases is that it illustrates that in an individual case there is a chance that is being taken away.

THE PRESIDENT: Yes.

MR. TURNER: So it has relevance to the specific legal argument and it is not merely a matter of policy.

Sir, for these reasons we do say that there is a compelling case that this tribunal should feel able to decide that it is a matter of law that this sort of agreement has the object of restricting competition.

On the remarks, or as to the remarks, sir, that you have made about a reference, we say here it is highly advantageous to have a full judgment, including on this fundamental point and on the factual and legal issues raised by it. It is much better than leaving this case on ice for potentially another three or more years before it returns for further debate.

THE PRESIDENT: It would not be three years. The period for reference is now about 14 months. It has come down considerably and there are lots of reasons it would not be three years.

As I say, we would decide many issues in this case finally -- but some of the core fundamental ones, such as the one we are discussing about object, can be referred in and also has the advantage that we then also deal with the question of what happens in the Lundbeck appeal.

If the Court of Justice says the General Court was wrong, takes a quite different approach, that casts in doubt all sorts of submissions we have heard perhaps from everyone.

MR. TURNER: That raises a further point in itself. The fundamental point, sir, to which you have referred, which may be the basis of a point that the European Court should opine on, is a matter that is now already on its way to the Court of Justice.

THE PRESIDENT: Yes.

MR. TURNER: It is already going to the Court of Justice in the *Lundbeck* case.

One has to bear that in mind in weighing up the discretion as to whether to make a reference as well, and it is our submission that there are not advantages in making a reference if the main point of concern is likely to be dealt with in the Lundbeck litigation.

THE PRESIDENT: But the danger is they will deal with it in a way that is not so clear in how it applies to our case and then everyone starts arguing what actually that ruling means in terms of this case. Whereas if this case is considered possibly at the same time, because the *Lundbeck* case I do not think has even been set down for argument yet --

MR. TURNER: That is right.

THE PRESIDENT: -- it is a very early stage -- and an appeal goes through procedurally, more stages than a reference, in Luxembourg. So there is a not insignificant prospect this reference could catch up with Lundbeck and be heard, subject to how the court in

Luxembourg organises its business, by the same constitution or following on from the *Lundbeck* appeals on, so that the differences, if they are differences, if they are relevant differences or if they are considered to be irrelevant differences, can be addressed head on. Then we would know whether the fact that there was a finding that to some extent is beyond the scope of the patents, was that critical. The factors that the various appellants point to in Lundbeck, which they say this shows it is very different, and you say those are just additional factors, that they are, as it were, buttressing what was the clear decision of principle, is that right or not, one can analyse paragraph after paragraph in the various *Lundbeck* judgments and try and reach a view.

But the Court of Justice can tell one straightaway, is this critical or is this just a further supplementary but non-essential reason?

So all of that gets sorted out.

MR. TURNER: Yes. This case may or may not be capable of being joined in Luxembourg with Lundbeck.

THE PRESIDENT: It would not be formally joined --

MR. TURNER: Heard at the same time.

But the question whether a reference should be made will go into a consideration of what is already on its way, and whether there are, sir, as you say, certain particular relevant points in this case that may not be dealt with satisfactorily, and if we go beyond the original fundamental point down to certain further points of distinction, on which you will hear further argument, it will be my submission that on those you will be satisfied and will not require there to be a separate reference, meaning that the net result will be that the existing case going to Luxembourg, the Court of Justice, on the fundamental point will be sufficient.

THE PRESIDENT: Yes.

MR. TURNER: Finally, if judgment is given by this tribunal and if it then does go up potentially even to the Supreme Court, it may be that with the advent of Brexit -- I believe the Article 50 letter has just been sent -- that there will be eventually no obligation by the Supreme Court itself to make a reference anymore as there currently is.

But that in itself will not be an objection, because if this case does go to a higher court at a point when we are to make our own decisions about these matters in the UK, then we will do so. This country's courts will make that assessment.

THE PRESIDENT: Yes.

MR. TURNER: Sir, I return then to my submissions.

I outlined the approach that was taken by the Authority in view of the main basis of the challenge that was made by my friends in their closings, which was to focus on the application of the test and whether we had simply relied on a wildly inclusive inference or looked in detail at the facts.

As I say, our approach, the approach we finally took ourselves, is in line with what the Commission did in *Lundbeck*. They similarly gathered and relied on specific evidence on the purpose of the value transfers, and they drew an adverse inference -- an inference -- simply if they found an unexplained value transfer made by the originator to the generic in an agreement where the generic accepted the restrictions.

If I may, if we go to {W/4/58}, you have the GUK (Merck) case in the Lundbeck stable. There is a paragraph which neatly summarises some relevant propositions for the purpose of these closings, 296:

> "Furthermore, the Commission cannot be required to show that the reverse payments exceeded the profits expected by Merck (GUK) if it marketed its generics in order to show the existence of a restriction by object. The mere existence of a reverse payment could therefore be taken into account by the Commission as a relevant contextual element, in order to establish the existence of such a restriction in the present case."

That is the mere existence.

Then they go on:

> "In the absence of any alternative explanation, that payment may be regarded as consideration for the restrictions imposed by the agreements at issue, since it is not certain that Merck ... would have accepted those restrictions in the absence of that payment ... and it can be seen from the evidence referred to in the contested decision that it accepted those restrictions provided that the numbers 'stacked up' ..."

Which resonates with the evidence here.

THE PRESIDENT: Yes.

MR. TURNER: You see that there the Commission's approach was very similar to what was adopted here, and the use of an inference by the Commission and accepted by the court was on the same basis and there is nothing -- I am sorry.

MR. GLYNN: If I may, we see here again the point about the explanation being in their minds as well as in your mind, and just before lunch you were pointing out really the rather thin attempts -- I am not being unkind in the way I put it -- the rather thin attempts being made by the other side to show what the explanations might be other than in rather general terms.

But I would like you, if you would, to expand a little on what you would regard, or you would think the CMA should regard as valid explanations. We have had the side letter issue sufficiently discussed. We know the theoretical points about efficiencies in distribution that Shapiro gave us almost in passing. In the general discussion we have had from the other companies, references to international price referencing, I think only one such reference, but it is clearly a very important point potentially. We have heard references to other countries in which litigation may be going on, so we had that point mentioned. We have certainly had the risk aversion point, which you mentioned just before lunch, talked about. We have had an agreement -- admittedly I entire agree with you purely at a conceptual level -- about the potential for what economists would call agency problems, in other words managers looking after their bonuses rather than the shareholders' interests, and the shareholders anyway -- there is only just one theory that says they are risk neutral and so on.

So we have a raft of issues which have been referred to, albeit in rather glancing ways in some cases, all of which would, I think, merit attention as candidates for explanations.

MR. TURNER: Yes.

MR. GLYNN: Over and above the ones we have heard.

So if the inference is being drawn subject to there being an unexplained value transfer, do we not need to know much more clearly what the explanations are that are being regarded as acceptable?

MR. TURNER: Yes.

The first point there will be that if there are explanations in the process that has taken place, you would expect the companies under investigation to bring those explanations forward.

MR. GLYNN: If I may --

MR. TURNER: If they do not do so, and there are no explanations for the payments which show that those were for certain purposes which can be regarded as legitimate, they come into the category of being unexplained and the inference can then be drawn.

MR. GLYNN: I think, if I may, my personal problem with that is that, at the time, the people in the company who are thinking and talking about these issues may quite naturally have used rather loose and general concepts. It may have seemed obvious to them that they wanted their patents protected, or ideas like that, and they would not have been articulated in a way that would make them clearly relevant to our needs in this case.

MR. MALEK: What we must avoid is treating an assertion as an explanation.

MR. TURNER: Yes.

MR. GLYNN: That too. Yes, of course.

MR. TURNER: Absolutely. But let us say, I will take risk aversion because, as you know, that has been floated in a sometimes tentative way by the appellants here.

Were it the case that GSK could say: what has happened here is that, for various reasons, perhaps the manager reason, sir, that you referred to, what has taken place is that rather than pay for delay for an entry restriction to be observed, the company took a decision that it needed to give away competitive opportunity greater than it would otherwise have expected the generics to have, I do not say that that would necessarily be acceptable, it is not this case, but that would be a different sort of case from pay for delay.

It is a situation which one can imagine, if it were realistic, a company being in the position not merely to assert but to bring forward some evidence to show this is what has happened.

On the specific areas, sir, that you mentioned, litigation costs, I think we know what the situation is there. Similarly, if the generics are going to be providing some kind of valuable economic service as part of an arrangement, that would be another thing. Possibly, therefore, if there was a supply arrangement which would mean that GSK could further expand the reach of the distribution of its products and these people were better able to achieve it, you might recall Professor Shapiro with the paediatrician example, then there would be another situation.

So far as international price referencing is concerned, I confess that insofar as that might mean that the company was seeking to protect higher prices across Europe more generally by this action, then we would not necessarily regard that as a good explanation, an understandable one, but seeking to harm the interests of consumers more generally across the continent of Europe might well not be regarded as a legitimate objective.

So far as patent protection in other countries is concerned, there may be separate patent protection there. This is a case concerning only the patent protection in the UK. Risk aversion I have now addressed briefly.

So returning to my thread, there is nothing in the least wrong with the Competition Authority doing what it did in this case, because you have seen the process, what the companies said and the evidence available to make this sort of inference.

Now I would add that from the very start in competition law cases, this body, the Competition Appeal Tribunal, has emphasised that in competition proceedings commonsense inferences do fall to be made by the Authority and by the Tribunal wherever appropriate.

If I may give you a few references. If we turn to authorities {Auth-B/3/32}, this is one of the first cases, the *Napp Pharmaceutical* case. In it, the first President of the Tribunal pointed out that although it is quite right to say that the Competition Authority has a burden of proof in these sorts of cases and it must satisfy it, at paragraphs 110 and 111, the Tribunal there explained that that may be, but you can discharge the burden of proof by:

> "... relying, in certain circumstances, [on] inferences [and] presumptions that would, in the absence of any countervailing indication, normally flow from a given set of facts, for example that dominance may be inferred from very high market shares ...; that sales below average variable costs may, in the absence of rebuttal, be presumed predatory ...; or that an undertaking's presence at a meeting with [an] anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged ..."

111:

> "Presumptions of this kind simply reflect inferences that can, in normal circumstances, be drawn from the evidence: they do not reverse the burden of proof or set aside the presumption of innocence ... Being essentially evidential in character, such presumptions are hardly equivalent to statutory 'reverse onus' provisions ... But even in the case of such a statutory provision, Article 6(2) of the [Convention] does not prohibit a permissive or evidentiary presumption from which a trier of fact may (as opposed to must) draw an inference of guilt."

That is really making the point that even if we bear the burden, inferences can be drawn which are commonsense.

If we can go to the *Racecourse Association*, please. That is at --

THE PRESIDENT: I do not know if you need to take us to it if you want to give us more references. I think it is important you leave time to go through the various other points, the benefits, the wholesalers, the NHS, the whole string of issues, some of them quite complicated. So if you want to give us --

MR. TURNER: I will give you two references and leave it there. *Racecourse Association* {Auth-Q/1/60}, volume 27 of the hard copy, paragraphs 131 to 133. This makes the point that it is a general principle. He who asserts must prove.

THE PRESIDENT: Yes.

MR. TURNER: *Aalborg Portland*, at the European level, which is {Auth-Q/2/44}, paragraphs 78 to 82. It is a well known authority in which the European Court made a similar point about European proceedings.

THE PRESIDENT: Yes.

MR. TURNER: Now, the appellants argue that our reasoning was a much more blunt instrument than it actually was. If you look at Actavis' written closing at {M/4/4}, paragraph 17, you have a theme that was common to the appellants:

> "If the generic settles and accepts a value transfer from the originator, then it will without more," underlined, "be deemed to have engaged in both an object infringement and an effects ..."

That, I hope you now see, is quite wrong.

Xellia's written closing proceeded down the same false track. I will merely give you the reference for speed. That is paragraphs 39 to 40 at {M/3/15}.

Briefly, they said that the fundamental problem with the CMA was that our approach means:

> "... the parties cannot settle, since the CMA appears to admit only of settlements that involve payments of no more than the patentee's avoided litigation costs or settlements without a payment to the generic at all. This imposes an extreme limitation on practical settlement options."

Two points fall to be made about what they have said.

The first is that they are ignoring the specific evidence pointing to the conclusion here in this case about the reverse payment package being made to induce cessation of efforts as a potential competitor and, at the same time, there was no good evidence showing there was any other explanation.

The second point is that a value transfer can be made to a generic in a patent settlement whenever there is a good explanation which is not anti-competitive.

So to develop further the answer that I was just giving to Mr. Glynn, to take one example, if you assume a generic is threatening to launch a competing product, it is injuncted on an interim basis pending trial, but it receives a cross-undertaking. A year later the parties settle just before the trial. They settle on the basis that they agree there is a 50/50 chance that the generic would have won.

They decide to make an early entry agreement, say, reducing the remaining period of patent exclusivity from the ten-year period to five years. The originator also makes a cash payment to the generic, £2 million. That payment may be capable of a good explanation, say, if evidence is produced to show it reflects the value to the generic of its lost profits for the year it was kept off the market, discounted by 50%, because that would correspond to the quantification of the originator's liabilities under the cross-undertaking. The payment would not have been made to induce the acceptance of entry restrictions.

So you see that there are a variety of circumstances where one can countenance the making of these sorts of arrangements.

The appellants' approach, therefore, misrepresents both the way in which we have relied on inference and they have misrepresented the extent to which we have relied on inference. There is a body of positive evidence in the case of both GUK and Alpharma showing the purpose of the payments was to induce the acceptance of the restrictions.

Ms. Demetriou, in the course of the address on Chapter II, abuse of dominance, will deal with the IVAX situation, but the CMA equally had a body of evidence there.

In the course of hearing this appeal, I should say perhaps one additional point on IVAX, further support came out from Dr. Reilly in his witness evidence, which should not be lost.

If we go to our written closing at {M/6/12} at paragraph 24.

You will recall that Dr. Reilly discussed before you his presentation to the executive team on 5th February 2001. He recommended establishing a supply agreement with IVAX even before testing to see if the product appeared to infringe GSK's patents. He estimated the size of the profit sacrifice GSK would make towards IVAX by entering into that supply agreement.

If we go back to paragraph 23 on the previous page {M/6/11}, Dr. Reilly, when he was pressed, accepted the President's point that the Project Dyke document indicated that there was in the UK a strategy to use possible supply agreements and settlements around the litigation to maintain stability for Seroxat and ward off the threat of generic competition. He confirmed, among other things, that he personally would have seen the 2003 operating plan, which we went to numerous times -- the transcript reference is {TR/5/65}, line 1 -- and it would have been reviewed by his management team.

The Tribunal will remember that that document specifically describes the supply agreements with both IVAX and GUK in the UK as a key strategy to maintain market stability for Seroxat across the plan period. Perhaps we should just bring that up to remind ourselves. That is {B8/269/2}.

It was at the top, paragraph 2:

> " ... Settlement has been reached with IVAX and GUK ... and a supply agreement has been established with IVAX."

With a description of what it did.

I leave that behind and turn to the remaining major points advanced by the appellants in their closings. Now I will attempt to speed up.

The first is the claim by GSK that the agreements led to increased competition and price falls and those fed through to benefits to the NHS to the tune of £50 million or more. In my submission, there was some confusion introduced on this subject during the exchanges on Monday, and it is therefore important to clear that up.

If you would please go to {TR/14/30} and begin at line 23, you have there the President asking Mr. Flynn to explain how the savings to the NHS come in, and there was then an exchange on this. Perhaps if you simply read this to yourself by reading down that page and over the page.

THE PRESIDENT: I have actually reread it and I am still unclear about the position and I would appreciate your explanation of how this applies.

MR. TURNER: Yes. The suggestion was made that the benefits to the NHS come as a consequence of prices to pharmacies falling. The saving has gone through to the NHS. If we turn the page.

THE PRESIDENT: Never mind how it was put. Can you just tell me what you say is the position?

MR. TURNER: Yes.

THE PRESIDENT: If I can help on this a little bit, we take Mr. Horridge's witness statement, because he explains the drug tariff, and look at that. That is where my problem comes, which is at {E/4/1}, I think. If one goes perhaps in that to page {E/4/3} where he explains that there are two categories, I think, that are relevant, there is the category C, where paroxetine was until the end of May 2002. That meant that pharmacists are reimbursed at the list price, GSK's list price.

MR. TURNER: GSK's, yes.

THE PRESIDENT: There is a part clawback.

Then going on to page {E/4/4}, at paragraph 14, he says:

> " ... the NHS took the view that it should reimburse contractors [that means pharmacists] as closely as possible to the price they actually paid for medicines dispensed under the NHS."

Over the page, paragraph 15 {E/4/5}, nevertheless there was a gap between the actual prices paid because they:

> "... varied over time and depended significantly on the availability and prices of parallel imports and/or generic supplies as well as the level of discounts and rebates provided by wholesalers or ... by the manufacturer."

(b):

"By contrast, the NHS drug tariff ..."

Which for category C drugs, which paroxetine was until the end of May 2002, it did not take into account any of those discounts, or parallel imports.

On that basis, as I understand it, prior to these supply agreements a pharmacist would be reimbursed at the GSK list price, but the pharmacist might actually be paying a wholesaler for a parallel import at a lower price, or a pharmacist might have negotiated one of the deals of the kind Mr. Sellick explained which was therefore less than the list price.

The drug tariff policy, subject only to eventual clawback, recognised that the pharmacist could keep the difference, and that was to encourage them -- it is not referred expressly, but Mr. Horridge explains it in his paragraph 16:

"... incentivised [pharmacists] to negotiate better prices with pharmaceutical companies with the objective that they could keep some of this gain for themselves."

That, as I understand it, was the position before these supply agreements.

Is that your understanding?

MR. TURNER: Yes.

THE PRESIDENT: So they got a certain benefit, the pharmacists, from the fact that wholesalers would sell them some parallel imports and for which they paid less than GSK's Seroxat.

MR. TURNER: Or, indeed, had it been a direct to pharmacy model from the start, the same would have been true, that the reimbursement is judged by reference to the list price. As Mr. Sellick and Dr. Reilly explained to the Tribunal, actual competition generally takes place at the level of discounts and rebates below the list price, which the branded drug company seeks to keep generally at a higher level.

THE PRESIDENT: The pharmacist has that benefit.

MR. TURNER: Subject to --

THE PRESIDENT: Subject to clawback.

MR. TURNER: Yes.

THE PRESIDENT: So when the pharmacist was buying a parallel imported product, that had a financial benefit for the pharmacist because it was still getting reimbursed at the GSK list price.

MR. TURNER: Yes.

THE PRESIDENT: Then we get the change in June 2002 because of these agreements, or because of the IVAX agreement perhaps, in any event, and paroxetine is moved into category A, which he explains at paragraph 9 on page {E/4/3}.

MR. TURNER: That is because we now have IVAX as one of the suppliers and two wholesalers, I think AAH and Unichem. Because of that fact, it moves into the different category and we look to the list prices of the suppliers more generally and take the weighted average there.

THE PRESIDENT: It is then a weighted average of the wholesaler and generic price.

MR. TURNER: Yes.

THE PRESIDENT: It is the (inaudible) price.

Two questions. Insofar as the pharmacist is still dispensing Seroxat, and the category A basket price is lower, he says the reimbursement price fell by 12% immediately as a result of this shift from category C to category A. That is paragraph 11 of Mr. Horridge.

So if the pharmacist is dispensing Seroxat for which it is still having to pay the higher price, is it now getting reimbursed at the category A basket price?

MR. TURNER: Yes. It is therefore being squeezed compared to what the previous position was.

THE PRESIDENT: Right. Insofar as it is buying generic paroxetine, for which the price may be lower than the GSK Seroxat price, and according to whether you listen to Ms. Webster or Dr. Stillman or Dr. Majumdar, it is 2%, 3%, 4% -- I think the maximum said it was 4.3% lower.

MR. TURNER: We have to be careful --

THE PRESIDENT: Average price to pharmacy.

MR. TURNER: Yes. The overall average.

THE PRESIDENT: That is the overall average including Seroxat, so it may be more than 4.3%.

But it is getting, clearly on those, similarly reimbursed at the category A basket price?

MR. TURNER: Yes.

THE PRESIDENT: So if the average price to pharmacists fell by 4.3%, to take the largest amount I think that any expert came up with, but the reimbursement falls by 12%, although the price to pharmacists has fallen, effectively, the net price, because of reimbursement, has gone up or they are worse off.

MR. TURNER: That is right.

THE PRESIDENT: That is right?

MR. TURNER: That is right. There is a squeeze, that is quite right.

THE PRESIDENT: So on that basis, there is no benefit to the pharmacists at all.

MR. TURNER: That is right.

THE PRESIDENT: From what has happened.

MR. TURNER: No.

THE PRESIDENT: It does not matter whether it is a 2%, 3% or a 4%. Therefore, the only real benefit in terms of paying less -- falling, not paying less -- a lower price, is the effect on the NHS?

MR. TURNER: Yes.

THE PRESIDENT: Which is Dr. Stillman's point.

MR. TURNER: Then I shall make, very briefly --

THE PRESIDENT: But if that is right then this whole debate about exactly how much the price to pharmacists fell becomes a bit irrelevant, does it not?

MR. TURNER: They, on the other side, raise two points. GSK alone says, well, we are not interested as a matter of competition law in the price to pharmacy; you are looking in the wrong place. The administrative adjustment that benefited the NHS is what you should be concerned with, and because that was the 12%, that is an end of the matter.

The other appellants make a different point which is put in two ways. They say that what one observes is an overall average reduction of some magnitude between -- one does not know; Ms. Webster says it may be illusory anyway, but let us say at maximum up to 4%. They put their case, as I understand it, in two ways. They say that on the object case, how can one have an object restriction which has resulted in benefits to the pharmacies? On the effects case, they say that if there is any form of reduction corresponding to what they call competition, that would need to be weighed in a counterfactual.

THE PRESIDENT: I understand that point. But the first point, there is no benefit to pharmacies because of the fail in the reimbursement price. It is fed through. There is a benefit to the NHS, but you may say that is just because of the way the rebasketing works.

But it is the bit in between. There may be a benefit to wholesalers because they pay less for some of the generic supplies than they pay for the parallel importers. That is Dr. Majumdar's point, and they may retain some of that themselves. But insofar as they pass it through, the pharmacists are not better off, they are worse off in any event.

MR. TURNER: Yes.

THE PRESIDENT: Because --

MR. TURNER: The way I would put that point --

THE PRESIDENT: Have I misunderstood how this works?

MR. TURNER: Not at all. I will be corrected, I am sure, overnight if I am wrong.

THE PRESIDENT: Mr. Flynn can correct me in his closing if he says -- he put forward Mr. Horridge.

MR. TURNER: The point is this. Dr. Stillman alone on the appellants' experts side said one should take into account something which is not strictly the outcome of a competitive process of rivalry, but which is the operation of the machinery of the NHS system and observe that the NHS did better by the 12%, and that should be an end of it.

If one --

THE PRESIDENT: Dr. Jenkins did not address this at all. Dr. Majumdar really focused on the wholesalers.

MR. TURNER: Yes.

THE PRESIDENT: It is not the pharmacies as such that are critical in any of this.

MR. TURNER: No, that is right. If one uses his approach and says, well, if we are entitled to take into account how the administrative machinery works out for the different stakeholders, and if one is then interested in the pharmacies, one does see that they suffer. They are harmed.

I think at that point it is therefore necessary for me to explain unequivocally that the reason why the CMA has focused on prices to pharmacies is not because this case is about the welfare of pharmacies full stop. We focus on pharmacies because those were the direct customers of GSK from the start of 2002 forwards, and because that is, to use Professor Shapiro's expression, the locus of competition. It is where one can clearly see the effects of the contested agreements on the competitive process, and that is why one is looking at it.

If I may give you --

THE PRESIDENT: The other point -- sorry to interrupt you, but the other point, which is also, it seems to me clear, is that because of the volumes supplied which significantly exceeded the parallel imports, and everyone expected this of course, it went beyond displacing parallel imports, and because the price of the generics that was lower than the price of GSK's Seroxat, it changed the mix effect, as you describe it. The mix effect, with the supply of generic, really you cannot quite separate from the move from category C to category A because it is making generic supply available that puts it into category A.

It is that change, therefore, which also led to the NHS paying less.

MR. TURNER: I am sorry, what led to the NHS paying less was the additional --

THE PRESIDENT: The move to the category A.

MR. TURNER: It was the move to the category A that led to the benefit to the NHS. That would not have been affected had the volumes been at a different level than they actually were.

The point about the volumes exceeding those which the parallel importers were bringing in prior to the Alpharma agreement -- at that point Alpharma is then only displacing the

Seroxat from that point forward -- is a separate question from the NHS remuneration issue to do with whether that means that there was increased competition that should affect the basic argument about restriction by object or effect.

THE PRESIDENT: So you say even if the generic supply had been limited to the amount of the parallel importers, though it just displaced the parallel import, it did not go any further, you would still have had the move to category A?

MR. TURNER: That is my understanding, yes.

Sir, Mr. Bailey confirms that and underlines that the category change happens because of the IVAX agreement and not because of the two subsequent agreements.

THE PRESIDENT: Yes. So what you get really is, because of the way the drug tariff system is structured, possibly a more realistic approximation to some extent in terms of reimbursement to the pharmacists towards what they have actually been paid than you did previously when the benefit of the parallel import price was just a bonus for them. That is just the way the regulatory machinery is structured, it is nothing to do with competition.

I think I have sort understood it, yes.

MR. TURNER: I am just going to make a couple of points on it and then leave this.

I just want to begin with the point I was just making about why we are concerned with pharmacies. If one can open the transcript at {TR/7/37}, line 32. Professor Shapiro there, at the bottom of the page, explains this point and we adopt it:

> "I am really focusing first on the competitive process, and I see what we have come to do as anti-trust economists for a number of decades now is we use consumer welfare as a guide in thinking about the competitive process ..."

If you follow that through, he explains why we are looking at pharmacies because we are trying to understand how the process of rivalry is being affected by these agreements.

That goes down to line 10. If I may give you one more reference along the same lines. {TR/9/5}, from line 11 in Professor Shapiro's address down to the bottom of the page, line 30. He explains there, again, why we are focusing on the pharmacy level. This one perhaps if I do take.

He says:

> "So because they had a fixed quantity, what the generic needs to do is be able to price so that it can successfully place that quantity at the pharmacy level. So it must offer terms that are good enough at the pharmacy level to achieve that, to sell the fixed quantity. As I have said, that is basically matching the parallel imports price. That was what was expected. That does not involve competing to get wholesalers' business.

The focus and the locus of competition is entirely at the pharmacy level and that is, I think, very important. I think we are -- I hope we are going to come back to that.

"Let me say this is what we -- in fact, observed and was expected, namely the generics would go to the wholesalers and say, I need this price at the pharmacy level -- in Alpharma's case basically stating the price at the pharmacy level -- you, wholesaler, will get your standard cut as part of my commercial necessity of offering good enough terms at the pharmacy level to sell my quantity, and that is not competing with another wholesaler -- excuse me, competing with another generic at the wholesale level; it is offering the standard terms to the wholesalers that they always get, basically the cost of doing business that the generic must incur in order to achieve its business aim, which is selling to the pharmacies."

So forth.

He is analysing the competitive process by reference to what is happening in relation to the customers on which the attention was focused by the business people, which is at the pharmacy level.

Finally, I will just give you a reference to Dr. Haydock's report where she had made this point originally when it was challenged first by Dr. Stillman. That is at page {H/2/6} paragraphs 6 to 18. I do not need to go there now.

The second point is that the change in category was not anything to do with material reductions in the price of paroxetine, sir, as you say.

The overall system was intended to try to reflect the amounts that pharmacists were paying, but it was imperfect in a very significant way. The clawback system to adjust the NHS payments was based on a periodic review of the discounts that a sample of pharmacies were getting across the board, not just for this medicine, and it was a very crude measure.

There is in the bundle, and was relied on, a Department of Health paper. If I just show you what they say about this system. It is at {B1/1/1}. That is the paper:

"Options for the future supply and reimbursement of generic medicines ..."

It is dated July 2001.

If you go to page {B1/1/4}, you see from the final bullet in the bottom that the DOH say:

"Reimbursement prices often differ significantly from true market prices. Price lists in some cases appear to be produced solely for the purpose of satisfying the requirements of the Prescription Pricing Authority (PPA) prices and the nature of the market are most opaque to the ultimate payer – the NHS. This is unacceptable."

Page {B1/1/11}, please. The final bullet, again similar, underlining that reimbursement prices:

"... show prices which, in many cases, are far removed from real prices paid in the market."

THE PRESIDENT: Sorry, which?

MR. TURNER: It is page 11 of Magnum and page 10 of the internal numbering. What they point out is that the competition takes place at prices underneath the waterline of the tariff price.

THE PRESIDENT: Yes.

MR. TURNER: If we go over the page {B1/1/12}, paragraph 3.13, the department pointed out that the present system, the one you are considering, largely fails to satisfy the purpose of determining the reimbursement price. They did not:

"... believe that current reimbursement arrangements give us transparent information as to the true prices paid in the market."

The last reference is page {B1/1/35}, paragraph 10.3, under the heading of "Reform ..." They consider bringing tariff prices closer into line with those paid by community pharmacies and dispensing doctors and think about ways of achieving that.

What you see, therefore, is the system that is prayed in aid as something that the Competition Authority and this tribunal should take into account was a flawed administrative measure.

Dr. Stillman's analysis, his own analysis illustrated precisely how these movements in the drug tariff prices do not reflect changes in competition reflected in pharmacy prices.

If you go to {G/2/20}, he produced a graph. The gold line in the graph shows the reimbursement prices for paroxetine. The blue line is the average price of 20mg paroxetine that is paid by the pharmacies.

You can see the point in time when the category change takes place because of IVAX. You can see also that the gold line, after Alpharma enters, the end of 2002, beginning of 2003, even moves slightly up, which does not appear likely to reflect underlying competition taking place at the level of the prices actually being paid by pharmacies.

But in any event, you see the two are detached from each other, and although the overriding objective of the NHS, very sensibly, is to ensure that payments to the pharmacies reflect the costs that the pharmacies incur, it was not working well.

THE PRESIDENT: But the pharmacies were worse off, as this shows.

MR. TURNER: Yes.

THE PRESIDENT: As a result of these agreements.

MR. TURNER: Yes.

MR. GLYNN: But the NHS was better off through an imperfect mechanism.

MR. TURNER: Through an imperfect method, and in either case we say that the right question is not to look at how the imperfect method has affected different stakeholders, either the NHS or the pharmacies. The right focus for the Authority and for the Tribunal is on the process of competition and how that has been affected by these agreements.

MR. GLYNN: But if the process of competition, including volume shift from one type of drug to another, were through an imperfect mechanism to have led to this significant reduction in the cost to the NHS, that would be a benefit to the final consumer of the competitive process, would it not? I know you characterise it differently.

MR. TURNER: We do. We say it is not. We say that the process which, by the way, we do not categorise as competitive, we conceive of the arrangement as being one designed to almost share out the market and to achieve a stability, had certain knock-on consequences because of the administrative arrangements of the NHS.

THE PRESIDENT: So there is a benefit to what may be the proxy for the final consumer, but it is due to the imperfect way in which the drug tariff, at that time, was structured and it is not something that results from what can properly be described as competition. That is your point.

MR. TURNER: That is our point.

THE PRESIDENT: There is that benefit, clearly.

MR. TURNER: Of course.

THE PRESIDENT: Therefore, it should not be brought into account.

MR. TURNER: Just two riders to that are, at first, of course, to the extent that that is a benefit at all that is relevant to this Tribunal, it was prompted by the IVAX agreement and not by the following two.

The second is that in our schema, if I am right that there is a restriction of competition through object or effect as a result of these agreements, then the way in which it is analysed after that is under the rubric of paragraph 3 of Article 101, which requires one to demonstrate that the agreement involved certain hurdles. We say this would not meet those hurdles in any event, contributing to technical or economic progress, indispensability and so forth.

MR. GLYNN: But if you view the drug tariff as being the way in which, let us say, the clumsy public interest of the taxpayer via the NHS is expressed in all of this, it is obviously

intended to follow down any reductions in the cost to the pharmacist that happened, however they happened. If you say that the result of the IVAX and the other agreements were in two bites to cause this tariff to come down, then surely the clumsiness or incompetence almost of the NHS/DH in this particular aspect of things is a side issue, is it not?

I mean, their intention is obviously to capture the benefits of changes in what is happening in the market.

MR. TURNER: I will distinguish the underlying or overriding intention, which is plainly to try to match the reimbursement to what is actually happening competitively to what actually does happen, and say that one should focus on what actually is implemented, particularly as you see when the department itself points out that that overriding objective is not, in practice, being implemented through --

THE PRESIDENT: You say the saving which results from the recategorisation was triggered by the IVAX agreement, and the two subsequent agreements, or three if you (inaudible) the extension of the Alpharma agreement, but the agreements with GUK and Alpharma do not in themselves produce any reduction in the reimbursement price.

MR. TURNER: No, that is right.

THE PRESIDENT: Because it had already happened.

MR. GLYNN: Forgive me, I am not sure if I (inaudible) here at all. I thought there was a suggestion that the major reduction was due to the IVAX one, but then there was a further reduction that was due to the other --

MR. FLYNN: That is true.

MR. TURNER: The category change that triggers the 12% reduction takes place because of the IVAX agreement. There is no further category change or anything else of that kind which then happens. All that happens is that if we have this graph -- it is still in front of you -- that there was a further slight decline at a certain point in the gold line and that reduction was said by the appellants to be attributable or must be attributable to the GUK and Alpharma agreements, which was not sensible.

It was a point you may recall I specifically put to Dr. Reilly at the end of cross-examination, where I pointed out here that if you see a rise in the gold line in the price being reimbursed and therefore the price being paid by the NHS, would you attribute that to the Alpharma agreement which it followed? He said no, you would have to look at it in detail to try to work out what was going on. So I said to him, well, in that case, if there is a reduction of a slight kind, could you attribute that safely to the introduction of the GUK and Alpharma

agreements? He gave the same answer, which was that one would need to look at the underlying factors carefully to see what had prompted it.

The final observation to make based on the exchange that took place on Monday is a small one, which is that Mr. Flynn suggested that the evidence showed at one point that the Seroxat price had moved down.

THE PRESIDENT: Can I stop you before we get to the Seroxat price, just on the position of the pharmacies. If one ignored reimbursement, then they did benefit because of the shift in the mix because the average price went down --

MR. TURNER: Subject to, you will recall from the hot tub, the quality adjustment point that the experts were debating. Sir, can I remind you?

THE PRESIDENT: Yes.

MR. TURNER: Their point there was compared with parallel imports you might assume the domestic product is an improvement because of the absence of the foreign labelling and the overstickering.

THE PRESIDENT: Yes.

MR. TURNER: But they were also debating the point that from the perspective of the replacement of Seroxat, there is a change of quality adjustment in the other direction because patients who are keen on and have been prescribed for a period of time the branded Seroxat drug may regard the change in the medication to the domestic generic product as a move in the other direction.

So the observation made -- I can give you the references to where Dr. Stillman and Professor Shapiro both effectively agreed on this point -- was that we do not know what the extent of the quality adjusted price movement would be because we do not know how these different vectors moving in opposite directions would have cancelled out against each other or not.

THE PRESIDENT: Subject to that and the quality adjustment, there was, simply in terms of the average price the pharmacies were paying, once the volume of parallel imports were surpassed by the generic supply there was that fall.

MR. TURNER: Yes, as a result of the --

THE PRESIDENT: The experts spent a lot of time discussing.

MR. TURNER: Yes.

THE PRESIDENT: But you did not actually -- and (a) is that fall as a result of what can properly be described as competition, and they discussed that, and (b) that fall did not actually

benefit the pharmacist very much because they have taken this big hit on the reimbursement --

MR. TURNER: Yes.

THE PRESIDENT: -- that they received.

MR. GLYNN: It might just be worth adding on that particular point, the switch from the parallel importers to the generics would at the pharmacist level have been clearly a switch to a better quality product. I think that is right?

THE PRESIDENT: Yes.

MR. TURNER: That was the assumption.

THE PRESIDENT: I think that was the evidence actually, more than an assumption, that they do not like the overstickering and foreign instructions and so on.

MR. TURNER: Yes. But similarly, for those sorts of reasons the change from the branded product on the evidence, Seroxat, to the generic product --

THE PRESIDENT: That is the quality adjustment the other way.

MR. TURNER: Yes. When I say assumptions, I mean that in giving their opinions the experts agreed that there was an issue there which also one takes into account.

You are paying a slightly lower price because of the mix effect for potentially a slightly lower quality product than was there before.

THE PRESIDENT: So the one place where there was any real competition was, for the wholesalers, as between parallel importers on the one hand and the generics on the other, which the generics won because all the parallel importers were knocked out?

MR. TURNER: That was the agreement, yes. All the experts agree on that. No one denies that because of the supply agreements, at that point, the wholesalers are subject to a process of competition because the parallel imports are replaced by the generic products. Thereafter --

THE PRESIDENT: That is competition (a) on price because they price just below or about the same as the parallel import and on quality because it is a more attractive product?

MR. TURNER: Yes.

MR. GLYNN: Sorry, that was the point I did not manage to make, clearly, but that was the point I was making.

I think it is reinforced probably by the fact that if the price was much the same and you were a wholesaler, you have to have some reason to make the switch. In commercial terms you might find it easier to understand a switch being made if it was to a better quality product, even if it was at much the same price. But if it was to a product which was much

the same in quality and much the same in price you might think, well, why should I bother switching?

MR. TURNER: We certainly accept that, that from the wholesalers' perspective they are taking the generic products because they prefer them to what was there before. The parallel importers similarly do not seem to reduce their prices.

This is the point of interest for Dr. Stillman who had expected that there might be some process of competition there. You did not observe it; the parallel importers exit immediately, effectively, at the same price.

THE PRESIDENT: So the wholesalers do get the benefit that Dr. Majumdar emphasised.

Also, of course, they get more supplies than they would have got, significantly more because they had been cut out by GSK which has moved to its direct to pharmacy model.

MR. TURNER: Yes, those points are correct. I will be making some further observations, some of which have been adumbrated already, about the process about competition that is prayed in aid on the other side.

Those points one can see and accept, of course, as our expert said. There is at that point a process of competition whereby the generics replaced the parallel imports. We do not deny that. Thereafter we do deny the remaining sequence.

THE PRESIDENT: The question is, what is the relevance of that to the overall analysis?

MR. TURNER: Yes. Absolutely.

THE PRESIDENT: Would that be a sensible point?

MR. TURNER: Yes. I will make one remark. The one remark is where you have an agreement, including one with an anti-competitive object, the fact that there may be other collateral matters to take into account does not affect the existence of an agreement which either has the object or effect of restricting competition. It is something that clearly comes into the equation.

It certainly does not mean that if these agreements had the object of restricting competition for the reasons I have given, it is displaced merely by that fact.

MR. MALEK: You say they would have to come in under Article 101(3)?

MR. TURNER: Yes. Perhaps just call up *Lundbeck* {W/1/105}, paragraph 498, I think it is.

There it is. That is the paragraph which makes the settlement point and then says:

> "The anticompetitive object of those agreements being sufficiently established — since they amount to agreements excluding potential competitors from the market in exchange for payment — even if they might also have benefited competition and consumers, those effects must be demonstrated by the applicants and examined in the

light of Article 101(3) ... and not evaluated by the Commission in the context of the first paragraph of that article ..."

So that is a convenient moment.

THE PRESIDENT: I am sorry I took you out of your course on this drug tariff point, but I really had not fully understood it until now.

MR. TURNER: It is important to meet the points that the Tribunal is concerned about.

(3.25 pm) (A short break)

(3.35 pm)

THE PRESIDENT: Yes, Mr. Turner.

MR. TURNER: Sir, just to conclude on the NHS point that we were discussing a few minutes ago. A material point is one that is made about it in our closing -- I do not want it to be lost -- at {M/6/47}, paragraph 115.

This is the simple point that when you are considering benefits and whether this sort of agreement can be expected to cause harm or not, we have discussed during the hearing that the right counterfactual is not the previous situation, the status quo ante, but what would have been expected as the alternative development. That is why comparing the three -- it is a 3 to 4% benefit against the previous situation is perhaps one way of looking at it, but not the right way from the point of view of assessing whether this is an arrangement that can be expected to cause harm.

When I went to Dr. Stillman's piece in the joint statement on page 16, similarly he was comparing it with what would be expected from a litigation.

The other point is that I mentioned that the experts had been debating the quality adjusted price point. I will merely give you the references. Dr. Stillman addresses it, for example, at {TR/9/49}, lines 23 to 26; Professor Shapiro {TR/9/71}, lines 1 to 11. That was the debate about in what direction there was a benefit or a harm.

Finally, as regards the assessment of these contested agreements as to whether there is competition that results from them, the point, sir, you were raising with me just a few minutes ago. I would come back to the debate about whether competition of the kind we have discussed at the wholesaler level is an important locus of competition to be considered, and you will recall the discussion with Professor Shapiro on that matter.

If I can call that up briefly, it is at {TR/9/65} from line 10, where he gave an example which I would ask the Tribunal to recall.

He says, beginning at line 12:

"We have a complication here in the current case because GSK is selling to the pharmacies and the generics are selling through the wholesalers. So what are we supposed to do? When I use the word 'direct customers' here, this was in the standard case ... The key thing in terms of economics is to look at what I call the locus of competition, where the firms end up competing."

Then he gave this example which we find quite informative:

"Suppose you had crude oil producers who sell their oil to refineries, who make refined products such as gasoline and that is the competition but they sell it through logistics firms who take the oil, put it on tankers, negotiate arrangements, and sell to the refineries. They have an intermediary. Suppose the crude oil producers all get together, form a cartel, and they raise the price. Suppose I told you that the logistics firms, by standard industry practice, they charge 1% of the delivered price of the crude oil as their fee for what they do.

"The crude oil price now doubles. The logistics firms, they have a 1% fee. So they are getting 1% on double the price. Let us suppose their costs do not change at all; they are still doing the same with the tankers and whatever, the people trading. They are delighted. The refineries are obviously the ones who are going to pay the price, the doubled crude oil price. To look at the effect on the logistics firm and say, they made more money, would be a very poor way to evaluate the effects of the cartel, even though technically, assuming they are taking title to the oil, they would be the direct customers."

Now, here, if we are right we have a situation where the wholesalers do have a particular custom about the level of the cup that they charge for particular products. It may be that generic drugs on average are much cheaper than parallel imported drugs and so a 12% or whatever percentage mark-up compared to a 3 or 4% mark-up on a much higher priced product would generally come to a similar figure. It may be that in this case they experience something of a windfall from the arrangements. But to equate this to competition in a relevant sense we say is not right, for the reason given by Professor Shapiro.

MR. GLYNN: That is not quite a fair comparison that he made there though, is it? Because here the wholesalers are the decision takers; it is they who make the decision whether to take a parallel import or a generic alternative, and they are making that decision as a result of competition between the two alternative suppliers and a very, very large amount of business changes hands as a result of it.

In a very important sense there has been a very important competitive process going on at the wholesale level in this case.

MR. TURNER: I understand that difference and accept that as a difference. We would not say that it is important.

In the circumstances of this case, if the wholesalers are not being competed for -- Dr. Majumdar's presupposition -- for business -- if you remember that is the way his report started out, that there was competition for the business of the wholesalers which led to the lower price of the paroxetine that they pay compared to the parallel imports -- that is not what happened. If it is merely paying an entry fee to the wholesalers, even if they choose to take that product rather than the old one, the parallel import, we do not say that that is an important aspect of competition.

Certainly it is not competition in relation to the supply of paroxetine to the wholesalers of a very specific kind. It is merely that the wholesalers say that for a generic product this is the cup that we will take.

MR. GLYNN: I agreed with Professor Shapiro on the point about seeing this as a windfall because of custom and practice and so on. That is not what I am -- what I am getting at is it seems, as far as I can understand it, that the decision taken, as a result of competitive process, was, in this case, the wholesaler in deciding to switch from the generics from the parallel imports and that that is a very major competitive development in the market.

It has not mentioned the pharmacists at this stage, but we should not neglect that as a feature of what happens in the market. Presumably expected and intended to happen by the parties.

MR. TURNER: Two points. We would say that the parties did not envisage that because they were focused on the price to pharmacies, and so far as GSK was concerned, maintaining the stability of the Seroxat price direct to pharmacy was its sole concern.

You will recall, and we will come to it in a moment, Dr. Stillman agreeing, well, why would GSK be interested in anything other than maintaining the price of Seroxat, which it was selling to the pharmacies?

Secondly, sir, while I do agree with you that the wholesalers were making a choice to take one product rather than another, it is our case that that is not a significant or major development to be taken into account, but it is a matter of lesser significance.

It is, finally, worth recalling at this point, as we are talking about the supply agreements, one other feature --

THE PRESIDENT: Can I just follow that through. I mean, you say it is of lesser significance. Is it something that one looks at on object, accept that it was not particularly the intention of

GSK, they were not very interested, no doubt, in the position of wholesalers, but they probably were interested in displacing parallel imports. It was clearly a benefit for them there.

MR. TURNER: They were.

THE PRESIDENT: So to that extent they were. Is it something that is relevant to looking at whether the basic object test is satisfied, or is that competitive development something that comes in under 101(3), or where does it fit?

MR. TURNER: We say the latter.

Going back to paragraph 498 of *Lundbeck*, which I showed you before the short adjournment.

THE PRESIDENT: Yes.

MR. TURNER: Our approach is that you have agreements paying potential competitors to refrain from a form of important competition there, where there was a prospect of very great consumer benefits. That in itself engages the object prohibition.

You are in the province of Article 101(3) when you are considering matters of this nature, and in relation to the framework under Article 101(3) I made submissions about how this should be approached.

The point I was just going to make was to recall also that although much of the focus of the appellants in this case has been that these were essentially settlement agreements, the main focus of which involved supply, perhaps this moves on naturally from this topic. We point out that a major aspect of the consideration for the entry restrictions was straightforward payments.

The figure of 75% of the value of these deals being attributed to the supply agreements has been aired by GSK, and it is only the result of treating the promotional allowance cash payments as part of the supply agreements.

If you go to page {A/2/117}, you see that very clearly from GSK's Notice of Appeal. The relevant paragraph is 5.41(e)(ii) at the top of that page and you will see there that they get their 75% because they say:

> "Given the direct linkage between the supply agreements and the promotional allowances which supported them cited above, on the CMA's own numbers a full 75% of that £50 million should not properly be regarded as part of any such 'payments and other value transfers' at all."

What they have done, therefore, is to assume that a part of what we see as straightforward payments is part of the supply agreements.

The cash was a very significant aspect of the deal, and as Professor Shapiro emphasised, and it is also our submission, where that is the case the use of the payment in cash as inducements to a potential competitor remains an object restriction regardless, which may help on the question we have just been considering.

So if you go to {TR/8/5}, you will see lines 1 to 6 where Professor Shapiro himself clarifies that when he was talking about non-cash cases, he was talking about non-cash cases that do not involve cash. He has a separate analysis of the two. He was not addressing what he calls hybrid circumstances, and at the foot of that page, lines 22 to 27, he says how he would consider the cash payments in themselves as engaging the problem.

THE PRESIDENT: Have you revised the calculation of GSK excluding the promotional payments?

MR. TURNER: We have that somewhere, and I do not have it at my fingertips. I think it is close to 50/50. I will have to come back to that, sir.

THE PRESIDENT: Tomorrow is fine.

MR. TURNER: Yes, we will do that.

Just to complete the reference, {TR/9/51}, lines 19 to 25, Professor Shapiro concluded on the discussion that he had in the hot tub with Dr. Stillman about the treatment of cash and non-cash, and he said:

> " ... suppose you had an agreement where there was a large cash payment alone and an agreement by the generic not to enter at all. I think we achieved agreement among the experts that would be anti-competitive. Suppose you now enter that agreement, that the patent holder provides a small quantity of product to the generic as well, a non-cash portion, would you completely change your analysis of that agreement? I hope not."

Which, from an economic point of view, is making a similar point to what we say is the right legal analysis. If you have an agreement, the object of which is to restrict competition, then any aspect which is said to justify the arrangement is considered separately.

I am sorry, I am reminded that the numbers on the point, sir, you asked about are in our skeleton argument at {S/6/11}, paragraph 24. It was one of the paragraphs that I referred to during the hearing itself where we set out the numbers in relation to each of the three deals.

THE PRESIDENT: Thank you.

MR. TURNER: The next point is the factual argument of Xellia, GSK and Actavis that the evidence in this appeal has revealed to you that Alpharma had already resolved not to pursue independent entry in any event by the time of the settlement.

So those three parties join in saying that the reverse payments made by GSK did not induce Alpharma to refrain from taking steps to compete independently because it was not going to do that anyway. Because three of the appellants have pursued that vigorously, subject to the Tribunal's indication I will address it.

The fullest exposition of the argument is in Mr. O'Donoghue's written closing, which is at {M/3/8}, paragraphs 22 to 26, under the heading:

"No restriction of competition - Alpharma had already unilaterally decided to settle."

This is a claim maintained by Actavis too. It is paragraph 65 of its written closing. You know that GSK has made the same point also.

It is necessary to be quite clear about the claim that is being made because it is bold. The claim needs to be that Alpharma had no intention of going forward into the patent trial to a judgment by the time of the settlement. If there had not been settlement money forthcoming, therefore, from GSK, Alpharma would have walked away without payment, or even capitulated in the litigation, but it had already decided, according to the appellants, to settle.

To begin, if I may go to a document you were taken to by Ms. Ford to demonstrate that Alpharma always intended to tuck in behind BASF in the litigation to await the anhydrate patent being declared invalid and not itself to fight GSK proactively.

If we go to this document, it is at {A4/63/1}. Ms. Ford took you to this in opening. It was the instructions to counsel that Alpharma gave in June 2002. I want to show you a part of it that you have not seen. It is page {A4/63/6}.

THE PRESIDENT: Sorry, I know we were shown this before but it is a little while ago now. This is June 2002?

MR. TURNER: Yes.

THE PRESIDENT: So this is just after GSK had started proceedings; is that right?

MR. TURNER: That is right.

THE PRESIDENT: Before the first hearing before Mr. Justice Jacob.

MR. TURNER: Yes, absolutely.

THE PRESIDENT: It is to appear at that hearing, that is what it is talking about?

MR. TURNER: Yes.

THE PRESIDENT: The head page says instructions to advise and appear, I think.

MR. TURNER: Yes. Now, if we go forward, if you have the Magnum version on your screen, page 6, you will see what Alpharma was describing as its attitude at that time.

There is a heading at the bottom, "Future strategy". If you see that:

"If BASF fail at first instance, Alpharma may launch their own attack rather than waiting either for the decision on appeal, or the hemihydrate patent to expire ... Although the basis of the attack would be the same as in the BASF claim, we would have the benefit of concessions made in that case, and of by-passing some of the difficulties encountered (for example with BASF's expert/experiments)."

So Alpharma may launch their own attack rather than waiting, was their approach.

There are, in fact, so far as we know, no contemporaneous documents making the very strong claim relied on by the appellants to succeed in this appeal that Alpharma had given up the ghost by the time of the settlement deal with GSK. We do not find it implied by any document. On the contrary, the documents which are contemporaneous suggest that Alpharma was ready and willing to fight if it was not offered sufficient compensation in a deal.

If we go back to {A2/15I/2}, this is one of the negotiation documents that we have already considered about the meeting significantly later, 11th October 2002. About two-thirds of the way down the page, the passage that I have taken you to a few times:

"GSK will offer a lump sum and/or monthly payment which can be turned into either a cross undertaking as part of the settlement or a promotional fee. We clearly have to negotiate this further and decide the minimum we can accept."

If they decided that the minimum had not been offered and they could not accept it, the implication is that they would be ready to fight.

Alpharma's readiness to fight late in the day too is also apparent from another document which is relied on in the decision. I will give you the decision reference, but go to the document itself. It is at {V/1/149}, footnote 559. The document reference, please, is {Z/576/1}.

THE PRESIDENT: We are not quite there yet. What paragraph of the decision?

MR. TURNER: The paragraph in the decision is footnote 559 on page {V/1/149}. So it appears in section 3 of the decision. 3.351, thank you.

This is a document which you have not focused on before. It is an email from Alpharma's external lawyer at Stephenson Harwood to the Alpharma team on 17th October 2002. You need to bear in mind that this is a few weeks before the settlement is reached.

If you go down four paragraphs, you see that she writes:

"There was a great deal of debate ..."

She begins that they had:

"... a hearing for directions regarding the amendment of the patent today. The opponents to amendment are ... Alpharma, BASF, Generics UK, Sumika Chemical and Apotex."

If you go down to the fourth paragraph:

"There was a great deal of debate about Alpharma's validity challenge and whether it is admissable. That will be looked at fully in 2 week's time. The Judge was sympathetic but not sure that he should not direct it to be heard in the main action as a proper challenge to validity. However, he could also see that Alpharma would want to get things sorted out on infringement alone if they could."

{Z/576/1}

That was their attitude on a validity challenge.

Then it goes on:

"There is good news that BASF have agreed that Alpharma can instruct David Kitchin QC, and his clerk has said he will come on board as senior adviser although at present he would not be able to do the trial. That might change. You will remember that we had hoped to instruct David at the outset but BASF were not happy."

Then ignore the next paragraph about charging rates.

If we turn the page --

THE PRESIDENT: He had acted for BASF, had he?

MR. TURNER: Yes, he appears to have, but he now agrees to be retained here at the top of the next page:

"We have also recruited a junior junior with whom I have worked in the past to do some of the legwork and to ease the pressure here during the experiments. That will produce an overall costs saving because she can do some of Daniel and Charlotte's work more cheaply."

{Z/576/2}

Then the immediate way forward is at (b):

"We are pressing for a full statement of case to reflect the Delta inspection results and what their case now is."

What you see from this is, first, that Alpharma was positively at a late stage seeking to introduce an invalidity challenge of its own and had aired that at a hearing. Second, it shows at a late stage Alpharma gearing up for battle and wanting to instruct a well recognised new QC, Mr. Kitchin. Third, it laid out the immediate way forward, including pressing for a Statement of Case.

There is no indication or implication of having given up. On the contrary, it is clear that Alpharma was preparing very actively, proactively, for trial.

If we go back, then, to Mr. O'Donoghue's written closing at {M/3/11}, paragraph 25.5. This is part of the section on how they had already unilaterally resolved to settle.

Xellia refers to a document shortly before the patent trial in November 2002 and that document is at {A9/184/98}.

Xellia quoted a short extract saying that GSK's Statement of Case revealed nothing new. His submission was that that went nowhere. But those quoted words do not appear in the document and the CMA has relied on the words:

> "Either they do not have a very strong case, or they are going to surprise us all just before the trial.
>
> "In short, there are no terribly disturbing news from the trial".

THE PRESIDENT: Sorry, where --

MR. TURNER: That is at the top under "Dear all":

> "While GSK was expected to make a statement of case last Monday ..."

This is prior to the trial that is then going to take place a few weeks later:

> " ... this statement was very limited. Either they do not have a very strong case, or they are going to surprise us all just before the trial."

The implication is that this is something which does not sit with the attitude of a party which has decided to withdraw come what may.

Finally, if we look at the document quoted by Xellia in paragraph 25.5 of its closing. At {M/3/11}, go back to Xellia's closing, 25.4 we just covered. 25.5 is a statement that we place:

> "... considerable reliance on an internal Alpharma presentation ... showing Alpharma's confidence that it was going to win based on GSK having a 'tough' argument to win. But it is clear – and was eventually accepted by the CMA – that this document dates from late 2003/early 2004. This was the date of the High Court's judgment in Apotex, which, for the first time, found the claim 11 claim to be invalid. By then of course everything had changed, which is why Alpharma immediately terminated the agreement and entered independently."

This document then post-dates Mr Justice Pumfrey's, as he then was, judgment invalidating the anhydrate patent, and the point that is made is that it is of little weight in indicating confidence about prospects of success for Alpharma at the time of the settlement agreement.

But if you go to the next document in the file, which is at {A6/146/1}, this is another presentation around the same time which appears effectively to cover the same matters. If we go in it to page {A6/146/4}, you see that it is considering the termination of the GSK contract.

If you go to page {A6/146/7}, you see that it is considering, or it is referring to invalidation of the anhydrate patent and that the appeal is pending, which helps date the document to late 2003, early 2004. You also see on that page, the last bullet that they consider, that even if the patent validity is upheld on appeal, it would be a stretch for GSK to win a claim that the Alpharma product infringes, "likely no infringement".

Our point is that there is no reason to suppose that the Pumfrey judgment on *Apotex* affected that infringement issue. He had not considered that point, nor that it was not the perception at the date of the original settlement agreement concerning the infringement of the Alpharma product.

THE PRESIDENT: Just one second.

MR. TURNER: The point is it is very clear there that they are saying, assuming that the patent is held valid on appeal, they may argue the displacement step occurs, and it is that that they say is a stretch for GSK to win.

MR. MALEK: Do we know who prepared this?

MR. TURNER: Only that it is an Alpharma presentation. It is marked "privileged attorney/client communication", but I have no information.

Then to draw together the strands, a major point in closing from three of the appellants has been that Alpharma had already resolved to settle by the time of the --

THE PRESIDENT: You have got the other document which is from around the same time. This is considering whether to renew, is it not?

MR. TURNER: Yes, that is right.

THE PRESIDENT: Which I think is referred to in the next paragraph where they consider the options and express confidence they can win, but they recognise there may be an injunction pending trial and pending an appeal.

MR. TURNER: Yes. This is dealing with their particular point --

THE PRESIDENT: That they were never prepared to take it --

MR. TURNER: They had all given up by the point of the settlement.

THE PRESIDENT: Yes.

MR. TURNER: So I come to the question of witnesses.

THE PRESIDENT: Before that, the other point that was taken was the Alpharma agreement was much shorter than the GUK agreement; it was materially different. It was one year, it was then extended for another year. It could be terminated in the event that generic entry took place on a month's notice, I think.

The period of the initial agreement was no longer in duration than the period likely to elapse between that date and the judgment on an appeal from the trial if the trial had gone ahead. So that it did not actually -- they were not agreeing to keep out of the market from any longer than they would have been kept out even if they had fought the case.

Then the second, on the extension, again, there is a reference to the date the best chance they had of getting in if the case had gone in their favour.

MR. TURNER: Yes.

THE PRESIDENT: It is rather different from the three-year agreement with GUK.

MR. TURNER: Yes. But not, we say, relevantly for the legal analysis either under object or effect.

So far as the object case is concerned, the point remains that it was anti-competitive in nature for GSK to pay Alpharma to stop its efforts to move forward in the litigation at that point.

THE PRESIDENT: What you say is that although they could not have entered into the market, they could have been the first in establishing a non-infringing product in a year's time?

MR. TURNER: Exactly. They are preventing these people walking towards the door of the market.

THE PRESIDENT: It was then left to others to do it.

MR. TURNER: Yes. Indeed, I do not have the document at my fingertips, we looked at it a little while earlier, the assessment by the Alpharma personnel of what GSK was seeking to achieve was to attack all the non-GSK product seeking to enter the market. I will get you the reference. Therefore, when the threat emerges, and Alpharma says that they recognised that we are now the major threat -- perhaps I should get you the reference for that shortly -- that they seek to address that threat when it came up for potential renewal, the arrangement could have been considered. But what they are doing is paying them to cease their efforts at that stage and therefore to put that on ice.

If we go to {V/1/151}, you see the quotation there at least. {V/1/152}, this is Torben Laursen. This is what I was just referring to.

At the top of the page talking about Dr. Reilly:

"He understood the value of an early entry by us compared to any other competitor (except IVAX who are on the market with GSK product). Consequently this must be factored into a contract. GSK wants to supply product to us if we enter. They want to attack all non-GSK product entering the market ..."

So the aim was to try to create delays, cease the efforts.

That is as regards the objects case. So far as the effects case is concerned, as I have indicated in opening, and we will come back to, we rely similarly on preventing potential competition --

THE PRESIDENT: Are you moving on to an effects --

MR. TURNER: Not immediately, no.

MR. GLYNN: Just very quickly, does this reference to them wanting to attack all non-GSK entering the market, is that another object in the GSK mind in the agreements, as you see it?

MR. TURNER: It is contextual. It explains that the purpose of that particular arrangement and the payment -- what they were seeking to achieve was to avoid non-GSK product, in this case Alpharma non-GSK product, coming in.

MR. GLYNN: So would it be fair to say that they might have had two objects: one being to end the litigation, and the other being to facilitate the replacement of the parallel imports?

MR. TURNER: Yes. I had not read that specifically as trying to replace the parallel import, which itself is, in a way, a GSK product itself, of course.

THE PRESIDENT: But this is in the context -- I think it is a response to the proposal which is set out at 3.355 whereby what Alpharma were putting forward is that the deal would be they could come in with their own product in perhaps April 2003.

MR. TURNER: Yes.

THE PRESIDENT: Their own generic product, non-GSK product.

MR. GLYNN: I see.

THE PRESIDENT: That GSK will agree not to oppose that, and then they have the discussion and I think the response is that GSK are not sympathetic to any more GSK product; they are not going to accept that.

MR. TURNER: Yes.

THE PRESIDENT: I think it is a reference back, is it not, to the proposal that you made a few days earlier --

MR. TURNER: Moreover --

THE PRESIDENT: -- 3.355.

MR. TURNER: -- by this point, if I am not mistaken, parallel imports have effectively gone from the market already. This is the Alpharma deal.

THE PRESIDENT: He had not made it. He had told his colleagues that that is what we are going to put forward. Then they have the meeting. They do put it forward and this is the answer.

MR. TURNER: What we have here is, I might say, the subjective document supporting the objective aim.

So I come to the question of witnesses. The case that is made by these three appellants here is there is no real factual dispute that Alpharma had unilaterally decided to settle. That is quoting Mr. O'Donoghue at paragraph 26. There is no real factual dispute that they had unilaterally decided to settle.

THE PRESIDENT: You say there is, very much.

MR. TURNER: There is, certainly. It is their case. One of the authorities that I mentioned earlier from the *Racecourse Association*, Mr Justice Rimer presiding, was in these sorts of cases he who asserts must prove. In the appeal, even if we bear the legal burden, if they want to assert and prove that point and that is their case, when you do not have the documents making that perfectly clear, then you should lead witnesses in the judicial appeal.

All of them have conspicuously failed to lead witnesses where those might have been expected because the points that they want to make are not anywhere in these documents. An adverse inference against them does fall to be drawn from that because the documents do bear out the CMA's case. The latest statement of the principle is in the Supreme Court decision in *Prest* which is at authorities N.

THE PRESIDENT: You cite it in your closing.

MR. TURNER: We cited it. Perhaps I do not need to --

THE PRESIDENT: Is there any prior statement put in from an Alpharma witness saying they have decided to settle?

MR. TURNER: We are not aware of it.

THE PRESIDENT: It is not really a case of adverse inference as such. You could say that this is quite a strong thing to do; you are just saying well look at the only evidence there is and it does not show that.

MR. MALEK: It is the absence of evidence.

MR. TURNER: It is the absence of evidence but also in a judicial appeal, if a party says "this is our case" and it is a case that can be made by a witness, then if they remain silent on that point, applying the language in *Prest* and the previous cases (inaudible) and so forth.

MR. MALEK: Even if a party has resolved to settle it depends on what terms, is it not? If it is: we have resolved to settle on any terms, we are never going to fight this; that is one thing. It is another thing if it is: we will settle if the price is right.

MR. TURNER: We understand that their case must be the first.

MR. MALEK: It must be, but it does not seem to be borne out from the documents we have seen.

THE PRESIDENT: Perhaps in the evidence supporting it, I am not sure it is an adverse inference, but in this case you look at the evidence and you say it shows the opposite.

MR. TURNER: We certainly say that too. But, insofar as one can draw any conclusion from the failure of a witness to support the proposition that they make, that is what we say. So that deals with that major point. We then go to the next factual claim advanced in these appeals. This is Actavis which says that, on close analysis, you can see that the payments from GSK to Alpharma were not inducements to Alpharma to defer their efforts, they were payments for specific matters.

Without descending precisely into the quantification of the different points, in closing Actavis says that at least a part of the payment by GSK should be explained as discharging GSK's liability to pay damages under cross-undertakings which it gave to Alpharma.

Then it says that another large part, the promotional allowance, should not be viewed as cash but a lower cost price of the volumes of paroxetine that it was given.

If we go to Actavis' written closing at {M/4/12}, you have the claim at paragraph 52 with the underlined words. Ms. Ford says that, from Alpharma's perspective, paragraph 53, third line, and as is evident from the express reference to the cross-undertaking, Alpharma were considering the minimum they were prepared to accept under the cross-undertaking in damages.

We respond that that is not self-evident and, on the contrary, the natural reading of the passage quoted is that it says something different.

It says that GSK will offer a lump sum and/or monthly payment which can be turned into either a cross-undertaking or a promotional fee. Alpharma had to negotiate and decide the minimum it could accept and that that relates to either of the forms of payment, the minimum lump sum or monthly payment.

Not only is it the natural reading of the document, we do not see Actavis' reading of it as coherent. It cannot argue at one and the same time that its chances of defeating the anhydrate patent were very high. You remember the references yesterday to the large payment which would be conceived of as due under a cross-undertaking, which would mean

that the chances of defeating the patent were very high; and, also, that both GSK and itself viewed the chances of defeating the patent as extremely low.

Their case is that they had already decided to settle, which could only justify a small payment, if anything, from GSK on that account. So that their submissions point in different directions.

If the payments from GSK were for the cross-undertaking, you would expect that to be reflected also in some concession of substance such as early entry or royalty agreement for the remainder of the period, if the implication is we are very likely to win.

If Actavis was serious in putting forward a specific case that these payments were attributable to this matter; there, again, I say that there is nothing in the documents, maybe an absence of evidence, which does support that case and one would have expected witness evidence, at least from the maker of the document, Mr. Laursen, or from one of the others involved in the negotiations with GSK.

MR. MALEK: One reading of this email is that they are just talking about: what label can we give it?

MR. TURNER: Yes.

MR. MALEK: Nothing else. It does not really help you as to what it really for.

MR. TURNER: Yes. Exactly. But they did not have a witness and there is a witness from Alpharma in this case, Mr Collier, one of the negotiators. They did not call him for cross-examination.

On top of that, you have heard evidence orally from one of the two participants at this settlement meeting with Alpharma, one of the two principal negotiators for GSK, Dr. Reilly. You will recall that he was asked about the bargain over a cross-undertaking and he confirmed he did not even know what the word meant. That is {TR/5/85} from line 22 and Ms. Ford chose not to cross-examine Dr. Reilly either.

I say no more about the cross undertaking explanation. As regards the so called promotional allowance payments if we go back to Actavis' closing submissions at {M/4/13} and go back to paragraph 57 under the heading "Promotional Allowance."

> " ... did not treat the promotional allowance as a payment in return for not entering the market. Rather, it treated it as a discount to the cost price of the paroxetine product sourced through the Alpharma-IVAX Agreement. This is evident from a contemporaneous document ..."

Which is over the page, dating from June 2003, the time of the extension of the supply agreement. The relevant extract is there at the top of the page.

Actavis says that this shows the payments labelled as promotional allowances were not inducements. I have foreshadowed the point. We say it does not. At its highest it is showing that part of the payments for Alpharma for renewing the arrangements and not pursuing independent entry could be thought of as profit from the transfer of the paroxetine, which is equivalent to cash.

Moreover, on promotional allowances, there is clear evidence in another contemporaneous Alpharma document, which the Tribunal has seen at least once, that the essential objective was to get hard money and that the label applied was neither here nor there.

If we go to {Z/587/1}. You have the Alpharma email of 24th October 2002 recording that Brendan Magrab and Torben Laursen:

> "Brendan and I yesterday concluded the UK settlement for Paroxetine with Mark Reilly, VP Finance for.
>
> GSK UK and Cynthia Robinson ..."

At the end under paragraph 5:

> "Linked to this we will get £ 0.5m which Brendan clever suggest to name "promotional allowance" in the contract to make it hard money."

The clever suggestion to give it that name to make it hard money is not consistent with that being the specific purpose of the payment.

There is nothing in Actavis' appeal which disturbs the case presented in the decision, which is that the evidence shows that payments to Alpharma, £11.8 million over the two year term, {V/1/301} were inducements to accept the entry restrictions.

The careful analysis of every element of the case is set out over 23 pages between paragraphs 6.157 to 6.203. Sir, those are the main points on the Alpharma side.

In terms of time, are we concluding shortly or --

THE PRESIDENT: No, I think we need to conclude but you have got all of tomorrow with Ms. Demetriou. I do not think you are short of time, are you? You are making good progress.

MR. TURNER: We are making good progress. Would it be possible to start at 10 o'clock tomorrow in order to safeguard that or is that difficult for the Tribunal?

THE PRESIDENT: If we do that we will need to take two breaks in the morning for obvious reasons. So we will start at 10.00 tomorrow.

10 o'clock tomorrow.