IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 22nd November-Friday 23rd December 2022

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

BETWEEN:

Appellants

(1) ALLERGAN PLC ("Allergan")

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

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

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

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

AND

Respondents

COMPETITION AND MARKETS AUTHORITY ("The CMA")

A P P E A R AN C E S

Mark Brealey KC (On behalf of Advanz)

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

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

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

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

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

Wednesday, 14 December 2022

(10.30 am)

Closing submissions by MS FORD (continued)

THE PRESIDENT: Ms Ford, good morning.

MS FORD: Good morning. Sir, two matters arising out of questions raised by the Tribunal yesterday. The first concerns the quality adjusted life years document that we said we would put on Opus. It is now on Opus at {H/197.2/1}. Perhaps I could just show the Tribunal where the relevant part of it is.

THE PRESIDENT: Yes, let us have a look at it.

MS FORD: If we go, first, please, to page 97 {H/197.2/97}, the Tribunal will see there the definition of a quality adjusted life year, and it is defined as:

"An index of survival that is adjusted to account for the patient's quality of life during this time. QALYs incorporate changes in both quantity (longevity/mortality) and quality ... of life. Used to measure benefits in cost-utility analysis."

Given the seriousness of the adrenal insufficiency condition and its potential consequences, this is obviously an appropriate factor.

As to how it is then applied, if we look, please, to page 38 {H/197.2/38}. There is a heading here, "Type of economic evaluation", and 5.1.11 explains that:

"... cost effectiveness (specifically cost-utility) analysis is the preferred form of economic evaluation. This seeks to establish whether differences in expected costs between options can be justified in terms of changes in expected health effects. Health effects should be expressed in terms of QALYs."

Then if we go down to 5.1.13 this document explains:

"Standard decision rules should be followed when combining costs and QALYs. When appropriate, these should reflect when dominance or extended dominance exists ..."

Just pausing there, this is not a reference to dominance in any competition law context, this is a reference to -- a treatment is dominant if it is more cost effective than an alternative treatment.

You see there a definition, "Incremental cost effectiveness ratios", and they are:

"... the ratio of the expected additional total cost to expected additional QALYs compared with alternative treatment(s)."

So you are assessing the ratio of cost to quality adjusted life years, and the figure we mentioned was the £20,000 feature and that is at the end of this paragraph.

"... expected net monetary or health benefits can be

presented using values placed on a QALY gained of £20,000 and £30,000."

So that is essentially ascribing a value to a quality adjusted life year, and the point that we were making is that at the very highest of its pricing levels the price of Auden's hydrocortisone was essentially something like 87% below the value that these guidelines considered to be good value, so the £20,000 figure for a quality adjusted life year.

THE PRESIDENT: But do we not, as part of that calculation, need to know exactly what benefits hydrocortisone provides to the patient to whom it is prescribed?

MS FORD: Well --

THE PRESIDENT: I mean, I am sure it does provide benefit because obviously there is a market for it, but in order to conclude the thought we probably need to have that fact as well.

MS FORD: We had referred to the way in which the CMA has described this medicine as being essentially a life-saving medicine, and the point that we make in the context of trying to assess the economic value of that is that because Auden essentially continued this medicine in circumstances where the original marketing authorisation holder was planning to delete it, had Auden not done so, for a significant part of the

relevant period there would have been no medicine on the market which could perform this function.

THE PRESIDENT: I mean, what you are doing, let me just articulate it so you can tell me how wrong I have got it: you are making a granular NICE QALY point. What you are saying is, look, hydrocortisone is a good thing. We have various bits of evidence to say what a good thing it was.

When you have a process of trying to evaluate what the worth of a good thing is, then a ballpark figure is 20/30,000 and the price of Auden's hydrocortisone was a significant amount below that, and that is as far as the point goes. I mean, I do not want to be rude about it, but that is the point you are making.

MS FORD: Sir, that is essentially the point and it is in the context of the economists all struggling to grapple with this economic value --

THE PRESIDENT: Exactly.

MS FORD: -- and so it is one way that we have offered to try and get to an appreciation of the economic value of this product which then has to be taken into account when you are asking, well, is it excessively priced?

THE PRESIDENT: Thank you. I understand, thank you.

MS FORD: The second point was the Tribunal asked yesterday whether any case law exists which might help in

understanding the scope of the Department of Health's powers in the context of our countervailing buyer power point. We have produced a brief note overnight on that which we will upload to Opus but we can hand out in hard copy now just for the purpose of making some brief observations on it.

THE PRESIDENT: Yes, thank you. (Handed)

MS FORD: In short, we have not identified any instance where the exercise of the power has been judicially reviewed in the way that the Tribunal was contemplating, but we did identify four points which might cast light on the scope of the powers.

The first point to highlight is that the NHS Act 2006 was a consolidation act, and the power that we looked at, section 262, replaced an identical power which was under section 34 of the Health Act 1999.

THE PRESIDENT: Right.

MS FORD: Section 34 has been used to regulate the prices of generic medicines in the form of a regulation, and that was something that was explained by the Tribunal in *Flynn Pharma*, if we can look, please, at {M/150/17}. If we look at paragraph 48, please. This is the Tribunal explaining, starting at the third line:

"Prior to the introduction of (the voluntary) Scheme M, there was a statutory maximum price scheme

applicable to generic products in the form of the Health Service Medicines (Control of Prices of Specified Generic Medicines) Regulations 2000 ... From 2000 to 2005 the price of phenytoin tablets was capped under the MPS. The MPS was adopted inter alia under section 34 of the Health Act 1999 ..."

Which is the provision which pre-dated section 262.

So the power has been used in a very immediate and a very comprehensive fashion by way of regulation to control the prices of generic medicines. That is the first point.

Secondly, the Tribunal will have seen from Intas' closing submissions at paragraph 106 that the Department of Health's powers were amended in 2017 and 2018, which is relevant to the Intas period. We have summarised the relevant amendments in our note, and one of the consequences was to clarify that where you had a supplier of generic medicines who was also a member of the PPRS, which is a voluntary scheme, the fact that they were a member of that voluntary scheme did not prevent the price control powers from applying to them in relation to their generic medicines.

That was the lack of clarity about the extent of the Department of Health's powers that was identified in *Flynn Pharma* because there was a concern that if you

were a member of any voluntary scheme, even though that scheme does not cover the relevant drugs in question, did that preclude the exercise of this power?

THE PRESIDENT: Yes, I see.

MS FORD: It is important to recognise that that lack of clarity never affected Auden's position because Auden was not a member of the PPRS, so that power was always available vis-a-vis Auden, and it also did not affect Actavis' position because Actavis was a member of Scheme M and subject to those powers that I have shown the Tribunal yesterday.

The other relevant change that was introduced was to bring in more extensive requirements to provide information to the Department of Health but again, in our situation there was not any relevant lack of information or lack of powers to extract information, in particular because Actavis was the member of Scheme M and there were powers to extract information under Scheme M.

But we mention these changes primarily because the observations that I mentioned from Hansard yesterday as to the purpose of the powers, the context of those was that those were made in the context of these amendments and it was said that the purpose of the powers in general was to address unreasonably high priced generic

medicines, and we have referred to the relevant extracts from Hansard in the note.

The third point that we have identified is that the Government publishes an annual review of regulations, and the 2022 annual review comments on the purposes of these powers under section 262(1). Again, we have set out what they say in the note, this is at page 6, paragraph 15. What they say is:

"Under section 262(1)(a) of the 2006 act the Secretary of State can limit the price of any health service medicine that is not covered by the voluntary scheme for branded medicines pricing and access. While no price control determinations have been made there are still situations where the cost of a product has caused concern. For example, there may be instances where a product's price considerably increases with no obvious justification. It therefore remains appropriate for the provision under section 262(1)(a) ... to be retained by the Secretary of State, should this price limiting power be used going forward."

The simple point that we make is that on the CMA's case this is a situation where a product's price increases with no obvious justification, and so on that basis this is the power that could have been deployed to address the matters in the present case.

Then finally, in terms of case law that has commented on section 34, we have drawn attention to *Genzyme*, which is {M/31/84}, please. The Tribunal will see in paragraph 273 reference to the fact that there is confusion over whether the powers could be used if the company was a member of the PPRS. So that is what is going on in 273.

But if we then look at paragraph 274, this is the Tribunal commenting on the purpose of the powers and they say:

"... We think it unlikely that the power to 'limit prices' referred to in section 34(1) could have been intended by Parliament to be used for the collateral purpose of controlling the anti-competitive practices of 'bundling' and 'margin squeeze' alleged in the present case. In our view, the statutory purpose of sections 33 to 38 ... read as a whole, is to control excessive profits or prices for branded health service products, and not to control other practices, such as those at issue in the present case, which are more appropriately dealt with under the Chapter II prohibition of the 1998 Act."

So what the Tribunal was doing there is it was pointing out that the case before it at the time was about bundling and margin squeeze, and that these powers

do not really have any relevance in relation to that conduct. But in my submission it is implicit in what the Tribunal is saying here that if it were faced with allegations of excessive pricing then these powers would be relevant to its assessment of a dominant position in those circumstances.

I showed you *Napp* yesterday. That is another case that mentioned the power to control prices under section 34 in passing, but again, because *Napp* was a member of the PPRS this particular price control power was not given prominence at that time.

That is essentially what we have managed to find in terms of assistance on the powers.

THE PRESIDENT: We are very grateful. Thank you very much.

MS FORD: Ms Thomas has passed up to me references to the Decision on the question of the seriousness of the condition of adrenal insufficiency in relation to the Tribunal's question. It is paragraphs 3.116 to 3.117, and the reference for the Tribunal's note is {A/12/73-75}.

THE PRESIDENT: Thank you very much.

MS FORD: Moving back to what we were addressing at close of play yesterday, the 10mg agreement.

THE PRESIDENT: Yes.

MS FORD: Our ground 5C of appeal concerns volumes supplied

to Waymade and AMCo under the supply agreements. As the Tribunal is aware, the CMA's case is that the volumes supplied were limited and it uses that fact to try and bolster its case that there was some unwritten pay-for-delay type understanding underlying the written agreements.

But in our submission that case has an element of bootstraps about it, because of course there are no volume restrictions on the face of the written agreements either. On the contrary, both written agreements contain minimum supply volumes and no prohibitions on requesting more, and they also included an obligation on Auden to use its reasonable endeavours to accept all orders.

So the CMA is here trying to bolster its case about the existence of an unwritten agreement by reference to other features which are themselves unwritten and which are inconsistent with the express terms of the written agreements.

It is also important to focus on exactly what happened, because the story that the CMA seeks to tell that these volumes were fixed and non-negotiable in our submission is difficult to reconcile with the fact that over the course of the entire relationship between Auden and Waymade and subsequently AMCo the volumes were

actually revised upwards twice. So prior to January 2013 the volumes supplied were 2000 packs. In January 2013 there was a threefold increase to 6,000 packs and in April 2014 it doubled again to 12,000 packs. As Mr Beighton said in his negotiations with Mr Patel, when I came to negotiate new volumes for the second supply agreement I asked him for more and he gave me more.

So in our submission all that can really be said is that the volumes were stable during the periods in between increases in volumes.

When Mr Beighton sought an increase based on his estimate of the 10,000 packs for his Aesica products, that volume was granted. It is important to recognise as well that AMCo clearly did not perceive there to be any absolute volume caps because they persisted in seeking to negotiate more, and we heard that repeatedly from both the Advanz witnesses.

Mr Sully in particular was quite careful to distinguish the position in hindsight when he recognised that in fact Auden had not provided more and the position at the time when he had no such understanding, and we say that is quite important because what the CMA is trying to do is infer some sort of common understanding between these parties at the time, and it

is not relevant to that exercise to say, well, let us look at what happened in hindsight. It is clear if you look back that you were never going to get more.

If the CMA's case is that AMCo understood they were being offered fixed volumes by way of a value transfer, by way of compensation for their commitment not to enter the market, you have to show that that understanding, that comprehension of the deal that was being offered was present at the time, and it is not enough that it might have become evident in retrospect. That does not disclose any sort of meeting of minds as to what was actually going on.

THE PRESIDENT: No, I mean, clearly there will have been a meeting of minds as to something. In other words, the increase from 2 to 6 to 12 must have involved an agreement as to how much would be provided.

MS FORD: Yes.

THE PRESIDENT: It is quite clear that the interests of Auden and AMCo will have been divergent in terms of how much should or should not be supplied. AMCo would want as much as they could get and Auden would want to provide the minimum.

So what I think we have to ask ourselves is: what would have informed the discussions between Auden and AMCo whereby such a figure was achieved? That is the

situation. I quite agree with you, one must not look at it with hindsight. One must look at it at the time the conversation took place. Of course it is an undocumented conversation so we are to an extent working in the dark, but that is the sort of reconstruction we have to undertake, why is it that they stopped at 12 or 6 or 2?

MS FORD: In some respects that is verging on an effects analysis, and that is the sort of debate that was had with one of the economists about whether or not you can say that the effects of this are problematic, and obviously that is not the CMA's case. They say it is so sufficiently problematic it is an object analysis. The core of the object case has to be that there was a meeting of minds on an undertaking not to enter the market.

THE PRESIDENT: Well, indeed.

MS FORD: The point we make is that if any understanding that the volumes being offered were limited only ever became evident in hindsight and AMCo kept saying, well can we have more, can we have more, because it was not their impression that they were being limited, they kept asking for more, then the inference that what is going on here, understood to both parties, is a meeting of minds that they are being compensated for not entering

the market cannot be shown to be present at the relevant time. It is only something that you identify with hindsight.

THE PRESIDENT: The problem, I think, that is present in that is agreement on 12,000 out of a market of, let us say, 77,000 I think that is roughly it, but call it 80,000, 12,000 out of 80,000 implies an assessment on the part of -- no, it implies more than that. It implies, I think, a common understanding on the part of both parties that AMCo cannot at the time of that agreement enter the market. The reason I say that, before you tell me I am wrong, the reason I say that is because if AMCo were able to enter the market at the time of the agreement they would want more.

MS FORD: It is important to recall that these are minimum volumes. These are expressed as minimum volumes in the documents, and so one cannot start from an assumption that there is an agreement of a maximum of 12,000. That is what the CMA must prove, and in our submission it has not succeeded in doing that.

THE PRESIDENT: Okay. We will have to look at Mr Beighton's and Mr Sully's evidence pretty carefully on that, and we will of course, but I must say my sense, and it may be wrong, my sense was that they asked for more. Sometimes they received it but sometimes they did not. In other

words, they would have wanted more than 12 but did not receive it. They received, obviously, an increase from 6 to 12, so I am not sure but we will obviously look at it because we will be guided by what the evidence is rather than what my defective recollection of the evidence might be.

My sense is that there was couched as a minimum nevertheless something of a maximum. It was not the case that AMCo could waltz in and say, look, we will have 60,000 units and we will sell all those. I do not think that was on the cards.

So there is some sort of maximum present, and if that is right then you do have to ask yourself: why did they stop at 12 or 6 or 2? Why did they not go further? What I am putting to you is that that implies some kind of mutual understanding as to the probability of market entry.

MS FORD: That last point is probably the point we fundamentally take issue with, because of course Auden could perfectly well have unilaterally determined that it was only prepared to offer a limited volume, and had it reached a unilateral determination then there is no concurrence of wills on a limit.

Also, Auden could have appreciated a practical reality that if one offers particular volumes and the

offer is sufficiently attractive to the counterparty, the practical consequence might be that the counterparty does not enter the market. This is why I spent some time emphasising what was in *ICI*, because that appreciation of how your counterparty might respond is not enough to show the concurrence of wills.

THE PRESIDENT: I completely have your *ICI* point on board. I suppose what I am putting to you is a sort of Milton Friedmanite point of price as a form of communication. What I am putting to you is that the bare fact of agreement at 12,000, certainly it shows what Auden were prepared to offer. I accept that. But the acceptance by AMCo of that figure communicates to Auden that they are not in a position to deliver into the market more, because if they could they would not accept the deal.

MS FORD: I would hesitate to say that it is quite that straightforward. Certainly it is the case that what Auden is doing is competing with Aesica as to what AMCo can get from Aesica and trying to compete for those volumes, and so it certainly contemplated that the alternative, the sort of -- the alternative possibility for AMCo is that it could take the Aesica product instead and that is why this is a competitive interaction. But there may well be other reasons why AMCo would consider taking Auden's product to be

favourable that do not -- that are not strict volume related reasons, and we have heard a lot about their concerns about skinny labels.

THE PRESIDENT: That is true.

MS FORD: We made our ground of appeal point on in general the burdens of regulatory compliance that generic companies face, and there will be reasons why it might well be objectively commercially viable and sensible for a counterparty to take an offer, and there is nothing wrong with the parties -- well, first of all with Auden competing for those volumes in that way and reaching an understanding as to what Auden is prepared to offer to the other party.

One cannot simply say that that understanding, that meeting of minds as to we will offer you a certain volume of product, is itself problematic.

THE PRESIDENT: What you are saying is that there are at least two reasons why AMCo will stick and agree at 12,000. One is that Aesica cannot deliver yet because of the problems they have in bringing the product to market, but secondly, leaving on one side or assuming as resolved those difficulties, you still have the question of how attractive a skinny label product will be in the market, and you may take the view, and as you say we have heard a great deal of evidence about this, you may

take the view as AMCo that if you are selling a skinny label then of the 80,000 products sold the best you can hope for is a fraction of that, which is significantly less than half.

MS FORD: That is consistent with what Mr Beighton said, because his explanation is that the volumes he actually sold -- sorry, the volumes he actually sought from AMCo, from Auden, he asked for 10,000 and he actually got 12,000, or he asked for 12,000, but he would have settled for 10,000. The basis on which he sought those volumes was because that was what he was anticipating being able to sell from Aesica.

So there is a logic from that side of the table as to the volumes which were sought and indeed supplied. But it is important to recall that there were volumes on the face of the written agreements, and nobody is saying that the written agreements in themselves are problematic. So it is --

THE PRESIDENT: No, no, we are in a very difficult counterfactual area because we have the written agreements, and you of course say that is it, there is nothing more, and we are debating in a hypothetical kind of way what those agreements might say if, contrary to your submission, they say more than is written down. So it is a bit of a mess, but that is the spirit in which

we are putting these points to you.

MS FORD: Indeed. The question is whether or not there is any basis to infer something more than is written down --

THE PRESIDENT: Yes.

MS FORD: -- and if so one comes to, well, then what? The point really is that there is a logic behind the figures, the 10 to 12,000 figures, in the sense that that was what Mr Beighton had in mind from Aesica, and that makes -- that is entirely consistent with the situation where Auden is competing with Aesica to supply those volumes.

THE PRESIDENT: Yes. I suppose the point I am making is that closing the deal at 12,000 and assuming 12,000 is a limit rather than a minimum, and we will look at the evidence about that, but on that assumption, which I accept is inconsistent with the written terms of the agreement, it clearly is, on that assumption it is communicating by acceptance of that quantity something about AMCo's capacity to compete, using Aesica, to Auden.

MS FORD: It must logically communicate that they consider themselves, potentially for entirely unilateral reasons, they consider it commercially better for them to take the deal than to not take the deal. I think that is the

extent to which one can infer from it, and of course that is the case with any agreement.

THE PRESIDENT: Well, it goes a little further than that, does it not, because what you are conveying is that your view, AMCo's, is that you cannot sell more or you do not think you can sell more of an Aesica sourced product or a non-Auden sourced product than 12,000 units a month.

MS FORD: I am not sure --

THE PRESIDENT: You are not sure that is right.

MS FORD: -- on Auden's side they could have had anywhere near that degree of certainty, and know, we had very candid evidence from Mr Beighton that they were bluffing Auden, and so there is information asymmetry which means that the parties are seeking to ascertain in terms of a deal.

THE PRESIDENT: I absolutely accept that, but is asymmetry not then there in the sense that it may be that AMCo have bluffed Auden into thinking that they cannot possibly sell more than 12 and in fact they could only actually sell 6 or 5 or whatever, so the bluff works there, but it does not work the other way, does it? Because you are, by accepting 12, saying that your expectation is that you are not really going to be able to enter the market selling materially more?

MS FORD: The Tribunal has my point that there may be other

commercial reasons why 12 is accepted, notwithstanding that you think you might be able to sell more. But it is important to emphasise that one could derive these sorts of inferences from any supply deal for any volume, because whenever a party enters into a standard agreement one can reasonably infer that they do so because they are rationally better off doing it than they would not be doing it. So the prospect that one might be able to ascertain information about the other party from the fact that they are prepared to take your deal falls, in my submission, well short of anything which is problematic in competition law terms.

THE PRESIDENT: No, I accept that. I mean, it goes back to the point that the terms you conclude on say something about your commercial thinking. That, I am prepared to accept, is true of any agreement. That must be right. I think what I am getting at is that it is going to be quite important for us to reimagine what is going on when these communications took place, bearing in mind of course everything that you said yesterday about the difficulty of establishing a sham and the importance of not being beguiled into a plausible unlawful explanation when there is a plausible lawful explanation. We have those points.

MS FORD: Sir, I am grateful.

I think then the Tribunal essentially has our submissions on the volumes, which is that they do not enable you, notwithstanding what one might be able to infer about the other side's unilateral commercial motivations, what they do not do is to enable you to infer any sort of undertaking not to enter.

I am moving on to our ground of appeal on an object infringement. The Tribunal will appreciate that it is only if it is satisfied that there is some sort of unwritten common understanding that we get to this point where we have to then ask: does it exhibit a sufficient degree of harm to constitute an infringement by object?

The applicable principles are in the *Cartes Bancaires* case, it is {M/106/11}, please. This is a case about the terms of agreement between banks for the use of bank cards, and it is in that context that the Court of Justice sets out what has to be demonstrated in order to establish an infringement by object.

If we start at 49, the court is saying:

"... it is apparent from the Court's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their

effects ..."

Then 50:

"That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition ..."

Paragraph 51 then gives an example of that, horizontal price-fixing cartels, and it explains that these are:

"... so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81 ... to prove that they have actual effects on the market ..."

Then conversely, 52:

"Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent ..."

According to the case law of the court, in order to determine which of these two boxes the agreement falls

into, whether an agreement by undertakings:

"... reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' ... regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question ..."

55 on the next page {M/106/12}, what you see here is the Court of Justice setting out a chunk of the reasoning of the general court, and then at 56 it says the general court has committed an error of law.

At 57 it says:

"First ... when the General Court defined the concept of the restriction of competition 'by object' ... it did not refer to the settled case-law of the Court of Justice ... thereby failing to have regard to the fact that the essential legal criterion for ascertaining whether the coordination between undertakings involves such a restriction of competition 'by object' is the finding that such coordination reveals in itself a sufficient degree of harm to

competition."

Then at 58, a further error:

"... the General Court erred in finding ... that the concept of restriction of competition 'by object' must not be interpreted 'restrictively'. The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition. The fact that the types of agreements covered by Article 81(1) ... do not constitute an exhaustive list of prohibited collusion is, in that regard, irrelevant."

If we go on to 59, please {M/106/13}. What the Court of Justice then does is go on to consider whether the errors of law that it has identified vitiate the general court's judgment, and we draw attention in particular to 69 on page 14 {M/106/14}. Here the Court of Justice is saying:

"... although the General Court set out the reasons why the measures at issue ... are capable of restricting

competition and, consequently, of falling within the scope of the prohibition laid down in Article 81(1) ... it in no way explained -- contrary the requirements of the case-law referred to in paragraphs 49 and 50 above -- in what respect that restriction of competition reveals a sufficient degree of harm in order to be characterised as a restriction 'by object' within the meaning of that provision, there being no analysis of that point in the judgment under appeal."

So it is making very clear there that the fact that something is capable of restricting competition is not sufficient for it to be characterised, without more, as a restriction by object.

Then we see 80-81 on page 15, please {M/106/15}. The Court of Justice is saying here:

"Admittedly, it cannot be ruled out that the measures at issue, as the General Court found ... hinder competition from new entrants -- in the light of the difficulty which those measures create for the expansion of their acquisition activity -- and even lead to their exclusion from the system, on the basis ... of the level of fees charged pursuant to those measures.

However, as the Advocate General observed in point 131 of his Opinion, such a finding falls within the examination of the effects of those measures on

competition and not of their object."

So it is quite clear here that the fact that you could point to potential anti-competitive consequences is not necessarily sufficient for the purposes of an object analysis.

THE PRESIDENT: Does the CMA get any traction -- I mean, we are quite far down your alternative defences, because for this argument to work we are assuming that we have decided that there is something more than the written terms, and I think that that would mean that there is something, well, illicit in those additional terms. We are not talking about implied terms or anything like that, we are talking about something which is in some way a side agreement to that which is written, either adding to it or contradicting it. Who knows what we will -- what the position will be. But that is the state of play for your argument.

Now, does the CMA get, as it were, traction from that fact of an illicit side agreement? I mean, clearly you cannot say just because there is an illicit side agreement that means that the "by object" box is ticked. That would be wrong. But does it go some way to provide ammunition to suggesting that the object box might be appropriate by virtue just of the illicit nature of the agreement alone, or does one have to do, as if it were

an express agreement, a breakdown as to whether it is sufficiently bad to constitute a "by object" infringement?

MS FORD: In my submission the analysis has to be the same whether it is an express agreement or an agreement which has to be ascertained by the circumstances: the CMA has an additional hurdle to overcome because before it gets here it has to show what are the terms of the agreement it claims to exist when they are not written down. But once the Tribunal ascertains the terms you then apply this analysis and you say: does it disclose a sufficient degree of harm to competition? Is it so evident that this is pernicious that one can dispose of any analysis of the effects of this?

THE PRESIDENT: As you said yesterday, this case is different to some other excessive pricing pharma cases in that the CMA starts at least at one stage, maybe two stages back, and having passed those two stages, as we are assuming they have happened, they are not in a better position than in those other pharma cases. They are simply getting themselves to that starting point and they have to establish the "by object" infringement as if it was all written there in black and white in the agreement.

MS FORD: Sir, indeed, that is the position.

THE PRESIDENT: Yes, thank you.

MS FORD: Of course, one has to -- at the object stage one has to show the requisite level of harm by reference to the agreement and its terms as they have been established to be in their context as I have read the relevant test, and nothing else. So it has to be a situation where the Tribunal is satisfied that that stripped-back analysis is justified. There is no need to look at the effects in the way that one ordinarily would because it is so evident.

THE PRESIDENT: Yes, thank you.

MS FORD: There is a difference of views between us and the CMA about, when you are doing that exercise, to what extent do you have to look at a counterfactual? The CMA says it is not necessary to look at a counterfactual. We agree that that is true in a very limited sense, and that is in the sense that, as we have seen from this authority, you do not need to conduct a full effects analysis in order to establish a "by object" infringement. That is the entire point of this category of infringements.

But we say that self-evidently if what you have to show is that this is an agreement which discloses the requisite degree of harm, that has to be in practice by comparison to a counterfactual, absent the agreement.

You cannot do that exercise meaningfully unless you actually contemplate, well, what would be the situation absent the agreement? There has to be some basis for comparison.

We have cited an example to make that good. It is the *Budapest Bank* case, it is {M/171/14}, in particular paragraph 82. This is a case about multi-lateral interchange fees. Halfway down the paragraph you get them disagreeing with what the Commission appears to say, and they say that:

"... the fact that, if there had been no [multi-lateral interchange fee] agreement, the level of interchange fees resulting from competition would have been higher is relevant for the purposes of examining whether there is a restriction resulting from that agreement, since such a factor specifically concerns the alleged anticompetitive object of that agreement as regards the acquiring market in Hungary, namely that that agreement limited the reduction of the interchange fees and, consequently, the downwards pressure that merchants could have exerted on the acquiring banks in order to secure a reduction in the service charges."

In our submission, this is an example of -- in the context of an object analysis the Court of Justice saying, well, you do, it is relevant to look at what

would have been the position absent the agreement. You cannot simply look at it in a vacuum.

Moving on to what the CMA relies on to show that this agreement, if we assume it has the terms consistent with the case advanced by the CMA, what do they rely on to show that it is so obviously problematic to competition that you do not have to even examine its effects? it is Decision paragraph 6.887, so {A/12/807}. The key line, really, is the last line of paragraph 6.887 where it says:

"Waymade's and AMCo's entry would have been, in principle, favourable to competition, beginning a process resulting in potentially lowering the cost of healthcare. The object of the Agreements was to prevent that."

You see a similar formulation in the defence. If we go to {A/6/47}. Paragraph 136, please. Here the CMA says:

"The CMA did not find, and was not required to find, that entry by AMCo would have led to lower prices for 10mg hydrocortisone tablets. Such a finding would have required precisely the kind of counterfactual analysis which is not necessary in an object case."

The Tribunal sees there that the difference between us in terms of whether or not that is necessary.

Then 137:

"The CMA's conclusion that the 10mg Agreement was an object infringement was based on the simple and intuitive premise that the launch by AMCo of a 10mg hydrocortisone tablet in competition with Auden/Actavis's own product ... would in principle have been favourable to competition."

That is the analysis on the basis of which it is said that this is an agreement which is so injurious to competition that you do not have to do an effects analysis.

We make four points about this. The first is that although the CMA has said that a counterfactual analysis is not necessary, its case on sufficient harm does involve an assertion about a counterfactual because it is asserting that competitive entry, which would have occurred but for the 10mg agreement, would have been in principle favourable to competition. That, in our submission, must be a comparison to a counterfactual or it simply does not make any sense.

Secondly, we say that the repeated use of the words "in principle" tells us something about the very limited nature of the exercise that is being done, because the CMA's findings are not premised on any factual basis whatsoever; they are expressed to be an assumption of

principle. Given that we know from *Cartes Bancaires* that an agreement which is capable of affecting competition is not enough to demonstrate by object infringement, in our submission appealing to simple intuition is not enough.

Thirdly, we would observe that this extremely superficial approach to the by object analysis can be contrasted with the length of time that Mr Jones for the CMA spent debating with Mr Bennett the question of the effects of the agreement. Clearly in the light of that exchange and the length of it, it is a detailed and complex analysis, and in our submission it is not enough to say that this is a matter of simple intuition and competitive entry is in principle favourable to competition.

Fourthly, we say that the CMA's simple intuition is flawed, and we say it is not right to assume that the necessary and obvious consequence of generic entry is aggressive pricing strategies and steep falls in prices. It is quite true that if you have several generic competitors entering then that might eventually happen, but that scenario takes time following first entry because every individual competitor has to overcome their own hurdles in terms of technical and regulatory problems to bring their product to market. But when one

only has a single generic entrant what one would expect is that generic entrant prices at a modest discount to the original supplier, unless and until additional generic entrants enter.

We have cited two articles which make that point. The first is at {A1.4/2/1}. This is an article, "Generic Drug Industry Dynamics", dating from 2005. If we look, please, to the bottom of page 1. We can see a summary there, they say:

"Our structural estimates yield a number of empirical findings. First, consistent with previous work, we find that generic drug prices fall with an increase in the number of competitors. Though estimating the relationship between market structure and prices is a necessary component of estimating our system of structural relationships, the estimated effect of entry on price is also of independent interest ... We calculate that the prices for the initial generic monopolist are 20%-30% (or perhaps even more) above long-run marginal costs. Generic prices steadily decline with an increase in the number of producers and begin to approach long-run marginal cost when there are 10 or more competitors."

Then consistent with that, if we go to {A1.4/1/1}, please. This is an article dating from 2002,

"Pharmaceuticals in US Healthcare: Determinants of Quantity and Price". If we go to page 19, please {A1.4/1/19}. The second paragraph is the relevant paragraph:

"In a competitive market with free entry, one expects that entry will take place until price falls to marginal cost. Industry sources state that currently when there is only one generic entrant, the generic manufacturer's price relative to the brand is typically about 85 percent; with two manufacturers it decreases to 75 percent; and successive entrants competing on price continue to drive down the generic/brand relative price, in some cases to less than 10 percent."

What is being said in these articles is consistent with the factual evidence that this Tribunal has heard, in particular from Mr Beighton when he explains that price would not have dropped substantially provided that there was only one competitor.

We saw a similar assumption in a document that originated from Cinven, it is {IR-H/150/12}, please. What we can see under, I think it is the third bullet under hydrocortisone, you see:

"Cinven's sensitivity lowers management's volume and price assumptions by 30% in each year of the plan to reflect the scenario of several players in the market

rather than two as management assume. This is a reasonable reflection of the impact of additional competitors entering the market at a similar time to Ampule."

So again, the same consistent assumptions. In fact, that is borne out by what occurred on generic entry in the circumstances of this case.

If we go to {IR-A/12.1/2}, please. This is the familiar chart showing the prices following competitive entry. The Tribunal will see Alissa entering in October 2015 and essentially continuing to match prevailing market prices. Auden/Actavis do not materially react to Alissa's entry with price cuts, they largely maintain their prices rather than lowering them. Then the price falls are only triggered later. So we see the entry of Resolution and Bristol in April 2016, and Alissa maintains its price until the launch of competitor products and that is when you see the price falls being triggered.

In our submission it is these competitive and pricing dynamics which one would have expected to see but for the 10mg agreement. In the absence of a 10mg agreement, even if AMCo had been able to enter, competitive entry is unlikely to have prompted material falls in prices. We say in those circumstances it

cannot be said that the 10mg agreement is so injurious to competition that it constitutes an object infringement.

PROFESSOR HOLMES: Can I ask a question please. You have set out very clearly why you do not think it is enough for the CMA to simply assert, as you put it, that in principle entry would be favourable to competition. Are you able to say anything as to what perhaps they might have done, you would have expected them to do short of a full effects analysis, because that is the tension we have had ever since *Cartes Bancaires*, is you do not have to do a full effects analysis to establish by object infringement, but you have to do something.

MS FORD: I think we would say that this is a case where they should have done a full effects analysis. So it is not one where one can point to -- what *Cartes Bancaires* is telling you is that there are some cases where simply the fact of the terms which are disclosed are so self-evident that you do not need to go on to do that analysis. So when you say what does the CMA need to do, it is something which is pretty much self-evident on the face of the agreement, but if that is not there it is not as though they could do more. They have to accept that this is a case where an effects analysis is appropriate and go away and do it.

PROFESSOR HOLMES: Understood, thank you.

MS FORD: I am moving on to the sixth ground of appeal which concerns the duration of the 10mg agreement beyond the 29 May 2015. I am in the Tribunal's hands as to whether to push on with this or to take a break now.

THE PRESIDENT: Well, we have only been going an hour, do you want to press on?

MS FORD: I am happy to carry on.

THE PRESIDENT: I am grateful.

MS FORD: So, this ground of appeal is concerned with the duration of the 10mg agreement, and it is obviously advanced on the basis of an assumption that we are unsuccessful on the ground of appeal which concerns that there was no common understanding at all. But we say that if the Tribunal has found a common understanding it cannot have persisted beyond either 29 May 2015, which is when Auden was acquired by Actavis, or alternatively 1 September 2015, which is when Auden's business was transferred to Actavis UK. We rely for the purposes of this ground of appeal again on the case law that we have already looked at, the *ICI* case, the *Bayer* case, the *Hitachi* case and the need to show a concurrence of will or a meeting of minds, because the core of this ground of appeal is to ask: how can the CMA show that this meeting of minds, this concurrence of wills which we

have to assume was established between Mr Patel and Mr McEwan, how can it show that that meeting of minds has passed to those who purchased Auden in 2015?

If we start by looking at Decision {A/12/50}, please. This is the section of the Decision where the CMA is summarising the key individuals that it says were involved in the conduct with which the Decision is concerned. If you see 3.38, what the CMA would like to say is it is a Decision:

"... about the conduct of a few key individuals, who retained relationships with one another despite the corporate changes of the undertakings they worked for."

Then 3.39 is then setting out examples. 3.39(a), you see them explaining that:

"... from its creation in 1999 until its sale to Allergan in May 2015 ... [Auden was] owned and managed by Amit ... Patel."

3.39(b), the position of Waymade:

"Since its creation in 1984, Waymade was owned and managed by Vijay Patel ... Until 31 October 2012, the Amdipharm group ... was also owned by Vijay Patel. [Its] managing director was Brian McEwan."

3.39 (d), they are addressing the 10mg agreement negotiated by Mr McEwan for Waymade under Vijay Patel's situation and Amit Patel for Auden.

If we go over the page to (h), please {A/12/51}, (h) is concerned with the first written agreement and that was negotiated by Brian McEwan for AMCo under the supervision of John Beighton and by Amit Patel for Auden.

Then 3.39(i) is the second written agreement, and that is negotiated by Mr Beighton for AMCo and Mr Patel for Auden.

If we note in particular what is said in (g), if we could go back up, slightly, please. In (g) you see the last sentence:

"Although the Amdipharm Companies had become part of a broader group under new ownership, the core individuals who had been dealing with one another on hydrocortisone tablets since mid-2011 were the same."

Then if we go down to 3.40:

"Despite the complex corporate history of the parties ... the conduct and agreements in this case were driven by a handful of individuals who dealt with one another on a consistent basis."

Now, that is not an assertion which the CMA can make in relation to Auden/Actavis, because when Actavis acquired Auden Mr Patel was no longer an employee of Auden and there was a complete change of personnel. So the short point that we make in this ground of appeal is

that any common understanding, to the extent that there was one, must have stopped there. There is a firebreak, because the mental element that is required, the meeting of minds, the concurrence of wills cannot be shown to persist beyond the departure of the key individuals who are inferred to have entered into it.

If we have a look at why the CMA, the basis on which the CMA claims that the 10mg agreement continues, this is at {A/12/769}. It is Decision paragraph 6.758 and following. You see the heading "May 2015 onwards: the 10mg agreement continues under Allergan's ownership."

These paragraphs essentially make four points as to why the CMA says this agreement continues. Paragraphs 6.759-6.761 are making the point that AMCo continued to place purchase orders and Actavis UK continued to fulfil those orders.

But all that shows is the ongoing operation of the second written agreement, and we know that the terms, on their face, of the second written agreement are unobjectionable. So in my submission the ongoing operation of the second written agreement does not show the continuation of any separate common understanding that is said to exist in addition to that written agreement.

The CMA then relies on the evidence of Mr Wilson.

This is paragraph 6.762, if we could bring that up. It says:

"Jonathan Wilson, Accord-UK's Managing Director at the time, confirmed in interview that he understood that the supply arrangement with AMCo protected Actavis's position as the sole supplier of 10mg hydrocortisone tablets. The Second Written Agreement meant that before it could enter with its own 10mg hydrocortisone tablets, AMCo would have to give Actavis three months' written notice ... Mr Wilson stated that 'AMCo's alternative was using their MA and getting it contract manufactured elsewhere.' Mr Wilson therefore understood that AMCo was a potential competitor to Actavis and could have entered the market under its own 10mg MA; but was refraining from doing so the in exchange for the payments it received from Actavis."

So what is being claimed is that the common understanding had essentially passed to Mr Wilson, and the basis of that claim is what Mr Wilson said in interview with the CMA.

Our submission is it is not a fair reading of Mr Wilson's transcript. At most what he was doing was confirming his understanding of the position at the time of the interview with the CMA. He was not saying that he had a contemporaneous understanding to that effect at

the time, and I am going to show the Tribunal the relevant passages.

It starts at {H/1194/16}. If we look at line 18, please. Mr Wilson is here being asked about his understanding of the terms of the supply agreement in September 2015, and that is at the point when Actavis were taking over the business. What he does in response is to draw a distinction between his understanding at the time and his understanding now. So, he says:

"Well, I would say I have subsequently read it a few times more since that. At the time, clearly, we were aware of the supply arrangements, but as it was. There was a forecast of orders from the customer, AMCo, for 12,000, at a price, which was the contractual price ... There were various terms in terms of the length of forecast and what was fixed, four monthly, or four months, I think."

So he is explaining what he could see essentially on the face of the documents. If we look at {H/1194/17}, please, lines 24-25. You see him again drawing this distinction. So, he said:

"... we inherited that agreement, so I'm not the best person to ask for where the terms of that agreement come from ... In terms of supply ... I saw it as a business-to-business relationship, where AMCo's

alternative was -- and again subsequently I've seen documents and read things and looked at the SO and things about what plans AMCo had ..."

So he is being quite careful to make -- distinguish between contemporaneous understanding and what he subsequently has seen.

If we then go to {H/1194/18}, please, lines 16 to 22. This is the passage that the CMA particularly relies on to say that he had the requisite understanding, and he is asked:

"So, was your understanding then for as long as you are supplying AMCo at this price, they won't be getting supply from their own alternative CMO and entering with their own product?"

To which he says:

"Well, that's my understanding now. And that was I think one of the terms that AMCo needed to give notice if they use their own, different source. That's my understanding now. At the time, I can't recall ..."

So in my submission it is clear that he is drawing a distinction between what he understood at the time and what he now understands --

THE PRESIDENT: Yes.

MS FORD: -- and it is also important to emphasise that a unilateral understanding that taking supply from

Actavis might in practice mean that AMCo would not take supply from elsewhere is not the same as saying that he was aware of a common understanding that AMCo had committed not to enter into the market. It is an important difference. Recognising practical consequences is not the same as saying: I understood that there was a commitment not to enter the market.

That is, in our submission, an error which is perpetuated in the CMA's closing submissions. I am looking in particular at 379 (d), {IR-L/7/158}. Paragraph (d) at the bottom there, you see the allegation that:

"Mr Wilson understood that Actavis's supply of Hydrocortisone tablets to AMCo meant that AMCo would not enter with a product manufactured by its CMO."

The Tribunal has my point that the transcript does not bear out that understanding at the time. But equally, a unilateral appreciation that this might be the consequence of supplying AMCo is, in our submission, not enough to show the requisite mental state, the requisite common understanding.

In fact if we go back to the transcript what we see is that Mr Wilson also gave evidence about the transfer process. His evidence shows that there is no practical way that he could have acquired any common

understanding. We have to bear in mind that Allergan completed its acquisition in May 2015 but then the hydrocortisone business itself was not transferred to Actavis until September 2015 and there is this gap between May and September.

If we look at the transcript, {H/1194/13} lines 13-14, you see him confirming that Actavis started properly looking at the hydrocortisone product in September 2015.

Then if we go over to page 15, please {H/1194/15}. Lines 2-3, he is asked:

"During your time at Actavis did you personally have contact with any individual at AMCo?"

To which his response is:

"I think I'd met Rob Sully at, once or twice at, probably BGMA meetings, but I didn't have any direct contact regards the, the supply agreement."

So his evidence is he did not have any direct contact, in respect to the 10mg agreement, with people at AMCo.

If we go to {H/1194/17} he is asked, line 3, "So, would they", and by "they" you can see the main terms of the supply agreement:

"... would they have been explained to you by people from the Auden, as part of the transition?"

To which his answer is:

"No, we would have, looked at it ... through the due diligence process."

So he is saying his knowledge of the supply agreement was looking at it, he was not briefed by people from Auden about it.

Then going to page 18 {H/1194/18}. Lines 9-14 when he is giving a comment on why Auden -- or the nature of the relationship, he is essentially saying:

"... I'm sort of straying into speculation of why Auden did this, but that supply for us was effectively competing against AMCo's in-house or contract relationship with another supplier ..."

He is saying it is speculation because his evidence is, I did not hear anything about it from AMCo, I did not hear anything about it from Auden.

So in the light of that, in our submission there is simply no means or mechanism by which Mr Wilson could have acquired any knowledge of any common understanding either from Auden or from AMCo that would have enabled it to persist beyond May 2015.

If we go back to what the Decision says, the reason why the Decision says this persists, it is {A/12/770}, please. Paragraphs 6.763 to 6.767 are a claim that the continuation of a common understanding is confirmed by

the fact that Mr Wilson tried to buy off a competitive threat from Alissa.

Can I ask the Tribunal just to run its eyes over those four paragraphs, 6.763 to 6.767. (Pause)

PROFESSOR MASON: Actually if there is any chance to have a two-page view so we could see on to the next paragraph that would be helpful. (Pause) Thank you.

THE PRESIDENT: Yes.

MS FORD: So there is a preliminary point to make, which is that conduct vis à vis a third party self-evidently does not evidence any ongoing common understanding as between Actavis and AMCo, so on any view this sort of evidence falls short, in my submission, from showing a common understanding.

But Mr Wilson's evidence on this was that it was Alissa that approached Actavis to seek supply, and he offered supply at £1.78 because that was the agreement that Actavis had for a broadly similar volume with AMCo on the same type of supply arrangement, and his concern was whether there was anything anti-competitive in not offering supply. So we can see that from the transcript if we go to {H/1164/63}, please. I do not think that is ... I am not sure I have given the right reference there, sorry. Can we try {H/1194/63}, please. Yes, that is the one. Grateful to Mr Johnston.

So, starting at line 5 he is being asked about the 1.78 price, and he is saying:

"... at the time we had the AMCo agreement. So that seemed a reasonable price ... for effectively ..."

He is saying:

"... this was a curious email from Alissa, given they'd already launched. So, at the time I felt it was somewhat of a fishing exercise. And I was quite comfortable to do a fishing exercise on the way back. I didn't know whether Alissa had issues with their product. It didn't look like they had a cost issue because they're looking for a supply under €1 a pack. But it seemed odd that somebody would be looking for supply, having just launched and set up all the sort of supply chain ... my main thinking was whether it was skinny versus full-label issue, so it's a curious email."

If we can scroll down:

"So, in terms of response, firstly, I didn't anticipate this likely being successful, in terms of, going anywhere, given the cost of goods required was less than our cost of goods and not something that we would have entertained supply at. The reason I chose £1.78 was that the agreement we had, for a broadly similar volume with AMCo on the same type of supply

arrangement, so it seemed the obvious place to do it. But in the back of my mind, I think if somebody had come to us for supply on broadly the same basis, that would be our, my starting point which is ... in fact, I'm sure, I would have considered is there any anything anticompetitive in not offering supply?"

So that was his concern, and then if we look at the same document, page 65 {H/1194/65}. Line 5 he is saying:

"It was the same product. Similar volume. Same situation, in terms of -- again, I didn't see this likely to materialise into anything, but, effectively competing at a CMO-type level for volume product ..."

So that is his evidence. If we go back to {A/12/770}, please. Paragraph 6.766, at the bottom there is a particular reference to the fact, or a quote which says:

"Mr Wilson confirmed in interview that he had used the Second Written Agreement as a model for this proposal, and that he assumed that for Alissa 'it was an either/or situation that he [Mr Davies] wouldn't then take supply from another source' ..."

If we show the rest of that paragraph:

... in other words, if [it] succeeded Alissa would not remain in the market with its own tablets."

Then you see the conclusion the CMA seeks to draw from that:

"Mr Wilson therefore tried to buy off the competitive threat from Alissa in order to regain and preserve Actavis's position as sole supplier ..."

Again, we say that Mr Wilson's evidence is much more nuanced than that, if we look at {H/1194/69}. So, the passage that the CMA relies on is beginning at line 11 and you see there:

"Now, I'm assuming ... and it was an assumption that didn't really get explored, that it was an either/or situation that he wouldn't then take supply from ... another source. It would seem unnecessary to duplicate supply chains."

Now, two points about that. The words "I'm assuming" in the present tense in our submission are another situation where Mr Wilson is being quite careful to indicate that this is a current assumption as opposed to and as contrasted to the position at the time, so he is indicating his present understanding, not necessarily an understanding at the time.

He also explains that the reason why he is now assuming that Alissa would not take supply from another source was not because of any common understanding that they would not enter the market, but because it would

seem unnecessary to duplicate supply chains. The Tribunal has my point that a unilateral assumption that that might be the effect of offering supply does not establish any common understanding.

So in our submission there is no basis whatsoever for this allegation that what Mr Wilson was doing was attempting to buy off Alissa.

The final, fourth point that the CMA relies on to say that this common understanding persisted is back at {A/12/771}.

THE PRESIDENT: We need to go down the page a little bit.

MS FORD: We are actually -- we are looking at the heading, "August to December 2015: AMCo devises a strategy to secure further increase in its payments ..."

So what is being described in these paragraphs are internal plans on the part of AMCo to attempt to renegotiate the 10mg agreement with Actavis to obtain increased supply. But none of that was communicated to Actavis, and so it simply does not establish any common understanding on Actavis's part. It is internal matters going on inside AMCo.

So in our submission none of this comes close to showing that any common understanding could have continued beyond May 2015. The line taken by the CMA in its defence is to say, oh, well, the change of personnel

on the Auden/Actavis side is not relevant because the existence of an agreement depends on an objective assessment of its terms, not a subjective understanding of the anti-competitive intention of any particular individual.

Of course, that as a principle is quite true. It is a familiar one. Once you have an anti-competitive agreement it is not necessary to show that the parties to that agreement had a subjective appreciation that what they were doing was anti-competitive. That is not a necessary ingredient of an infringing agreement. But that is not what we are asking here. The question we are asking here is: has the existence of this agreement, the continuation of this agreement been established at all in the period post-acquisition by Actavis? That, in our submission, does require the continuation of the mental element, the meeting of minds to show that ongoing common understanding.

The next answer you get in the defence is, we rely on the evidence of Mr Wilson as corroborative, not because it is necessary. Our submission on that is the mental element is necessary. If the CMA is trying to show that this common understanding persisted beyond May 2015 it does need to show a mental element, and so by backing away from its reliance on Mr Wilson in that

way the CMA is left with no basis at all for its finding that there was this ongoing concurrence of will post May 2015.

THE PRESIDENT: Can I test that proposition. I mean, we are getting into quite deep waters on questions of corporate attribution of knowledge, really, but let me unpack my question a little more.

First of all, if we are considering ground 6 then we will either have decided or will have hypothesised a pretty bad situation for your clients because we will have decided, I think, that the written agreements are -- well, let us call them shams, let us call spades spades, and I stress I am speaking entirely hypothetically. So we have a sham, we have additional terms which contradict or vary or add to the written agreement. They are material in the sense that they are constituting or sufficient to constitute a by object infringement, because I think you will have to have lost on that as well. We are therefore asking ourselves whether what I think would have to be a dishonest agreement between the parties persisted. So I think that is the sort of position that we will be in when we are considering ground 6.

MS FORD: Yes.

THE PRESIDENT: Now, does that not lead, if your submission

is right, does not that lead to the rather perverse outcome that one is actually better off with a sham agreement than with a written agreement expressing the terms properly? For instance, suppose one translated the naughty unwritten part of the agreement into the written contract so that you, as it were, deleted the sham, you have terms which are written there and agreed by the two entities, and of course these agreements would be by the human beings acting as the agents of the corporate entity.

Now, if that happened, if you incorporated the naughty bits in writing there would be nothing in this point, would there? I mean, it would carry on binding even if one had the departure of the protagonists to the dishonest agreement.

MS FORD: The point, in my submission, is always a question of fact.

THE PRESIDENT: Yes.

MS FORD: The difficulty arises because the terms are not written down, and so one first has to establish what they are.

THE PRESIDENT: Sure.

MS FORD: Then at the point of May 2015 there is a factual enquiry as to whether that understanding that there was something going on that was not on the face of the

agreement is continued. The problem -- one can assume as a question of fact that that problem would not arise if those terms were recorded on the face of the agreement as you put to me, because in those circumstances when other personnel come in they will see the entirety of that agreement, they will understand what is going on and they at that point have a choice. They can either terminate that agreement from that point onwards or they can continue it, and if in those circumstances that agreement were to be continued one reasonably infers that they have adopted and perpetuated the common understanding.

That factual enquiry, if you apply it to this case, because these terms are not evident on the face of the agreement you have to ask, well, how on earth could those who came in gain an appreciation of the nature of this agreement that is said to be continuing? The evidence in the transcript of Mr Wilson's interview with the CMA is that he had no briefing from the Auden side, he had no contact with the AMCo side. How could that appreciation and that adoption, that corporate adoption of this course of conduct possibly have occurred?

THE PRESIDENT: Let us take it that we are not prepared, because I think the logical consequence of your argument is that we actually have to find Mr Wilson as dishonest

as we would find -- as we would have found the original protagonists. I think that is the logical consequence.

MS FORD: I say that is the logical consequence. I do say very strongly that is not a finding which the Tribunal can make on the face of these documents, but I recognise that that would be the logical consequence.

THE PRESIDENT: Ms Ford, let me just say that as an initial take we would be quite reluctant to make findings of dishonesty in circumstances where one has really not gone to town on the subsequent adoption or otherwise of the agreements. I mean, it is going to be hard enough at the inception of the agreement but at least we have heard from some people and we can focus on a particular point in time. I think the order of magnitude, difficulty is far greater when one gets later on.

Obviously I am articulating this so the CMA can push back if they want to, but it does seem to me that the logical consequence of your argument is that we have got to show dishonesty against subsequent players and that is going to be quite a hard finding to make.

MS FORD: I do say that insofar as that is the case, that is the immediate consequence of the way in which the CMA has approached this period because it is a very limited passage in the Decision which is dealing with a very important question of whether this conduct could

possibly have been carried over after the acquisition by Actavis.

THE PRESIDENT: I mean, what I am pressing you on is whether your premise that one has to show that level of, as it were, adoption of dishonesty. That is really what you are saying. That the earlier dishonesty that we are assuming was adopted by the later actors and that view of the world is actually presuming that there is no attribution to the legal person of a dishonest state of mind because one could analyse it somewhat differently. One could say, let us assume we have got the protagonists, the human being protagonists to this dishonest agreement acting as the agents of the corporate actors. Their dishonesty is attributed to the company in exactly the same way as if the agreement was written down and entered into by these people. It is no different. It continues until it is disavowed by the company.

Now, is that -- that is why I said we are getting into deep waters of attribution.

MS FORD: It is that last proposition which we would strongly take issue with.

THE PRESIDENT: I know. It is why it is wrong that I am interested in.

MS FORD: Insofar as there is established dishonesty that

dishonesty is then attributed to the corporate entity. But the question here is whether that dishonesty in the form of a common understanding did continue post 2015. If it could be established that it did then it would be attributed in the same way, but it is no answer in my submission to say that some sort of amorphous corporate attribution gets you over this firebreak when there are not the human actors who have that dishonest mental state present at the time. There is a complete change of personnel, a new corporate entity acquires Auden and it is not possible in my submission to get over that difficulty by saying that there is some sort of ongoing corporate attribution in the absence of the human mental element from which that attribution derives.

THE PRESIDENT: I mean, that is the question. There is some very interesting law on this in the attribution of knowledge in insurance non-disclosure cases where you say a single human being did not know the material fact when proposing insurance on behalf of a corporation. Yet the file, if you looked at the file, which in most of the cases the human proposer has not, but if you looked at the file you would discover that the corporate entity did actually know through various different human actors who have kept files.

In a sense, the question -- first of all, that is

a very hard question as a matter of insurance law. I am not sure what the right answer is, but if you can in some way aggregate the divergent knowledge of different human actors and attribute it to the legal person that does not actually exist, then you have got a very different way of viewing the world than your way of viewing it which is the continuation of the intention, as it were, through the agents, the human agents, of the corporate entity that is basically just a legal fiction.

MS FORD: In my submission it is not so different because the proposition that you are putting is that you aggregate these disparate elements of human knowledge at the level of the corporate entity but it necessarily assumes that that knowledge is present.

The problem that the CMA has in my submission in this case is that post May 2015, post-acquisition by Actavis that knowledge is not present in the mind of a human actor that can be attributed to the corporate actor. It is not there. So it is not a question of aggregation. It is a factual question: can you demonstrate the presence of that knowledge?

THE PRESIDENT: I absolutely understand that. I think what I am doing is by parity of reasoning I am saying if you have a necessarily continuing state of mind, is it enough for the actor, the beginning of that period whose

dishonest state of mind is attributed to the company, to be enough to allow it to carry on and unless the company actually does something to disavow it, it continues? In other words, the change of human actors does not affect the continuing state of mind of the corporation. It carries on.

Now, you could say that is actually quite unfair to the corporation because what you are doing is you are saying that the necessarily, in our example, dishonest state of mind that arises through the human actor who vanishes from the scene and therefore will not be known by anyone coming on later, nevertheless continues to allow the infringement to continue onwards. I accept that is the logical consequence of what I am putting to you.

But I suppose what I am asking is, is there anything more that you want to say, and this may be another supplemental note, other than you are wrong, because it does seem to me that there is a problem either which way of analysing it. I mean, I can see the injustice of what I am putting to you as an unconscious continuum of knowledge but it does seem to me that your argument is giving the dishonest agent a degree of latitude in escaping by way of a principle the consequence of the dishonesty by causing the agreements to be subterranean

and hidden.

MS FORD: Just to pick up that last point, the dishonest actor bears the consequence of their conduct for the period for which their dishonesty is attributable to the corporate entity and so it is not a case that they get away without being responsible for their conduct.

THE PRESIDENT: No, that is fair. We are talking about duration here, I accept that.

MS FORD: In terms of the proposition that a company must be imputed with this dishonest knowledge unless and until it disavows it, in my submission the real difficulty with that in the particular circumstances of this case is how on earth could the company disavow this conduct when it was not evident that the conduct was going on? The only information available to the incoming corporate entity and the incoming personnel is what is on the face of the documents, and the CMA's case is that what is on the face of those documents is not the common understanding.

So it is an impossible hurdle to ask a corporate entity to disassociate itself with that degree of dishonesty when it cannot perceive that it is going on, and that is the problem in my submission.

THE PRESIDENT: I see that, and I think we are at least, for the sake of this debate, assuming a single human

dishonest actor who is present on day one who on day ten removes him or herself without communicating to another human actor the dishonest state of mind and there is therefore no way in which anyone doing their due diligence can fracture the dishonest state of mind assuming, as I am putting to you, one is attributing it to the corporation. There is just no way to stop it.

MS FORD: That scenario is one step short of this scenario because the scenario you have just put is that the human actor who has the dishonest state of mind leaves but the corporate entity continues. Of course here we have a transition in the corporate entity because the corporate entity acquires Auden and so there is, in my submission I use the term firebreak, there is a complete firebreak between May and September when this common understanding, and it is common ground that this is a requisite element of the infringement here, a mental element, a common understanding, it could not possibly have been transferred to the later period in my submission.

THE PRESIDENT: Yes. Is that a convenient moment, Ms Ford?

MS FORD: It is.

THE PRESIDENT: We may have further questions on this, but it may be that they will be framed later on because this is not easy. But thank you very much. We will rise for

ten minutes until five and 20 past.

(12.17 pm)

(A short break)

(12.25 pm)

MS FORD: Sir, one final observation on the point that we were debating before I move on from it. In our submission this particularly difficult point arises as a consequence of the way in which the CMA has brought its case, because this is a very unusual case in the sense that the infringement in question is not said to be on the face of the written agreements which exist. It is an infringement which requires an element of awareness, an awareness of concurrence of wills, that is common ground, and it is an ongoing element of awareness that is required, and the way that is said to be present, on the CMA's case, is by this unwritten common understanding.

That is a relatively exceptional state of affairs, the nature of the case being put, and it is because of this relatively exceptional state of affairs that we get into this difficulty. Because the CMA has to show that this essential element of the infringement, the common understanding did in fact persist, and in circumstances where that common understanding is not written you have to ask what mechanism, by what mechanism could it

possibly have been conveyed?

In our submission absent that human element, the presence of somebody who possesses that ongoing awareness, ongoing understanding of what was actually going on, it cannot persist, and that key element of the infringement is not shown to be present for that period of time.

THE PRESIDENT: In a way it is a very significant variant of the point that I put in relation to penalty, in that one does not often have an infringement that is segmented by a series of changes of ownership, and I was alive to the issue on penalty but this is the same phenomenon creating another rather difficult question.

MS FORD: It does very much arise here. It is not so much to be attributed to a corporate change of ownership because in a more conventional allegation of an anti-competitive agreement the analysis would be right that if you have a written agreement and that written agreements passes to a corporate successor then the conduct continues unless they disassociate themselves from it. It is the particular circumstances that what is said to be objectionable, that core element of the infringement, the undertaking not to enter, is characterised as an unwritten understanding which necessarily has to be borne by individuals.

THE PRESIDENT: Yes, so you are saying, I think you are right about this, it is a combination of the sequential shift of change of ownership and departure of personnel plus the sham agreement which renders state of mind unusually, you say, important in this case.

MS FORD: Sir, that is right, yes. It is a somewhat exceptional scenario.

THE PRESIDENT: Yes, thank you.

MS FORD: I am moving on to our seventh ground of appeal, and this concerns the duration of the 10mg agreement but it is run in the alternative to the sixth ground of appeal, and that is in this sense: that the sixth ground of appeal focused on the mental state of the incoming Actavis entity. This ground of appeal concerns findings which the CMA made as to AMCo's state of mind at particular dates which precede the end of the 10mg agreement in June 2016.

If I can show the Tribunal the factual findings that we rely on, it is at {A/12/293}, please. It is 3.731. You have a finding that:

"By March 2016 AMCo had ... reached the view that it could delay the launch of its Aesica product no longer ..."

It goes on to explain why that was, but the core finding is it had reached the view that it could delay

the launch of its Aesica product no longer.

Then there is a further finding, paragraph 3.734. In the footnote, footnote 1106, we see findings as to April 2016 when AMCo confirmed it would supply a customer with its Aesica 10mg product, and May 2016, when it in fact made its first supply.

We say that these factual findings about AMCo's state of mind, AMCo's intention to enter the market independently are clearly in conflict with the CMA's case that there was a common understanding to the effect that it would not do so.

The CMA says that because these matters were not communicated to Auden/Actavis then this sort of conduct is to be equated with cheating on a cartel rather than bringing the 10mg agreement to an end altogether. But in our submission that assumes the existence, that ongoing and continuing existence of a common understanding which is not being complied with. Our ground of appeal is asking the Tribunal to consider whether it can be reasonably inferred that there was such a common understanding persisting during this period in circumstances where AMCo was taking active steps towards independent entry.

The reason we say that is because, as the Tribunal canvassed with me yesterday, the CMA points to what it

says is a lack of urgency on the part of AMCo and the fact that it suspended its plans for independent entry. It points to matters such as that, and it says that information enables you to infer the existence of a common understanding. So it is actively seeking to deploy AMCo's conduct and state of mind in support of an inference that there is a common understanding not to enter the market.

It must follow that, in a period where the CMA has found that AMCo had resolved to pursue independent entry and in fact proceeds to do so, that no such inference can be sustained for that later period. AMCo's conduct in sharing price lists in the market and actually making sales would have been market knowledge and there is no evidence in the Decision that Actavis queried such conduct or took retaliatory steps in response to it. There is no evidence that Actavis responded to AMCo in a manner which might be characterised as analogous to perceived cheating on a cartel.

So if we ask what can be inferred as to any common understanding during this period, insofar as it was ever substantiated in our submission it has clearly fallen away by this point in time on the basis of the CMA's factual findings.

Again, we say it does not assist the CMA to point to

the fact that AMCo continued to place orders under the written agreement because the Tribunal has the point that there is nothing objectionable on the face of that document and it does not itself suffice to establish the ongoing common understanding.

This case, which is based on inference and which we say is weak throughout the period, is particularly unsupported in this period in the light of the CMA's own findings of fact as to AMCo's state of mind and its conduct at this point in time.

Sir, I am moving on to deal with the adverse inferences point. I have, as I said yesterday, deliberately left it until this point to address it because the Tribunal has now heard the nature of the grounds of appeal that we advance, and we say that they are either points of legal principle or points where we say that the CMA has not discharged its burden of proof in all the circumstances, including taking into account the presumption of innocence.

The test to be applied in determining whether an adverse inference should be drawn is set out by the Supreme Court in *Efobi*, and it is {M/185.1/16}. It is paragraph 41 towards the bottom, please. The Supreme Court is saying:

"The question whether an adverse inference may be

drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal ... is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of rationality. So far as possible, Tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and the particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are interrelated and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

So the Supreme Court is saying, do not over-legalise this exercise, it is essentially a matter of common sense. It is also the case that it is rare, even in commercial litigation, for a court or Tribunal to draw an adverse inference from the absence of a witness. We have cited *Phipson on Evidence* on that, it is {M/190.4/1}. It says there:

"The court may be entitled to draw adverse inferences from the absence of a witness who was available to and might have been called by a party. However, the court does not usually do so, not least because there may be all sorts of reasons why a particular witness is not called and one usually cannot be confident to infer what the witness would actually have said. Further, in general it is for a party to choose which witness he wishes to call and there is no property in a witness, and in the case of a witness in the jurisdiction the opposing party can seek to compel a witness's attendance by means of a witness summons."

If, as *Phipson* says, adverse inferences are rare in commercial litigation, in our submission this Tribunal should be even slower to draw them in the circumstances of an appeal where it is the CMA that bears the burden and the appellant that benefits from the presumption of

innocence.

The Tribunal will also note what is said in *Phipson* about there being no property in a witness and the opposing party can call and seek to compel a witness by means of a witness summons. Obviously in this case it was canvassed with the Tribunal in the context of discussing the possibility of exercising the Tribunal's power to summon witnesses, whether and on whom the obligation would have been and which party properly ought to have done that. We set out our position very clearly that it would have been for the CMA to do that. We explained it is the CMA that interviewed Mr Patel twice. It is the CMA that obtained a signed witness statement from him. It is the CMA that indicated in its letter the extent to which it relies on Mr Patel's witness statement at various points in its Decision. It is {K/63/2} for the Tribunal's reference.

We note that in its written closing submissions the CMA was at pains to emphasise all the relevant matters on which it says Mr Patel might have been able to give evidence, and if the CMA considers that its findings in the Decision require bolstering in all the respects that it has identified then it was at liberty to call Mr Patel to do so, and it chose not to do so.

We do say it makes no sense to suggest that it was

for us to call Mr Patel. He was no longer an employee at the point where the CMA commenced its investigation. He had separate representation when he was interviewed by the CMA, and those acting for the Auden/Actavis appellants have never acted for or been asked to act for Mr Patel.

As the CMA is aware, because it made reference in the Decision, there has been litigation between the Auden/Actavis appellants and Mr Patel, and that litigation has been settled on terms which are confidential and it is in that context that Mr Patel has not been called as a witness.

We do say nor is there any necessity for us to do so, because our appeal turns on points of principle and matters as to whether the CMA has discharged its burden of proof, and we say in that circumstance it does not necessitate factual evidence.

So we say this is not a case where it is appropriate to draw any adverse inference against us.

THE PRESIDENT: I mean, are you saying in this case there are three potential outcomes: we draw an inference against your clients, we draw an inference against the CMA, we draw no inference at all? My sense is that you are submitting that the middle course, doing nothing, is appropriate in this case.

MS FORD: That is right. We have not sought to suggest that one should draw an inference against the CMA. What we do say is that one could conclude that the CMA has not discharged its burden of proof.

THE PRESIDENT: Which is a separate point.

MS FORD: Indeed, yes.

THE PRESIDENT: Thank you.

MS FORD: The other matter that you, sir, indicated you wanted to hear from us on yesterday was the relevance, if any, of the 20mg agreement. We have addressed that at paragraph 74 of our supplemental note.

THE PRESIDENT: Yes.

MS FORD: It is, of course, the case that we did not appeal the CMA's findings in respect of the 20mg agreement, but we say it is not appropriate for a decision not to appeal to be held against us in relation to matters which we did appeal. We say that parties take decisions not to appeal for all sorts of reasons and it is not appropriate to seek to look behind that or to read into it some adverse consequence for the remainder of the appeal that we have pursued.

Secondly, we do emphasise that there are important factual differences between the circumstances of the 10mg and the 20mg agreement.

THE PRESIDENT: Ms Ford, I think there are two questions,

are there not? The second question I entirely understand, which is there may be insufficient resonances between 20mg and 10mg to make the point pointful, in other words there is no inference to be drawn on the facts because the facts are just different. So that I get.

The anterior point is whether that is an enquiry that one can embark upon at all. Is it your position that you are saying because you have not appealed it we should not look at it at all even if it were highly pertinent, or are you really just making the second point that one does not get anything out of the 20mg agreement in terms of trying to understand the 10mg agreement?

MS FORD: We are saying that you cannot draw any inference from the circumstances of the 20mg agreement and the fact that we did not appeal it in order to resolve the matters which are appealed on the 10mg agreement. We say that both because -- they are perhaps not quite as clearly delineated as you put to me, both because we say it is not appropriate to try and draw conclusions from the fact that something has not been appealed, but also because of the factual differences between the scenarios which mean that they are not actually informative in any event.

THE PRESIDENT: No. Certainly, again speaking provisionally and the CMA can push back on this if they want to, I would have some difficulties in drawing an inference of any sort from the fact that you have not appealed a part of the Decision. That, as it seems to me, would be verging on the impermissible, probably. One cannot, you know -- it would be like saying we are going to draw an inference against you for not challenging points of fact in the areas where you are appealing. I mean, you have chosen your course. The facts in the Decision are what they are, but you do not get clobbered with some kind of additional inference because you have not chosen to call evidence or attack on a broader basis what is going on.

That I get. But the fact is certain findings of fact have been made in relation to 20mg as well as 10mg, and I suppose what I am asking is, is there any reason why we cannot simply look at those findings of fact and use them if they are in some way probative? Of course, if they are not probative it gets binned. So it is that question, not your failure to appeal, but the fact that there are findings which -- well, I suppose what I am asking is, are we obliged to look at them, look at the Decision as a whole and take what we can from it, and I will obviously hear you on the point that we do not

get anything from it at all, we need to hear from you on that, but I understand that point, or are you saying that we should just segregate 20mg and 10mg without looking at 20mg and just file it in the bin?

MS FORD: No, we are not going so far as to say the Tribunal has to close its eyes to factual findings that have been made. I think we accept that the Tribunal must look at the Decision as a whole. Our submissions are much more on the second option, which is to say that in fact the Tribunal derives very limited, if any, assistance from such factual findings as has been made in relation to the 20mg.

THE PRESIDENT: That is helpful, thank you.

MS FORD: Just to elaborate upon that latter point, the factual differences are why we say that it really does not help to answer the question.

First of all, as we have been debating at length, the 10mg agreements have been formalised into written agreements and it is common ground that the terms of the written agreements are unobjectionable and are inconsistent with the case that the CMA is seeking to run in relation to the 10mg agreement. That is very much in contrast with the position in relation to the 20mg, where there has not been that process of formalisation into unobjectionable written agreements.

So that really is at the core of the debate about the nature of the 10mg, and so the 20mg really does not assist in that respect.

Secondly, we have also been discussing the fact that 10mg agreements provided for minimum volumes and a "reasonable endeavours" obligation on Auden to supply more, and those minimum volumes were in fact supplied at the price that was set in the agreements, and so in that respect the way in which the 10mg agreement operates is indistinguishable from a standard supply agreement.

As the Tribunal has been told, the 20mg agreement involved a buy-back provision whereby the product was sold back to Auden, and so Waymade took no risk on the sales, and that, again, is obviously very different from the circumstances of the 10mg agreement.

Finally, one has to take into account the context of the agreements and in particular the skinny label/full label debate. In the context of the 10mg agreement Waymade only had a skinny label indication, and we have heard that that created uncertainty as to its regulatory position and it created informational asymmetry, and all of that provides relevant insight as to the circumstances in which the supply agreement was concluded.

Waymade had a full label indication for the 20mg

product and so the regulatory backdrop and the context of those agreements is obviously, again, very different. We say a combination of those factors means that the Tribunal is really not assisted to any degree by looking across at the 20mg agreement. It must resolve the disputes on the basis of the evidence as to the 10mg.

THE PRESIDENT: Is it a bit like the use of similar fact evidence in other litigation in that you can look at, as it were, copycat behaviour provided it is strikingly similar, and the mere fact that you have been naughty once does not mean to say that you have been naughty twice. In other words, you cannot derive an inference about the later case simply because you may have been naughty twice, you have to show something more. I mean, I think in the criminal law the test is strikingly similar. I think it might be the same in the civil law. But your point is it is not strikingly similar and one cannot, as it were, infer naughtiness from other purely naughty behaviour. Is that what it boils down to?

MS FORD: With the caveat that it is some time since I studied criminal law, the point is in essence, as you put it, that there is clearly nothing even approaching strikingly similar such that this actually has any sort of probative relevance.

THE PRESIDENT: You can take it we will have a look at what

Phipson says about similar fact evidence on the civil side, though given we are in quasi-criminal proceedings it may be that actually the criminal test, if different, would be more appropriate. That is something we might want to think about. But that, in essence, is what you are saying: the cases are just different such that it would be unwise/improper to draw an inference from 20mg?

MS FORD: Sir, that is what we are saying on the facts of the case.

THE PRESIDENT: On the facts of the case, yes.

PROFESSOR HOLMES: Can I ask just one supplemental question in relation to that. There was a line of questioning with the witnesses, Mr Beighton and Mr Sully, as to how much enquiry they might have made when they were presented with a deal by Auden which they said was too good to be true, to paraphrase. Could the backdrop of a 20mg agreement be relevant to how much enquiry they might have been expected to make or not make?

MS FORD: The evidence of the Advanz witnesses in response to that enquiry was very fair, and they were saying they did not know -- quite understandably they did not know what was in the mind of Auden when they were being offered these agreements. The premise behind it, in my submission, was this idea that actually they were being offered something which was inexplicable from Auden's

side, that was the premise and therefore it should have put you on enquiry because it is clearly somewhat problematic.

In my submission that premise is itself not borne out. The line of enquiry is put on the wrong premise, because actually there is a commercial rationale for what Auden might have been doing, albeit that the witnesses very fairly said, well we did not perceive what it was.

PROFESSOR HOLMES: I understand that.

MS FORD: We simply saw a gift horse and we took it.

There is a commercial rationale from Auden's perspective in terms of competing to maintain its volumes and competing with Aesica on terms that meant that it might be able to retain its volumes, and so in those circumstances one cannot -- the premise of the entire enquiry is undermined because in my submission you should not be asking the witnesses, well, should this not have prompted an enquiry? There is a perfectly commercial and rational explanation for it.

I am reminded, on a purely factual basis, that AMCo did not acquire the 20mg business, which is another factual distinction as between the two circumstances.

PROFESSOR HOLMES: Okay, thank you.

MS FORD: Sir, I am moving on to deal with penalties.

THE PRESIDENT: Yes.

MS FORD: I can make a start, or I do not know if that is a convenient moment?

THE PRESIDENT: I think in three minutes you will not make much of a start.

MS FORD: I may not make much progress, no.

THE PRESIDENT: We are making good progress, I get the sense.

MS FORD: Very much so, I just have to deal with our eighth ground on penalty and then we are done.

THE PRESIDENT: We will resume then at 2 o'clock.

(12.57 pm)

(Luncheon Adjournment)

(2.00 pm)

THE PRESIDENT: Ms Ford.

MS FORD: I am moving on to our final ground of appeal which concerns the amount of the penalty, and the Tribunal will have very much in mind that we advance this by way of alternative to the primary contentions concerning liability.

Can we look, please, at {IR-A/12/1012}. This is the table in the Decision which summarises the penalties that have been imposed in respect of each infringement. I would just like to first of all look at the total fines that were imposed in respect of the entire course

of conduct, so including the parental liability of Allergan and the fines on Accord-UK in the Intas period.

Line 1 is the unfair pricing abuse. So there is 147.1 million imposed in respect of that.

Line 2 is the 20mg unfair pricing abuse, there is a further 8.1 million imposed in respect of that.

Line 3 is the 10mg agreement, and there is 63.2 million in fines imposed in respect of that.

Then at the bottom, line 6, the 20mg agreement, 2.8 million imposed in respect of that. So the total fines including parental liability on Allergan and including the Intas period are 221.2 million.

If we then look at the fines imposed specifically on Actavis UK, now Accord-UK, it hits its statutory cap once under the 10mg unfair pricing abuse. So that is the first line, and that is the reference, if you look at the attribution column, the reference to "Accord-UK alone: 28.4 million". That is Accord-UK hitting its statutory cap under the 10mg unfair pricing abuse.

It then is fined its statutory cap again under the 10mg agreement in line 3. So again, if you look at the column on attribution you see "Accord-UK alone: 28.4 million".

It is then fined an additional 6.1 million in respect of the 20mg unfair pricing abuse, which is in

line 2, and on top of that another 2.8 million in respect of the 20mg agreement.

Then on top of that it is fined an additional 44 million for the 10mg unfair pricing abuse during the Intas period.

So it is a total of 109.7 million, and it is almost four times the statutory cap that applies during the Auden/Actavis period, the 28.4 million. It has been fined almost four times that, all in respect of essentially the same course of conduct.

One asks, well, how is it possible that Actavis UK has been fined the equivalent of almost four times its statutory cap? The answer is, as you can see from the table, that instead of imposing a single penalty in respect of this course of conduct the CMA has imposed four separate penalties. It does so by drawing a series of distinctions to justify applying multiple fines.

So it draws distinctions between infringements based on whether they concern the 10mg or the 20mg tablets, and it draws distinctions between infringements based on whether they entailed unfair pricing or entering into agreements.

Our position is that these distinctions are wholly inappropriate because the conduct which underlies these infringements is so heavily interrelated. As to the

distinction between the 10mg and the 20mg tablets, the CMA found that these were in the same market prior to independent entry. So at the very least for the period prior to independent entry one would think there would not be separate penalties, and the Tribunal has our point in the context of market definition that even after independent entry nothing changed in relation to the functionality or substitutability of those products.

As to the distinction between unfair pricing and the agreements, it is the CMA's case that the purpose of these agreements was to enable Auden/Actavis to sustain its unfairly high prices. We can see that in the Decision it is {A/12/1021}. This is the Decision 10.153, paragraph (f). You see the reference to the fact that:

"that each of the agreements ... sustained [on the CMA's case] a separate Unfair Pricing Abuse."

When it comes to assessing the financial benefits that are said to be attributable to the infringing conduct, the CMA accepted that they formed part of the same course of conduct and so it accepted that any benefits attributable to the agreements are captured in the calculation of the financial benefits relating to the unfair pricing abuse. Just to show you that, it is {A/12/1074}, paragraph 10.311. I am suddenly worried

this is the wrong reference. Possibly towards the bottom of the page, thank you.

"... an uplift has been applied to account for financial benefits in respect of the 10mg Unfair Pricing Abuse, the CMA has not taken any financial benefits obtained by Auden/Actavis into account at this stage of the penalty for the 10mg Agreement because any benefits attributable to the Agreement are captured in the financial benefits relating to the 10mg Unfair Pricing Abuse."

So the CMA itself is recognising the extent to which the conduct that it is focusing on is heavily interrelated.

If we look at {A/12/1020}, please. The Decision paragraph 10.153 is the paragraph where the CMA seeks to explain why it has imposed four different fines, and in our submission what it does is to alight on differences between the different infringements but differences which do not explain why they are sufficiently material to justify different fines. So in broad terms, yes, these are differences but no, they do not really give any justification for imposing four separate fines. Just to work through them very quickly.

Subparagraph (a), 10mg and 20mg hydrocortisone tablets are different strengths. Well, of course they

are, but so what? Particularly when they are in the same market prior to independent entry.

Then 10.153(b) you see that the CMA drawing a distinction between unfair pricing and saying that is an exploitative abuse and the agreements are an exclusionary abuse. Again, yes, competition lawyers do draw distinctions along those lines, but what is relevant is whether or not these courses of conduct are distinct or whether they are interrelated. We say here it is very clearly the case and indeed the CMA's case that one type of conduct was interrelated with the other.

Paragraph (c) {A/12/1021}, you see the proposition that:

"... different prices are charged and separate pricing decisions taken with respect to the different strengths of hydrocortisone tablets."

That, in our submission, is really no more than the first point, that there are in fact different strengths, so they would normally then as a consequence lead to different decisions in respect of them. But again, in our submission it is really immaterial given that they form part of the same market and the same interrelated course of conduct.

Paragraph (d) you see the point that the market has

developed differently and the 10mg and the 20mg unfair pricing abuses have different durations. To some extent those conclusions are in dispute in the light of our various grounds of appeal, but in any event we say they are largely immaterial to this exercise of salami slicing the various different infringements.

(e):

"the fact that the Agreements had shorter durations than the Unfair Pricing Abuses."

Ultimately that is a matter for where the CMA has decided to draw a line, and again some of that is very much in dispute, but again it does not justify, in our submission, imposing separate fines in respect of them.

Then (f), the differences between the agreements themselves, so:

"... the Agreements had different terms, counterparties, starting dates and durations, related to a different strength of hydrocortisone tablet, and each sustained a separate Unfair Pricing Abuse."

Again, we say they reflect little more than the straightforward fact that they were separate agreements which happened to be with separate parties, but not that they should be fined separately, in my submission.

The approach that the CMA has taken in drawing these distinctions is a novel one. So it has not been seen in

previous decisional practice and we have cited some examples. The first one is what was done in *Napp*. This is {M/24/7}. If we look at the introductory paragraph, paragraph 1, the Tribunal can see that there is a single infringement found in respect of abuse of a dominant position in the supply of sustained release morphine tablets and capsules. So the infringement covers different forms, tablets and capsules treated as one infringement.

If we go on to page 14 in this document, please {M/24/14}, and down to paragraph 32. This paragraph is a summary of the conduct, and the conduct that was challenged in the Decision was both exclusionary and exploitative, so the conduct that is described in subparagraph (a) is essentially exclusionary conduct. It is price discrimination, predatory pricing.

Then if we go over to (b), subparagraph (b) is exploitative conduct in the form of excessive pricing, so this concerns both forms of conduct.

If we go to page 15, please {M/24/15}. Paragraph 34, you can see that the conduct in question covers multiple strengths, and in some respects is differentiated as between strengths, so you can see the Decision finds that *Napp*'s prices in hospitals were below total delivered costs on all tablets except

certain strengths and below direct costs on all tablets except certain strengths, and then if we go over to 36 {M/24/16} you can see that *Napp*'s pricing strategy was targeted differently according to the different strengths, and yet in this case one infringement and one fine.

Similarly, the *Flynn Pfizer* case, if we look at {M/130/17}. This is the actual decision, the CMA's decision in *Flynn Pfizer*. 2.2 records:

"... the CMA finds that Pfizer has engaged in four separate abuses of dominance. The CMA therefore reaches four separate infringement decisions in respect of Pfizer's conduct -- one for each of Pfizer's Products and in respect of each of Pfizer's Prices."

If we go to 2.5 {M/130/18} we see that the same finding was found for Flynn. But then if we go on to page 436, please {M/130/436}, paragraph 7.60:

"To address the fact that all four of Pfizer's Infringements have taken place in the same relevant product and geographic market, the CMA has chosen to issue one single fine in relation to all four of Pfizer's Infringements ..."

And then similarly, 7.61 is in relation to Flynn, and all four of Flynn's infringements took place in the same relevant product and so the CMA has chosen to issue

a single fine.

Then finally, in relation to *Paroxetine*, {M/117/29}, please. This was a decision in relation to GSK's drug Seroxat, and you can see in paragraph 3.22 that that was sold in 20mg and 30mg packs and also in an oral liquid formation. The 30mg strength was sold in much smaller volumes than the 20mg strength and different price trends were observed across the different strengths, and the effect of the infringing agreements in that case was to postpone generic entry for both strengths, but the CMA did not find separate infringements in respect of those two different strengths. They only found one infringement.

So in our submission, in the light of the previous decisional practice it is extremely difficult to justify how the distinctions that the CMA has alighted upon in this case can justify the imposition of multiple fines.

On the question of intention or negligence, as --

THE PRESIDENT: Just pausing there, if you are moving on. Are you saying that it is an abuse of the CMA's discretion how to structure its fine to parse out the different elements of infringement and to fine for them separately? Is that the thrust of your argument there, that there should have been a single penalty?

MS FORD: Yes, I am saying the factors that the CMA has

identified to seek to justify applying multiple fines do not justify it, and the consequence -- and I am going to come to back to this when we look at the stage where the case law requires the CMA to take a step back and look at the proportionality of what it has done, the consequence is essentially to completely undermine the effect of the statutory cap, because the statutory cap is intended to prevent a company from being imposed with an excessive burden, and that is circumvented if one says, ah, well, I am going to impose four different penalties and that way I get to fine you four times up to your statutory cap.

THE PRESIDENT: Yes. I apologise for raising criminal law a second time today.

MS FORD: I am going to be equally unhelpful.

THE PRESIDENT: But it sounds a little bit like concurrent and sequential sentences in criminal law.

MS FORD: I think that is probably a fair analogy, yes.

THE PRESIDENT: In other words, is the essence of your objection not so much that there has been a separate calculation of the fines but what the CMA should have thought about is: are these, as it were, discrete infringements or are they sufficiently related? Now, I am not articulating the test at all, but I think that is what one asks in the criminal law. So say you have

committed four offences and you say, well, it is four years for each of them and if they are related those four years run concurrently and you serve a totality of four years. On the other hand, if they are distinct but tried together then you tot them up separately and you will serve 16, or a variant of the two.

So I am just trying to tease out the essence of your objection. Is it really not so much that they have come up with six different figures but that they ought perhaps to have considered whether they should cumulate those figures or allow them to run effectively concurrently?

MS FORD: Yes, certainly we are not going so far as to say that it is never permissible for the CMA to impose multiple fines. It is not a blanket obstacle of that nature, but in doing so they do need to consider whether or not what they are fining is separate and distinct conduct or interrelated conduct, and as far as it is interrelated then we say it is not appropriate for them to impose separate fines and thereby circumvent the effect of the statutory cap.

THE PRESIDENT: Yes. Because the statutory cap, that point would not run if you had two infringements which were completely separate. I mean, it begs the question

whether they would be in the same decision, but let us ignore that problem. If you had two completely different infringements, albeit in the same decision, you would probably expect the CMA first of all to assess the penalty separately and in that case, and I am postulating really very separate things, you would cumulate and apply the turnover test separately to each, rather than say it was being circumventing by doing the same process twice over.

MS FORD: Yes, absolutely, yes.

THE PRESIDENT: Thank you.

MS FORD: As the Tribunal is aware, the CMA may only impose a penalty if an infringement has been committed either intentionally or negligently. That is section 36(3) of the Competition Act.

THE PRESIDENT: Professor Mason has just made the point, and he is right to raise it, I see that we only have Mr Bailey here. Of course that is all in all sufficient, but if there is a problem with leading counsel and they want to be here then we would want to deal with that.

MR BAILEY: No, sir, leading counsel is engaged in preparing --

THE PRESIDENT: I assumed that was the case, but we would not want there to be any issue. So thank you for that

clarification. Ms Ford, do go on.

MS FORD: Our position is that the intention or negligence threshold is not met, and we make that point firstly by the state of the case law at the relevant time. Just to remind the Tribunal what the relevant time is, as to excessive pricing the conduct in question is said to be broadly from 2008-2018, and in terms of the alleged pay-for-delay agreements the relevant period is roughly 2011-2016.

Excessive pricing cases were unusual, and this Tribunal in *Flynn Pharma* made the point in its judgment, this is paragraph 3:

"Cases of pure unfair pricing are rare in competition law."

The legal test for unfair pricing was only clarified by the Court of Appeal in *Flynn Pharma* in its judgment in 2020.

In terms of pay-for-delay infringements, the position in respect of those was clarified by this Tribunal in its recent judgment in *Paroxetine* in 2021, and the position on the law in that case was considered to be sufficiently unclear that the Tribunal made a reference to the Court of Justice in respect of it in 2018 and the Court of Justice handed down its judgment in 2020.

The CMA has said that there was no genuine uncertainty as to the unlawfulness of market sharing or unlawful pricing, but of course that puts the issues at an extremely high level of generality and the more pertinent question, in our submission, is whether it is evident that the conduct, the particular conduct that was in issue in these proceedings is properly to be characterised as equating to straightforward market sharing or unlawful pricing. In our submission it is far from evident, and the position is particularly opaque in relation to excessive pricing, because how is a business supposed to know where legitimate profit maximisation ends and where excessive pricing begins?

In this case Auden was benchmarking against Hydrocortistab and against Plenadren, both of which were markedly more expensive. The NHS had powers to intervene to secure lower prices but chose not to do so. How, we say, can it be said that Auden/Actavis knew or ought to know that their prices were exploitative?

If we look specifically at the period when Auden was taken over by Actavis, as the Tribunal has heard this morning there was this complete change-over of relevant personnel. From the perspective of those personnel who were coming in there was nothing on the face of the written agreements that was self-evidently problematic,

and Actavis inherited Auden's price approach, which appeared justifiable by reference to comparators in the market, most notably Plenadren, and it was ostensibly reasonable to continue that approach.

So in our submission there is no basis whatsoever for a finding of intention or negligence in particular during that period.

Just working through the various stages of the fining guidelines, step 1, the starting point. We say that the 30% starting point in this case, which was obviously the absolute maximum highest possible starting point, is clearly excessive. We say this is not a clear-cut case. It is not the sort of case that can fairly be characterised as the most serious in terms of competition law infringements. Again, we have made the point that it is out of step with the CMA's previous decisional practice including in the pharmaceutical sector. We have set out this analysis in our written submissions, but the bottom line is that until recently the CMA tended to take a figure of around 21% as an appropriately serious figure for serious and clear cut infringements in the pharmaceutical sector.

Here again, we say that this high starting point is particularly inappropriate during the Actavis period for all the same reasons.

If we look at the factors that the CMA has identified as relevant to the assessment of seriousness, it is at {A/12/1027}, please. 10.172 is the paragraph where it is setting out the factors that are relevant to the CMA's assessment of seriousness. Paragraph (a), you see there the assertion that market sharing and excessive and unfair pricing are most likely to harm competition.

The Tribunal has my point that simply characterising the conduct in this case as market sharing and excessive pricing at a high level glosses over a lot of the complexity and a lot of the ambiguity, and a lot of the quite unique characteristics of the conduct in issue in this particular case.

Subparagraph (b), the point is made here that immediate release hydrocortisone tablets are an essential medication. This does in fact feed into the point that we were discussing earlier today about the importance of this medicine, and for that reason in my submission this is actually a point in Auden/Actavis's favour, in the sense that as we discussed, had Auden not taken over the licence from MSD these tablets would not have been available in the UK at all for a certain period of time.

Subparagraph (c) {A/12/1028} is structure of the

market, and this is the CMA essentially reciting the factors that it relies on to say that Auden/Actavis is dominant. So these are factors which are necessary for there to be any sort of infringement at all, but we say they are no basis to suggest that any infringement, if made out, is one of a particularly serious nature.

Subparagraph (d), "Harm to End Customers", what is going on here is that the CMA is placing emphasis on the fact that the end customer was the NHS, but of course we must not forget that the Department of Health on behalf of the NHS had a concrete power to intervene to put an end to the infringements and did not do so. So if anything, in our submission, this is a factor in our favour.

Subparagraph (e) over the page {A/12/1029}, this is the heading "General deterrence". The Tribunal will see an assertion under this heading that the potential gains from such conduct are so great and so certain that a high starting point is justified in the interests of general deterrence.

We do not accept that this is a legitimate assumption to make. First, the gains from excessive pricing are not certain. Higher prices might cause customers to switch to a different product or simply to reduce demand, not least because there did exist

clinically substitutable products in the form of Plenadren and Prednisolone.

Secondly, if and insofar as there were such gains then we say it is far from obvious that they would have accrued to Actavis, which is actually the entity that is being fined in the interests of general deterrence. We say that because either the gains were paid out to the shareholders of Auden in the form of dividends or, insofar as they were reinvested and so were reflected in the value of Auden as a company, they were then paid to the owners of Auden when Actavis purchased the company.

So it makes little sense, in our submission, to be fining Actavis by way of general deterrence and pointing to supposed gains from this conduct.

In response to these points that we made in our notice of appeal, defence paragraph 469, it is at {A/6/176}, is essentially saying -- it is essentially attempting to defend this conduct on the basis that it is a general proposition rather than a finding of fact. It says it is:

"... clearly relevant to the propensity of dominant undertakings to impose unfair prices ... and to ensure general deterrence."

Insofar as it is said to be simply a general proposition and not a finding of fact, we say it cannot

justify a high starting point being applied specifically to Actavis in the context of these particular proceedings. We say there is a real double-counting issue here, because this is the first point at which the CMA takes into account financial benefit under general deterrence and seriousness, but then we see it again under specific deterrence, under step 2, so -- sorry, step 3, I think that is. So we say not only is this problematic to be taken into account at all, but it becomes particularly problematic when one ends up taking it into account multiple times. We will see that it pops up again. I am told it is step 4. We will work through the steps until I get the right one.

I am moving on to step 2, adjustments for duration, and the only point we make here is that obviously one or more of our grounds of appeal affects the duration of various of the infringements and so, insofar as those were to be upheld, they then need to be revisited in relation to the duration.

THE PRESIDENT: Yes.

MS FORD: Step 3, adjustment for aggravating and mitigating factors, the first element here is the involvement of directors and senior management. We say it is not appropriate to apply a 15% uplift for involvement of directors and senior management, as the Decision has

done. The Tribunal has my submission that the circumstances of this case are far from clear cut and it would not have been evident to the directors that something was wrong, and so we say there should be either no uplift at all or a smaller uplift.

But once again, we say this is a point which applies with particular force during the period when Actavis acquired Auden, and we have seen that the CMA relies on Mr Wilson's involvement as a director.

The Tribunal knows that Mr Wilson only became involved from 1 September 2015. That is at the point at which Waymade had already launched its 20mg hydrocortisone tablets, and in October 2015, so a month later, that is the point where Alissa launched its 10mg hydrocortisone tablets.

Shortly afterwards prices began to fall as a natural consequence of competitive entry. As we know, that is exactly what Actavis assumed would happen when it took over Auden's business.

So one asks: what realistically could Mr Wilson be expected to do differently? In our submission it is not realistic to suggest that he should have taken steps to ensure that the pricing that he inherited from Auden, that the levels fell even faster when it was clear that they were already falling as a consequence of

competitive entry.

As to the 10mg agreement, the Tribunal already has my submissions that there is no basis for any suggestion that Mr Wilson personally was aware or had any knowledge of any common understanding, and nothing untoward was evident on the face of the agreements.

We have made the point before the short adjournment that the CMA has not made a relevant finding in respect of Mr Wilson which could amount to either intention or negligence, because their finding was essentially that he appreciated the practical consequences of supply, if they were upheld, were not enough -- sorry, I will try that again. He appreciated the practical consequences of supply under the 10mg agreement may be to protect volumes, but we say that is a unilateral appreciation. It is not enough to show a common understanding, and so there is insufficient finding of Mr Wilson's involvement such to justify any uplift.

The next heading is cooperation, and we say that Auden/Actavis should have been given credit for the extent of their cooperation with the CMA's investigation. The point we make in particular is that we provided the CMA with the Everlaw document hosting platform, and we say that is likely to have been particularly useful given the interrelated nature of the

investigations in this case. We made the point in our written submissions that practical cooperation of this type in the *Casio* case did result in a 10% discount, and we offered our help before that decision came out. So we say our cooperation in that respect merits a similar discount.

Moving on to step 4, adjustment for specific deterrence and proportionality, this is where we come back again to the financial benefit. I have shown you that we have already seen it appear under the 30% starting point. When we come back to step 4 we find the CMA increasing the penalty again by reference to the need for specific deterrence. The uplifts that are applied at this stage are really quite extraordinary. If we look at {A/12/1059}, please, table 10.7 is showing the CMA's estimate of the financial benefits obtained by Auden/Actavis from the 10mg unfair pricing abuse.

The third column shows the penalty at the end of step 3, and the fourth column is headed, "Revenue differential above £20 per pack (minimum financial benefit)", and this is the sum that the fines are then uplifted to.

In many respects one could just completely dispense with steps 1 to 3, because this step completely eclipses any of the reasoning that then goes into 1 and 3 by just

uplifting to the amount of the perceived financial benefit.

Period A1, so this is the first row of the table, and period A3, so this is, I think, the third row of the table, the fines go from 40.6 million to 87.65 million. I get that from 77.5 million in the first row and another 10.2 million in the third row. That is in total a 116% increase in fines.

Period A2, this is the second line, the fines go from 6.8 million to 37.9 million, and that is a 457% increase. Just to point out, there is then a further uplift to 74.3 million resulting in around a 1,000% increase overall which reflects factors specific to Allergan and its turnover. So we are not jointly and severally liable for that because our statutory cap has already been exceeded. That will be addressed by Allergan.

Period A4, there is an uplift from 8.9 million to 12.5 million, so that is a 40% increase. Then there is a further uplift of 44.4 million which is around a 400% increase, which is addressed in Intas' notice of appeal.

Finally, if we go on to {A/12/1072}, this is the estimate of the financial benefits obtained from the 20mg unfair pricing abuse. If we look at period B2 you see an uplift there from 1 million to 2 million, a 100%

increase.

In *Flynn Pharma* this Tribunal expressed a degree of scepticism about the large uplifts in that case. It is at {M/130/465}. I am afraid I have got the wrong reference there {M/150/465}, please.

EPE OPERATOR: It only goes up to page ...

MS FORD: Yes, we are looking for 461, so possibly the previous page {M/150/144}. Paragraph 461, the CAT is saying:

"Had we upheld the CMA's finding on abuse, we would likely have regarded the very substantial uplift for deterrence applied to Pfizer as, on its face, difficult to justify and not required by the CMA's own penalty guidance ..."

The uplift to Pfizer in that case was 400%, and that was this Tribunal putting a shot across the bows in terms of potentially inappropriate penalty uplifts, and in our submission that shot across the bows has been ignored because the increase imposed on Actavis in respect of period A2 alone is greater than 400%, and that is before you factor in additional increases for periods A1, A3, A4 and B2.

Going back to paragraph 461, we can see the Tribunal saying that they would have given the appropriate uplift for deterrence close scrutiny, and they say {M/150/145}:

"... particularly having regard to the new price control powers of the [Department of Health] that have recently been passed into law."

In the present case the Department of Health's powers have been applicable throughout the period and we know that it did not use them, and in our submission that makes it all the more inappropriate to purport to uplift fines in this way in the interests of deterrence.

We say that fines are not intended to be a means of disgorging profits, and given the likelihood that any infringement will lead to follow-on damages claims, if fines are routinely uplifted by reference to profits in this way then there is a strong risk of double-counting.

That double-counting risk arises in another respect as well, because as I have shown you, the CMA recognises that the agreements and the unfair pricing abuses concern the same course of conduct such that any benefits attributable to the agreements are captured in the financial benefits relating to the unfair pricing abuses.

That means that if you are purporting to uplift fines of financial benefit then logically you have to look at the existing fines for all the relevant conduct, and then you uplift for financial benefit.

So, for example, take the 10mg conduct. What you

ought to do is look at the total fines for the 10mg unfair pricing and the 10mg agreement, and then you uplift those fines to take into account financial benefit insofar as is appropriate.

What the CMA actually did was to look at the fines for the 10mg unfair pricing on its own to uplift those for financial benefit and then add in the 10mg agreement fine on top. So even on the CMA's own case that exceeds the financial benefit attributable to this course of conduct as a whole, and it leads to excessive fining and that is even on the CMA's view of the world.

We say there are other factors which mean that the financial benefit has been overstated in this case. The first is the point that I already made in the context of general deterrence, that the financial benefit here will either have been paid to Auden in the form of dividends or in the form of the purchase price for the company, so on any view it is not actually retained by Accord-UK, the entity which is now being fined.

Also the Tribunal will recall, in the context of discussing the practice of portfolio pricing, the CMA's argument that if hydrocortisone had been priced lower then other products could have been priced higher in order to maintain reasonable profitability across the whole portfolio. If that had happened then the

financial benefit attributable to this conduct in particular is overstated, because the same effect would have been achieved, on the CMA's own case, by pricing other products higher.

Of course, we have also heard that when generic entry occurs there is not this immediate and precipitous drop in pricing. Prices fall very gradually, and that is another dynamic which in my submission is not properly reflected in estimating the financial benefit which can be attributed to this conduct.

The CMA's answer to those sorts of points is to say, well, we are not obliged to examine a counterfactual scenario. We do not have to do that to establish a restriction by object so we certainly should not be obliged to do it for a penalty assessment. But of course it is the CMA which is purporting to uplift its penalties to ensure that they exceed the supposed financial benefits of this conduct, and if it has not actually troubled to undertake a realistic assessment of the financial benefits that are attributable to the conduct then in our submission it should not be uplifting its penalties on that basis.

If we look at {A/12/1061}, Decision paragraph 10.265 then claims that:

"... the penalties at the end of step 3 do not

reflect the serious nature and severe impact of the 10mg Unfair Pricing Abuse."

But the factors that the CMA then goes on to rely on are precisely the factors that it tried to deploy to justify a maximum 30% starting point. So, first how can it be said that the penalties do not reflect these factors? These are the ones that fed into the starting point in the first place. Secondly, here there is yet more double-counting.

We do say that there are factors that the CMA has wrongly failed to take into account, and those are factors that mean that Actavis UK in particular does not require any further deterrence. The first is that Actavis did not instigate the conduct in question. At the very most it could be criticised for failing to bring falling prices down even quicker than they in fact fell. Then the Tribunal has the point that Actavis did not receive a significant financial benefit since it paid sums representing the value of the benefit to Auden.

So we say those are factors which ought to have been taken into account in terms of assessing the degree of deterrence which is in this case appropriate.

Finally, we come to what has been termed the "step back", and the case law tells us that the CMA must:

"... take a step back [at the end of its penalty calculation exercise] and ask itself whether in all the circumstances a penalty at the proposed level is necessary and proportionate ..."

I am quoting there from *Kier* group.

In our submission, the penalties imposed on Accord-UK are neither fair nor proportionate. The Tribunal has our point that Accord-UK's statutory cap, which for obvious reasons is supposed to represent the top end of its potential liability, is 28.4 million and for the periods excluding the Intas period it has actually been fined 67.7 million. It has been fined at the level of the statutory cap twice in respect of the 10mg strength alone, once for unfair pricing and once for the 10mg agreement. Then a further 10.8 million for the 20mg and 2.8 million for the 20mg agreement, then on top of that it has been fined a further 44 million in respect of period A4, which is the Intas period.

If we look at the authorities about what the statutory cap is supposed to achieve, it is supposed to prevent an excessive burden, so *Eden Brown v OFT*, {M/82/23}. Paragraph 57, you can see the Tribunal saying at the bottom third of this paragraph:

"... the penalty cap imposed by section 36(8) of the Act is determined by reference to the entirety of the

undertaking's business, in all product and geographic markets, and thus prevents a penalty for violation of competition law from imposing an excessive burden on the undertaking."

Then similarly, *McCann Limited v CMA* in {M/179/39}. I was hoping for paragraph 94, can we go back one page, please {M/179/36}. We can see at the bottom this is by reference to European case law. It is referring to the limiting of the fine to:

"... 10% of the total turnover of the undertaking in the year preceding the infringement decision, exists for the purpose of avoiding the imposition of an excessive burden on the undertaking ..."

This takes us back to the point that I was canvassing with the Tribunal earlier. We do say that an approach which artificially slices and dices interrelated elements of conduct and in that way imposes multiple penalties undermines the purpose of the statutory cap, and the consequence is to impose fines which are unfair and excessive and disproportionate. We say it ought to have been evident to the CMA when it took the requisite final step back that what it has done is to impose an excessive burden.

Unless I can assist the Tribunal further, those are my submissions.

PROFESSOR HOLMES: I just have one question, please. Sorry, I perhaps should have raised it earlier. When you were talking about the separate infringements you spoke about the different strengths and the types of conduct, but would you see it as potentially relevant that the 10mg agreement and the abuse provisions would -- if made out, would infringe different legal provisions in Chapter I and the Chapter II prohibition?

MS FORD: No, in my submission I would not consider that relevant because of the CMA's own case that these are interrelated and essentially self-reinforcing conduct, and so one sees the distinction in the legal provisions because it is obviously necessary to make a distinction between conduct that relies on a dominant position and conduct that relies on agreements between undertakings, so unilateral conduct as distinct from collaborative conduct, and that is obviously a relevant legal distinction which becomes quite important but not, in my submission, when one is looking at whether or not a fine is disproportionate at the end. These, on the CMA's case, are self-reinforcing courses of conduct and on that basis we say it should be one penalty in respect of them.

PROFESSOR HOLMES: Understood, thank you.

THE PRESIDENT: Ms Ford, thank you very much. We have no

1 further questions. Mr Jowell, should we rise for
2 ten minutes or -- it is ten to three.
3 MR JOWELL: I am happy to continue or to rise, whichever --
4 THE PRESIDENT: Let us make a start.
5 Closing submissions by MR JOWELL
6 MR JOWELL: With the Tribunal's permission, I wish to
7 address it today on behalf of Allergan Plc and to start
8 I would like just to note one particular feature of
9 Allergan's position, and that is that it has received
10 its fine solely in respect of its position as ultimate
11 parent company of its former subsidiaries, Actavis UK
12 and Auden McKenzie Pharma. So Auden and Actavis UK are
13 alleged to have directly participated in the alleged
14 infringements, whereas Allergan by contrast is not
15 alleged to have been a participant in any of the
16 infringements. Allergan's alleged liability is
17 therefore entirely derivative.
18 It is also noteworthy that as a reflection of this
19 purely derivative liability the CMA scarcely involved
20 Allergan in its investigation at all. It was brought
21 into it extremely late in the day, just four months
22 before the SO was issued, and even then the CMA showed
23 no real interest in what Allergan itself knew or did.
24 It did not interview any of the relevant directors of
25 Allergan such as Mr Stewart or others. It did not even

seek any documents from Allergan before it issued its statement of objections in March 2017. It asked only one minor question of Allergan after it had issued its statement of objections.

So Allergan really, in terms of its own conduct, has not been subject to any meaningful enquiry or investigation.

Now, we accept, and of course it is recognised in the case law, that parent companies can be fixed with this form of wholly derivative liability just because a subsidiary has directly participated in the infringement. There are examples of that in the case law. I do not intend you to take it up, but an example of that is in case the *Akzo* case which is in the bundle at {M/137.2/1}.

But what is unusual is the next factor that I come to, and that is the size, both absolute and relative, of the penalty imposed upon Allergan. In total the penalty comes to £109 million on the sole basis and a further 2 million on a joint basis, so a total of £111 million. That is, we think, the largest penalty that has ever been imposed by the CMA in the entire history of United Kingdom competition law.

But it is perhaps even more extraordinary when one considers it in relative terms to the fine imposed on

the other addressees of the Decision, most of whom are direct participants, because it is larger than all of the fines imposed on those direct participants including its own subsidiaries.

That is particularly remarkable when you consider the duration of time for which Allergan is said to have been involved, because Allergan's period of alleged liability lasts for just 14 months from 29 May 2015 when Actavis bought Auden to the 1 August 2016 when Actavis UK was sold to Teva. That can be compared, that period of 14 months, to the period of the whole infringements, which are eight years in the case of the excessive pricing infringement and four years in the case of the 10mg agreement.

So the upshot is that Allergan is responsible alone for over 40% of the total amount of the fines, even though it is said to have been liable in a purely derivative capacity for just 12% of the duration.

Now, one consequence for us of having a purely derivative role is that it places us at one or more stages removed from the actual conduct of the infringements. For that reason and also to avoid repetition I intend to leave it to those whose clients are alleged to have been directly involved in the infringements to advance most of the submissions in

relation to liability for those infringements.

Now, there are two exceptions to that where I do want to touch on liability, just to emphasise and expand on two of the points that Ms Ford KC has made already, but I am going to try to be very brief. But I want to make it clear that nothing should be read into my not dealing with those other liability points, it is just that we recognise that others are closer to the ground in relation to these infringements and we gratefully adopt their submissions.

THE PRESIDENT: Mr Jowell, I am sure all of those before us will appreciate that there is going to be degrees of overlap, and we are not of the view that points are made stronger by repetition so we entirely endorse your light touch approach --

MR JOWELL: Understood.

THE PRESIDENT: -- and invite, indeed to the extent they have not already adopted it, others to follow your example.

MR JOWELL: I am grateful for that indication. On that basis, I intend to divide my submissions into four parts. First of all, I want to just touch on these two points on liability. Then I would like to remind the Tribunal of the content of certain general legal principles that are, we say, relevant to the proper

resolution of these appeals. I will go to those because they will -- the application of those principles really will permeate my more detailed submissions that I will come on to in due course, in particular in relation to the propriety and the amount of the penalty.

Thirdly, I then want to address you on this issue of the hold-separate period which I am sure you will have seen in the pleadings, which goes to both liability and to penalty for the last part of the alleged infringement, the period from March to August 2016.

Then finally, I wish to address you more generally on the legality of the penalty and to seek to identify the key steps in the analysis where the CMA's Decision has erred and led it to impose a penalty on Allergan that is wildly out of all proportion to its alleged participation liability for these offences.

Now, liability. Obviously, to state the obvious, to the extent that the appeals on liability are successful then -- by those who are said to be responsible for participating in the infringements, then because our liability is derivative the liability on Allergan will also fall away.

The two specific points that I wish to touch on relate to first, the test for unfair pricing laid down in the Tribunal's *Napp* judgment, and secondly, the

alleged 10mg agreement insofar as it concerns Allergan.

Now, Ms Ford has already taken you to the relevant passages of the *Napp* decision of the Tribunal. She has shown you that the approach both of the Director General of Fair Trading and of the CAT was that there were in fact two cumulative necessary conditions for a finding of excessive pricing: first, that there should be prices that are very significantly higher than would be expected in a competitive market; but also secondly, that it should not be likely that the high profits would stimulate successful new entry leading to effective competition within a reasonable period.

That was the test adopted in paragraphs 390-391 and it was the approach that was applied, which one saw at paragraph 403. Perhaps if we can just have that up on the screen. It is at {M/24/111}, paragraph 403. You see it again there.

Now, as Ms Ford also explained, the legal and economic rationale behind the second condition in *Napp* makes perfect sense. Excessive pricing is potentially, at least, a very unruly horse indeed and there is a real possibility, if it is left to wander, roam freely, that it could be -- there could be all sorts of false positives or type one errors as they are known in the jargon, and the second condition that is imposed in *Napp*

we say guards against unnecessary and incorrect regulatory intervention in circumstances where market forces themselves are already likely to operate to correct, to self-correct the excessive pricing over a reasonable period of time.

We say that it is a soundly based and rational additional condition that has been included.

Ms Ford took you to the so-called Project Apple documents which show Allergan's perception of the market when it was contemplating its investment in Actavis. They are some months prior, actually, to the actual investment because the Apple documents are in December 2014 and January 2015 and the actual investment occurs at the end of May 2015.

But what one can see from those documents is that what Allergan was anticipating was imminent competitive entry, and with profitability and market share of hydrocortisone expected to drastically decline with 60% share erosion and 90% price erosion within three years.

The CMA's Decision does not dispute this and in fact it relies on it, and Ms Ford went to the relevant paragraph which, perhaps if we could pull it up. It is at {IR-A/12/73}. She took you to paragraph 3.113. It is also important to see the footnote at the base of the page. If one looks at footnote 151, if we can -- okay.

There we are:

"In January 2015 Actavis anticipated market share erosion of 60% and price erosion of 90% over a three-year period with the expectation that competitors would enter in 2015 'without indication for adrenal insufficiency and being launched and dispensed off label'."

So there is no dispute about this. What I would like to add is that not only did the CMA recognise the reality of the Project Apple predictions in its Decision, but it went on to cross-examine and put its case on that basis to the witnesses. If I could just remind you of that, if we could go to Day 6, please, of the transcript at page 41 {Day6/41:1}. You will see on line 11 there that the cross-examiner, Mr Holmes, I think, puts it as his final proposition of fact. You see he says:

"Question: ... Let me put the proposition and then we can discuss it. Auden and Actavis's documents prior to skinny label entry show that they understood that such entry would lead to this process of substitution resulting in a loss of a large part of Auden's customer base and in significant price reductions. Are you in a position to agree or disagree with that statement ..."

And the witness says, well, I have not looked at the

underlying documents.

If you go forward to page 44, please, you see on line 19 {Day6/44:19} we see there he says:

"Question: ... In the final bullet, the forecasts are set out:

'Modelled share erosion of 60% and price erosion of 90% over three years.'

So, again, I think you would agree that this shows serious concern about the impact that this potential source of competition from skinny label tablets would have on Auden's volumes and prices?"

If we could go over the page, please {Day6/45:1}.

"Answer: I agree. At that time in January 2015, this seems to be a reflection of Actavis's views.

"Question: Yes. It turns out that this was a reasonable accurate prediction, judging by the market data we have looked at, share erosion of 60%, price erosion of 90% over three years."

So the cross-examiner is accepting that not only was this prediction made, but this was a reasonably accurate prediction.

Then the next couple of pages from 45-47 {Day6:45-47} I do not intend to read you through, you will recall that it was put to the witness that Actavis reduced its price by some $220 million precisely because

it anticipated vigorous price competition and market share erosion in hydrocortisone.

Then if I could ask you, please, to look at page 48, if we could have that up {Day6/48:21}. If you see line 21. He asks him to look at -- Dr Bennett to look at his second report and he quotes, you will see quotes from the report.

If we could go over the page, please {Day6/49:2} you see he says:

"So, no ongoing constraint. But the switching to the cheaper product [he says] is competition at work, would you not agree? Pharmacies getting better prices because of a new version of a product which they were happy to substitute for Auden's more expensive offering, that is price competition, is it not?"

So what is being put to the witness is that this is price competition at work.

Now, the ultimate test for excessive pricing, as Lord Justice Green observed in *Flynn Pharma* at paragraph 97, and I think Ms Ford took you to that already, but just so I can just read it out. He says that:

"In broad terms a price will be unfair when the dominant undertaking has reaped trading benefits which it could not have obtained in conditions of 'normal and sufficiently effective competition', ie 'workable'

competition."

Now, if the CMA's own case is that competition was at work, price competition was at work, should this Tribunal not conclude also that there was workable competition? It seems a very fine distinction if there is some difference between those two things, and we say really that is the beginning and the end of the excessive pricing case as regards Allergan because by the time it purchased Auden competition was already at work and prices were due to come down within a reasonable period.

Now, if I could take you to how the CMA seek to deal with this point, the *Napp* point, in their defence. This is in bundle A/6, so {IR-A/6/122}. You see under the heading, "The CMA's alleged failure to satisfy the second element of the test in *Napp*". I am afraid what they have to say in these paragraphs is very thin indeed. The first paragraph, 326, we see what they say. They say Allergan -- they mention the argument that is alleged, and then they say:

"These criticisms of the duration of the abuse are unfounded. The Decision is careful to set out in some detail the feature offence the relevant market that enabled Auden/Actavis to increase and sustain unfair prices throughout the Unfair Pricing Abuses. The short

point is that the relevant market was not capable of functioning in a manner that was likely to produce a reasonable relationship between Auden/Actavis's prices and the economic value of hydrocortisone tablets. This [it said] is a complete answer to Allergan's and Auden's complaint."

Well, with respect, it is a very incomplete answer. It is no answer at all, because if you apply the test laid down in *Napp* it is not enough that prices are currently excessive; there is an additional condition that has to be met and is not met.

If one then goes on to paragraph 327 over the page, please {IR-A/6/123} they then say:

"In any event, Allergan is wrong to elevate the test for excessive pricing used in *Napp* as a universal requirement in all cases. It is not. Rather, as the Tribunal itself pointed out in *Napp*, the Director's approach ... was solely based in the circumstances of that case, but 'there may well be other ways of approaching the issue of unfair prices under section 18(2) of the Act'. The CMA submits that it properly applied the United Brands test in this case, and did so in accordance with applicable principles including those laid down by the Court of Appeal in *Phenytoin*."

Well, in *Phenytoin*, as Ms Ford showed you, the Court of Appeal actually refers to the *Napp* test and does so without any demur.

So what they are really saying in this paragraph is simply, well, we have changed the goalposts, we have moved the goalposts here. We have taken away one of the two essential conditions.

They do so without any justifying reason or explanation, in circumstances where the *Napp* case is ostensibly a very closely comparable situation of excess pricing, alleged excess pricing in the pharmaceutical sector and soundly based, for reasons we have developed already, both in legal and economic terms.

Then if you see paragraph 328, finally, they say:

"As to the points made at paras 56-58 ... the Unfair Pricing Abuses are not negated by Actavis and its analysts expecting competitors to enter the market and entry materialising. These points overlook the fact that Auden/Actavis was protected from effective competition by the barrier to expansion created by the orphan designation. This, in turn, resulted in a significant number of pharmacies considering that they had no choice but to pay unfairly high prices for Auden/Actavis's hydrocortisone tablets. Those ... prices lasted more than 8 years ..."

Now, with respect, the allegation that they had no choice has not been sustained by the evidence, by their own expert evidence, and the allegation that they were protected from effective competition is simply not how they put the case in cross-examination of Dr Bennett. Dr Bennett was cross-examined on the premise that this was working and effective price competition. So we say there is just nothing here in the defence that merits the departure from the *Napp* condition and the *Napp* condition is clearly not met, the second *Napp* condition.

That condition is there for very, very sound reasons and this Tribunal should not depart from it, in my respectful submission.

That is what I would like to say about the first point on liability. There may be a question.

PROFESSOR MASON: There is from me.

THE PRESIDENT: After you.

PROFESSOR MASON: It may well be the same question, so I'll try once and you can improve on it, President.

To ask a question of you that I think the President asked previously, for that second condition which you are emphasising, high prices stimulating new entry or conversely not, what is your view as to the appropriate timeframe over which entry might be stimulated?

MR JOWELL: I think it has to be the medium term. It cannot

be the long-term, I accept that. But I think -- and typically one talks in competition cases, in our experience, of a period of something like two to three years being representative of the medium term, and that is precisely what this is. In fact, it is a bit sooner than that, really, and one can have debates about, well, does it have to start in the medium term or does it actually have to have eventuated, completed in the medium term? But actually it is both started -- well, it started instantaneously by the time Allergan is involved and it is completed within three years. In fact two years.

PROFESSOR MASON: Is there anything about this context or this market that helps better to define -- "medium term" is inevitably ambiguous. Is there anything about the market or the context that helps to define when we are in the medium term rather than the short or long? Is there any kind of frequency or regularity or, particularly on the supply side, that allows us to have a sharper definition of medium term?

MR JOWELL: May I take that away and think about it?

PROFESSOR MASON: Of course.

MR JOWELL: If there are specific feature that you have in mind, sir, then I would be happy to consider them as well. But I would like to ponder that, if I may, and

1 come back to you.
2 PROFESSOR MASON: I allow you to ponder unpolluted with any
3 of my thoughts as to what are those features.
4 MR JOWELL: I would be happy to do so. But I think that it
5 is -- what one is entitled to take from this is that
6 this is -- in a way it is an absolute classic case of
7 it. You have corroborative evidence of what was
8 predicted at the time, what happened, it all happened
9 within two to three years and this is the, as the
10 Chairman said, in Friedmanite terms this is the price
11 signaling to the market for there to be entry, and entry
12 there indeed was, and one sees the prediction of
13 the prices tumbling and the prices indeed tumbling.
14 PROFESSOR MASON: Your thoughts in due course on how to
15 define medium term a bit more precisely would be
16 welcome, thank you.
17 THE PRESIDENT: Oddly enough my question is the flip side of
18 that, a backward-looking question.
19 We have said a couple of times now that this is an
20 unusual case in the need to parse what might otherwise
21 be a single infringement into segments of time, because
22 of the acquisition and disposal of the business that was
23 actually found by the CMA to be infringing. That
24 colours a number of points, and we covered some with
25 Professor Valletti and some with Mr Stewart. Mr Stewart

was asked really about not so much his knowledge but his organisation's knowledge of the business that they were acquiring and disposing.

What I want to put out for your response and pushback in due course is the extent to which what one ought to have spotted in terms of prior anti-competitive conduct, how far that ought to feed into questions of -- well, certainly penalty and perhaps liability, when one is choosing to acquire a business. It probably would help if I put a little bit of flesh on those skeletal bones, so I will do it by way of an example of a document that we looked at when Mr Bailey was cross-examining Mr Stewart and to which you have referred.

If we can bring up {IR-H/922/1} and then if we go first to page 15 in that document {IR-H/922/15}. What we see here is the price adjustment or competition working point that you have been making, but the figures that I want to particularly identify are, if one looks at the years 2012, 2013, 2014 one sees a market share of 100%, which obviously suggests -- well, rather more than suggests, dominance.

Then one also sees not so much the price but the price change that is articulated, and we see a price change of 28% in 2014. One does then see, as you have

adverted to, the adjustment downwards beginning in 2016 and running through to 2019 and these are, absolutely right, significant falls. But it is the 28% in 2014 that I am particularly picking up on.

If we then go to page 3 of this document {IR-H/922/3}, the fifth bullet on that page we are very familiar with, we have seen it a couple of times. But:

"Near term cash cow with the remainder of the business is growing with a significant pipeline."

But it is the "near term cash-cow" that, again, I am highlighting.

Now, this is just an example, but it is the sort of example of a point that I think we would want to be addressed upon, which is if you like, a kind of acquisitional morality, that if you see something which raises alarm bells, and you may say they do not raise alarm bells, but I am putting this as an example of something that might be used as a good example, if you look at these things, do not enquire and you have PwC looking under the bonnet, if you do not enquire and you buy it then the poison pill that represents the past infringing conduct is something that you assume liability for, because you are going to get sued in the future and you either should protect yourself by warranties or, as we discussed with Mr Stewart, not buy

at all because it is just not right that you should do it.

I anticipate you will have a lot of points to say in response to that, but I wanted to get it out now.

MR JOWELL: No, let me make a very clear distinction. If you -- let us -- there is the liability that you have in relation to the prior, any prior anti-competitive conduct that a potential subsidiary has carried out in the past, and anyone acquiring a subsidiary has to take that into account and as you say, potentially has to be on notice of that. The liability that you then potentially take for that is the liability that the subsidiary may be liable for a past competition infringement. It may be liable for damages actions, it may be liable for fines and so on. You as a parent company do take on, if you like, a form of contingent liability when you take that on, which you then have to either say, well, that is what we are accepting when we buy this or take -- or you protect yourself by various warranties from the sellers.

That I fully accept. But if one goes back, if I may, to, I think it was page 15 that we were looking at with the price evolution {IR-H/922/15}. So you are positing, well, with 100% market share and high prices they should have seen that from 2012-2015 there was an

infringement. Now, we do not accept that because we do not think it is as simple as saying, well, just because you have 100% market share and high prices therefore there is an infringement of excessive pricing, or that that could be inferred.

But let me suppose for the sake of argument that that is the case. That is certainly not the case going forward, because one sees they are purchasing mid-2015 and one sees then immediately, really, in 2016 very dramatic anticipated declines in the price.

So where I take issue is I say, well, from mid-2015 you cannot say that there is a prediction here of infringing conduct on the part of the subsidiary. So anybody in Mr Stewart's position, even if, say, they are -- let us suppose Mr Stewart obviously did not have access at that time, did not have access to the *Napp* judgment as far as I'm aware, he certainly did not indicate that he did, but let us suppose that he had the *Napp* judgment in front of him, he would say as far as any future infringement is concerned there would be no basis to suppose there was any future infringement from the point in time from when they buy the company. Because he would say, well, the condition, an essential condition of *Napp* is that prices should not be coming down due to entry and price competition within

a reasonable period, and that is precisely what we are predicting.

So you can see at least the beginnings of an argument to say that for the prior period you would say he should have been on notice because it is 100% market share and a high price but there is no basis for saying he was on notice going forward.

Now, what have Allergan been fined for? It is entirely and solely the period going forward. That is what our appeal is about. Our appeal is only about the period from 29 May through to 1 August 2016.

So yes, if Allergan had been hit by a fine indirectly on its subsidiary, then that point would have force, but it does not have force in relation to our appeal which purely concerns the actual penalty on Allergan.

THE PRESIDENT: I entirely understand the point you are making about the basis of the penalty and we will park that if we may. Just so that I have understood your point about prior infringements and the appropriate way of penalising those. Let us leave questions of damages out of account. I think we can park those.

Your position is that the acquiring undertaking assumes a liability that is limited by reference to the undertaking that it acquires, the subsidiary. In other

words, any penalty will be economically damaging to the parent because its subsidiary's value will be undermined but one computes the penalty by reference to the subsidiary's turnover, its culpability as a subsidiary and you do not have any pollution upwards so far as the prior infringement is concerned.

MR JOWELL: That is absolutely correct, and to be fair to the CMA, they do not seek to impose their fine on Allergan for the prior period. So Allergan is only affected insofar as the subsidiary is fined for the prior period.

THE PRESIDENT: In effect, what we are saying is that this question -- now let us turn it to a hypothetical one because I do not want to get hung up into the facts, but let us suppose one has on acquisition got a set of circumstances that warrant further investigation. They are not conclusive about a prior infringement, they are suspicious. That is not something which triggers any kind of punitive response under the law as it stands at the moment.

MR JOWELL: No.

THE PRESIDENT: That is your --

MR JOWELL: And nor should it.

THE PRESIDENT: Nor should it.

MR JOWELL: Yes, I think that -- we will come on in a moment

if I may to the sort of rationale for the attribution up to the parent of liability, but to be fair to the CMA they do not seek to attribute liability for conduct that precedes the actual acquisition. So when one is considering Allergan's liability it is purely the period going up post-acquisition. One has to judge it on that basis and when one sees these figures we say it is just, in accordance with the *Napp* test one cannot say there is an infringement. Of course you can move the goalposts, as the CMA has sought to, and take away that condition. We say that is very inadvisable and wrong in law. They are not entitled to do that.

THE PRESIDENT: Of course it all depends on how you frame these things. You framed it, and I quite understand why you are framing it, as a liability for a prior infringement but if one frames it as a question of acquisitional morality, as I think I put it earlier, one is actually talking about present conduct of the parent in choosing to acquire something which perhaps it should not have done.

MR JOWELL: I think one needs to be very careful here. Competition law is very important but direct investment perhaps is even more important for the prosperity of this country and if we start to use competition law to try to, almost to say that as a form of morality to

impose on acquirers, foreigners, investors in the UK, it is liable to do far more economic harm than competition law can do good. So I think we need to keep things a little bit in perspective as a general matter.

Of course there are always going to be issues in acquisitions when people say, well maybe the past conduct of a particular acquired company is questionable, but that is dealt with contractually and it is not something that competition law should start to try to, if you like, police the historic morality of companies that are being acquired.

But if you ask the question: did Allergan, if you like, as I think the CMA tried to put it at one point in the Decision they say, they invested in a monopolist effectively an exploitative monopolist, that is just not the case. It is not the case on their own case because they have accepted that Allergan was investing in a company that going forward was going to be facing fierce price competition.

What is more, they believed that in pounds shillings and pence because they were not prepared to pay for the hydrocortisone business. They demanded the $220 million reduction precisely because they did not see any benefit in this going forward because they believed that it was all going to be competed away in the near term.

That is as far as acquisitional morality in our submission goes. It goes to how this thing is going to conduct itself in the future. As regards the past is concerned, that is a matter for contract and warranties and so on. If one starts to use competition law to say, well, you should not ever purchase companies that might have historically engaged in competition law abuses, then I suspect that is going to do a good deal of harm to the economy of this country and it is not a route we should go down I would urge on the Tribunal.

THE PRESIDENT: I think if I can articulate your response to the point I have been putting to you. First of all, you say it is not as simple as acquisitional morality. There are other considerations which mean one needs to tread quite carefully.

MR JOWELL: Yes.

THE PRESIDENT: Secondly, I think you say this is actually not an approach that is in any way enshrined in UK competition law. It would be a departure.

MR JOWELL: Yes.

THE PRESIDENT: Thirdly, you say this is not the basis on which the CMA has penalised your client and, fourthly, I think you say that it does not actually pertain even on the facts of this case because if you look at this table in the round what you see is the acquisition of

a cured infringement, if it was that at all, in that you have got what you say competition working. Have I got your sort of nested response?

MR JOWELL: Mr Chairman, you put it much more succinctly and better than I have and, yes.

THE PRESIDENT: I am grateful.

MR JOWELL: Is this a good moment to ...

THE PRESIDENT: Yes, indeed. We will rise until quarter to. Thank you very much.

(3.34 pm)

(A short break)

(3.45 pm)

MR JOWELL: Mr Chairman, Professor Mason asked about any particular features of this market that might indicate whether the general two- to three-year periods were a reasonable time or a medium term in competition law should be either departed from or should remain the same. The one in the short -- very short adjournment that we have had, the one feature that we would note is that, and I say this of course on instruction, that the typical time to market from inception of the thought to actually putting the product on the market for a generic drug is roughly that time period of two to three years. One sees that illustrated in this case in the case of Teva, which took roughly that time period from its

starting-off to then put the 10mg product, hydrocortisone product on to the market.

Now, of course at the time we are talking about in 2015 there were -- many of these competing products were well through that process, so in fact -- and that is why the competition eventuates right in the very near term.

If I may then move on to the second point on liability on which I would like to briefly address you, and that relates to the alleged 10mg unwritten agreement. Now, it is not alleged anywhere in the Decision or by the CMA that Allergan Plc knew about this agreement. It is not even alleged anywhere that [redacted] of Actavis UK, who reported to Allergan, herself knew about it. So Allergan are at least one, and we would say more than one stage, removed from this unwritten agreement.

Now, you have heard from Ms Ford in her sixth ground of appeal, and she has submitted to you that when Mr Patel left Actavis on the point of the acquisition at the end of May 2015 that understanding by its nature had to come to an end because it is dependent, as she put it, on the awareness of the parties. This particular nature of this agreement is dependent on the awareness of the particular individuals, and it cannot survive the departure of those individuals whose awareness it

depends upon.

It is also the case, however, that it is notable that Actavis UK in September 2015 took over the marketing and selling of hydrocortisone from Auden. So if the point that Mr Chairman, you put to Ms Ford is correct, were correct, and we say with respect it is not correct, that one can as it were attribute the awareness to the corporate entity, that would only work as regards Auden McKenzie in the period from May but it would cease in September 2015 when Actavis UK takes over the marketing authorisation, because that is a separate corporate entity.

So if the attribution point is correct it only works as far as Allergan is concerned for a period of three months of its alleged period of liability. It would not, we say, be sensible or proportionate to find Allergan derivatively liable for such a minute period of time on such a basis.

Those are the only two points I wanted to just emphasise in relation to liability for the infringement. If you are against me on either of those and you were to find that they do not, the two factors that I mentioned do not negative entirely the liability of Allergan or indeed Auden/Actavis, we still say that they are highly, highly relevant factors when it comes to the legality

and proportionality of the fine, and they have not been given any proper weight, or indeed any weight in ascertaining the proper amount of liability, of fine that Allergan should suffer, particularly in relation to specific deterrence. They have been completely ignored.

Yet it is absolutely crucial to ask, to take into account first, the fact that Allergan was expecting this vigorous price competition in relation to unfair pricing, and also that Allergan had no awareness at all of the alleged unwritten agreement. I will come, of course, to develop those points in due course when I come on to penalty.

Could I turn next then to the legal principles. I know very well that the Tribunal is going to be very, very familiar with all of them, but I nevertheless think respectfully that they bear some repetition. I just want to -- there are three of them. The first of them is an aspect of Dicey's Rule of Law, and it is called by some legal accessibility, by others legal certainty. Could I invite you to take up the case of *R v Rimmington*, which is at {M/45/1}. The judgment is of Lord Bingham and the case involved the law of nuisance and its application in two particular instances. If I could ask, please, to go to page 22 {M/45/22} and to show you paragraph 32 in the speech of

Lord Bingham in the House of Lords. You see it says:

"The appellants submitted that the crime of causing a public nuisance, as currently interpreted and applied, lacks the precision and clarity of definition, the certainty and the predictability necessary to meet the requirements of either the common law itself or article 7 of the European Convention. This submission calls for some consideration of principle.

In his famous polemic Truth versus Ashurst, written in 1792 and published in 1823, Jeremy Bentham made a searing criticism of judge-made criminal law, which he called 'dog-law'.

'It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he should not do -- they won't so much as allow of his being told: they lie by till he has done something which they say he should not have done, and then they hang him for it.'

The domestic law of England and Wales has set its face firmly against 'dog law'."

Now, as a dog owner myself I should say that that is not even how we treat dogs these days, but it is certainly not how we should treat persons, whether they be corporations or individuals, including foreign corporations seeking to invest and do business in this country.

Now, later on Lord Bingham quotes Lord Justice Judge in the Court of Appeal in *R v Misra*, who himself is quoting Lord Diplock. If I could show you that, it is page 24 {M/45/24}. You see it says:

"Recent judicial observations are to the same effect. Lord Diplock commented in *Black-Clawson* ... 'The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.' In *Fothergill v Monarch Airlines* he repeated the same point: 'Elementary justice or, to use the concept often cited by the European court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or more realistically by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible.'"

Now, I take you to these passages and in particular

to Jeremy Bentham's memorable comment for two reasons: first, to remind you of course of the basic principle of the importance of legal certainty, and we will come to the legal uncertainty that characterised the tort of excessive and unfair pricing; but also because Jeremy Bentham's memorable comment about dog law actually rather usefully highlights, in our submission, two distinct concepts of deterrence. On the one hand there is what one might call legitimate deterrence, and that arises where a person either knows in advance or ought to have known in advance that a particular act was wrong, and the person nevertheless commits that act.

Now, in those circumstances part of the punishment for that wrongful act can reasonably be justified by deterrence to ensure that the person does not offend again and also pour encourager les autres, just as an example to the third parties.

But then there is also another form of deterrence, and it is still deterrence but it is just unfair and illegitimate deterrence, and that is what Jeremy Bentham called dog law. That is where a person acts in a particular way who could not reasonably have known in advance that the act was wrong, and yet he is nonetheless punished for the act.

Of course, in those circumstances the punishment can

still act in a sense as a deterrence going forward because the person can be dissuaded in the future from acting in the way for which he has been punished, just as the beaten dog knows not to jump on the sofa the next time, and of course others who see the punishment being meted out can take the same message away.

But deterrence in this form is not consistent with legal certainty, and it is not also consistent with any basic concept of fairness. So insofar as deterrence can legitimately form part of punishment it must be justified by a prior act that was clearly ascertainable in advance as unlawful.

It is not enough to say with hindsight that the act in question was undesirable. That may be a reason for prohibiting the act in the future, but it is not a reasonable justification for punishing someone for committing that act in the past.

This is a critical distinction when it comes to ascertaining the fairness and the legality of the fines in this case, because as I will come on to, the fines on Allergan for specific deterrence are simply unjustified by anything that Allergan could reasonably have known it was doing was in any sense wrong at the time it did it.

THE PRESIDENT: Mr Jowell, I quite take your point, but one could say since we have abandoned the understanding of

the common law that judges declare that which was written but instead develop it, that there is a degree of retrospectivity in common law evolution, which is a point that Professor Stapleton makes in her essays on tort in the Clarendon lectures she gave. The answer, I think, to squaring the circle is that that is why the common law is incremental, in that one cannot branch out in a completely new way absent wholly exceptional circumstances like a complete new development. One has to move step by step so that the law is evolving in a consistent way. So retrospectivity is there, but it is controlled by, I would infer, the point of legal certainty so that you know where you are. But that is the sort of limited pushback that I would make to Jeremy Bentham.

MR JOWELL: I take that point, but I think that it is also important to draw a distinction between -- we will come on to it, between liability and penalty in that context because --

THE PRESIDENT: Indeed, and there is almost certainly also a distinction between the civil law and the criminal law. Generally I would accept that.

MR JOWELL: And criminal -- yes, indeed. One aspect of the importance of lack of retrospectivity is not just fairness, it is also the importance of this

predictability to commerce and therefore to overall prosperity. In fact, Lord Bingham in his book "*The Rule of Law*", and we do not have it in the bundle, but I am sure it will be familiar --

THE PRESIDENT: I have it well in mind.

MR JOWELL: -- to everyone here, he deals with this on his chapter on the accessibility of the law, and having, really, reiterated what he said in the *Misra* case which I mentioned, he goes on to state, he quotes Lord Mansfield who said:

"In all mercantile transactions the great object should be certainty; and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other."

Lord Bingham himself goes on to say, he says:

"No one would choose to do business ... in a country where the parties' rights and obligations were vague or undecided."

We say that the Tribunal should bear that in mind when -- before endorsing very severe fines for conduct that could not reasonably have been known to be worthy of sanction at the time that they were committed.

So, that is legal certainty. The second point of principle, and I know Mr Chairman, you have this well in mind already, is that competition law infringements and

certainly financial penalties of the type meted out in the present case are treated as a species of criminal law. If one can just -- I will just briefly show you that in Lord Justice Green's judgment in Flynn v CMA which is in {M/170/42}, please. Perhaps to avoid me droning on, perhaps if the Tribunal could just read paragraphs 135-140.

THE PRESIDENT: I wonder if we can put these on two pages and then we can read the two. (Pause) I wonder if we could move forward a page. Perfect, thank you. (Pause)

MR JOWELL: Now one feature of the fact that competition law infringements are a species of quasi-criminal law is reflected in the fact that there is a requirement for fault. The law requires that the offence must have been carried out either negligently or intentionally, and that is in section 36 of the Competition Act.

So the undertaking must be aware that its conduct is anti-competitive in nature or at least it must be clearly foreseeable that it is anti-competitive.

Another feature of the serious nature of infringements of competition law is that even though it is the undertaking that is said to infringe the law, nevertheless responsibility for committing such infringements is regarded as personal in nature and responsibility is attributed to particular persons

within an undertaking.

If I could just take you to a useful summary of the law which is in *Bellamy & Child*, which is in {M/156.01/3}. You will see 14.087, at the foot of the page under the heading "Fines on parent and successor companies":

"In general. Given the serious nature of infringements of Articles 101 and 102 and the potential severity of the ensuing penalties, the Court of Justice has held that responsibility for committing such infringements is personal in nature. The principle of personal responsibility means that an infringement should, in principle, be attributed to the natural or legal person that operates the infringing undertaking at the time the infringement is committed. Competition law refers to undertakings, which must be understood as an economic unit even if in law that unit custodies of several natural or legal persons. Since only legal entities can be held liable for penalties, the Commission must consider, once it has found that a particular undertaking has participated in an infringement, which legal entities within that undertaking should be required to pay all or part of the penalty to be imposed. This raises two issues:

(a) when should a parent company or a group of

companies be held liable for conduct engaged in by a subsidiary (parental liability); and.

(b) what happens when the legal entity that engaged directly in the infringing conduct changes ownership between the start of the infringement and the date on which the fine is imposed (successor liability)."

If we continue:

"Effect of joint and several liability. Where fines are imposed on a parent or successor because the infringing conduct of another legal entity has been attributed to it, the fines are imposed jointly and severally. The Commission is not required to apportion the fine further. Where there is no contractual agreement between the different entities as to the shares to be paid by those held jointly and severally liable for payment of the fine, it is for the national courts to determine those shares in a manner consistent with EU law. The extent to which a parent's liability must be co-extensive to that of the subsidiary has been considered in a number of judgments. On the one hand, the liability of the parent company does not exonerate the subsidiary from liability for its own participation in the cartel. On the other hand, the notion of parental liability cannot be reduced to a type of security to guarantee payment of a fine imposed on its

subsidiary. As a result, it is conceivable that a parent company may be ordered to pay more than its subsidiary. However, the circumstances in which that could arise are likely to be limited. In particular, in a situation where the liability of a parent company is derived purely from that of its subsidiary and in which no other factor individually reflects the conduct for which the parent company is held liable, the liability of that parent company cannot exceed that of its subsidiary."

If we could go to the next page, please {M/156.01/5}:

"Moreover, in such a scenario of purely derivative liability, it appears that the parent's entitlement to the benefit of any reduction in fine that its subsidiary may secure is not contingent on the parent challenging the fine on precisely the same grounds in its own appeal."

So just pausing there, Allergan are, as I said, in a position of purely derivative liability. But despite that Allergan has been fined for the period of its infringement, for 14 months of its infringement, vastly more than its subsidiary has been fined for that same period. One of the important points that I will be considering again is whether -- what could be the

possible basis in the circumstances of this case for elevating the fine on the parents so far above that of the subsidiary. As I will come to, we submit that there was absolutely no basis for any further elevation on the parent company.

If I could take you to page 5 of this authority I think you will see 14.090:

"Imputing the conduct of subsidiaries to their parents."

You will see this is relevant to the question of the Hold Separate:

"A parent company may be personally liable for the conduct of its subsidiary, including in circumstances where the subsidiary has a separate legal personality, if that subsidiary's conduct can be imputed to it. The conduct of the subsidiary can be imputed to the parent where the subsidiary does not determine independently its own conduct on the market, but carries out in all material respects the instructions given to it by the parent, having regard, in particular, to the economic, organisational and legal links between the two entities. To put the same point differently, the parent company of the group can be held liable and fined for the infringing conduct committed by its subsidiary where the parent exercises 'decisive influence' over the conduct

of the subsidiary."

It goes on to discuss that potential liability.

So the test, is whether -- does the subsidiary act independently or does it carry out the instructions of the parent company at the relevant time?

The answer that the European competition law has given to this question of when the parent company is liable for the acts of the subsidiary is not one that follows the English rules of attribution of liability under laws of -- under our corporate laws. Instead -- and that is not particularly surprising because it is a transnational rule for one thing, and there will be different practices in different member states with different willingness to pierce the corporate veil across different jurisdictions, and therefore European competition law has fashioned its own set of distinct rules, effectively, where one can pierce the corporate veil and ones that are appropriate for competition law. That set of rules is really encompassed in this notion of the decisive influence test.

I should just show you one or two of the underlying authorities in relation to that. If we could go to {M/68/19}, please. This is the opinion of Advocate General Kokott in *Akzo* Nobel. You will see at paragraph 75 she says:

"The interests of the parent company are not impaired by a presumption rule such as that under discussion here."

The presumption rule being one that where you have 100% ownership you are presumed to have decisive influence, but it is a rebuttable presumption.

She says:

"It is open to the parent company to rebut, in a specific case, the presumption of exertion of decisive influence, based on conclusions derived from common experience, by demonstrating that it exercised restraint and did not influence the market conduct of its subsidiary."

Then you see footnote 67, and if we could just show the footnote. She says:

"The Commission correctly mentions the following examples in this regard:"

So these are examples of when the parent company exercises restraint and therefore the presumption of decisive influence is rebutted.

"(a) the parent company is an investment company and behaves like a pure financial investor, (b) the parent company holds 100% of the shares in the subsidiary only temporarily and for a short period, (c) the parent company is prevented for legal reasons from fully

exercising its 100% control over the subsidiary; ..."

And she refers to the examples given by an Advocate General in a prior case.

If we could go next to the court in *Akzo* Nobel, that is at {M/76/11}, please. You will see paragraph 60:

"In the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a simple presumption that the parent company exercises decisive influence over the conduct of its subsidiary ... and that they therefore constitute a single undertaking within the meaning of Article 81 ... It is thus for a parent company which disputes before the Community judicature a Commission decision fining it for the conduct of its subsidiary to rebut that presumption by adducing evidence to establish that its subsidiary was independent ..."

So the touchstone is independence.

If we go on to the next paragraph, please, 61:

"In that regard, it must be made clear that, while it is that at paragraphs 28 and 29 of *Stora* ... the Court of Justice referred, as well as to the fact that the parent company owned 100% of the capital of the subsidiary, to other circumstances such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary

or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning before concluding that the reasoning was not based solely on the fact that the parent company held the entire capital of its subsidiary. Accordingly, the fact that the Court of Justice upheld the findings of the Court of First Instance ... cannot have the consequence that the principle laid down in ... is amended."

On to the next paragraph, please, 62 {M/76/12}:

"That being so, it is sufficient for the Commission to show that entire capital of the subsidiary is held by the parent company in order to conclude that parent company exercises decisive influence over its commercial policy. The Commission will then be able to hold the parent company jointly and severally liable for payment of the fine imposed on the subsidiary, unless the parent company proves that the subsidiary does not, in essence, comply with the instructions which it issues and, as a consequence, acts autonomously on the market."

So it is really, the critical point here it is the -- is the subsidiary independent or must it -- or

autonomous on the market or must it comply with the instructions issued by the parent company?

Now, the Tribunal posed a question on Day 4, I think Mr Chairman, you posed the question which is whether the decisive influence test for imposition of fines is the sole test for working out what the fine ought to be. The thought that was floated by the Tribunal was, well, if you have a parent company that buys a subsidiary and then sells the subsidiary and thereby makes a turn on the two transactions, and if that subsidiary is engaged in anti-competitive activity such that you are getting value for that anti-competitive activity but you are not paying the price of the anti-competitive conduct, should the fine reflect the commercial dealings in the company so that you pay a price, effectively you have to repay the profit that you made?

Now, if I may say so the Tribunal has put its finger on a very important point, and there is a short answer, if you like, a rather glib short answer and a longer answer. So the glib short answer is, well, if a parent buys a subsidiary that is already engaged in anti-competitive activity and sells it in the same state then it should not make a net benefit because whilst it may have sold higher it will also have to buy higher, so the two should cancel each other out. That is obviously

a rather glib answer and does not really get to the heart of it and there may be circumstances where an acquirer does in fact make a turn.

So the longer answer is this: that the mere passive receipt of a benefit alone by a shareholder does not suffice and cannot suffice unless there is also decisive influence. What lies behind the decisive influence test, in our respectful submission, is the idea that the parent company must have had some degree at least of personal responsibility for the infringement itself. Put simply, a legal entity should not be fined and its directors thereby potentially stigmatised unless they are at some way in fault. There must be at least some form of culpable failure of supervision or control.

Competition law is really striking a balance between being prepared to pierce the corporate veil in circumstances where it would not be permissible in corporate law, but doing so really in circumstances where there is at least some decisive influence over the offending subsidiary but not where the subsidiary is truly independent and autonomous, because when the subsidiary is truly independent and autonomous there can be no culpable failure at all on the part of the parent company.

So the imputation of liability is not, therefore,

based upon a principle of restitution or disgorgement of benefits that may have come from competition law infringements.

If I can give a simple example to illustrate why that must be so, I am sure that there are a number of people in this room who own shares in publicly listed companies, and indeed I am sure there are some people in this room who own shares in privately listed companies, and it may well be that a number of those companies are engaged in anti-competitive activity. We know, for example, that the European Commission said that companies like Google and Apple and so on are alleged to have engaged in anti-competitive activities. Somebody may have owned Google shares or Apple shares and they may be engaged in anti-competitive activity and they may have thereby inflated their profits as a result of that, and the shareholder might have sold their shares, thereby indirectly benefitting from the increase in price that the anti-competitive activity gave rise to in those particular shares.

Similarly, they may have received dividends in the time of their period of ownership which were elevated by reason of the fact that the anti-competitive activity made those companies more profitable.

Now, nobody, I think, in those circumstances would

suggest that there is any kind of claim for disgorgement by the individual shareholder in those circumstances. They do not have to return those surplus dividends or the additional profit they made by selling the shares.

Really, the same applies to parent companies, at least where those parent companies do not control the activities of the offending subsidiary at the relevant time.

That is why one sees Advocate General Kokott saying, well, where the parent company is a purely financial investor then that would rebut the presumption of decisive influence.

We say mere financial benefit does not suffice, and what is required is indeed decisive influence as laid down in the case law, which requires effectively that the subsidiary should not be independent and that the subsidiary should take all its instructions if given by the parent company.

Now, there is a third principle, the third principle of course is proportionality, and the assessment of the proportionality of the fine by this Tribunal is a critical aspect of the function that this Tribunal plays in the scheme of competition law.

This is an appeal, this is not a judicial review, and the Tribunal must apply its own discretion ab initio

in considering the proportionality of the fine. It will, of course, have regard to the CMA's guidance and to the CMA's assessment in its Decision, but then having done so this Tribunal must consider the matter afresh. The Tribunal's key function is not necessarily to look at each calculation of the fine in minute detail. The key function is to act as a check on the proportionality of the fine overall. That is not to say it does not look at the different stages of the calculation and the ratchets, but the main function is to stand back and look at all the circumstances and consider proportionality in the round.

If I could invite you to make good those propositions, if I could start with *Eden Brown*, which is in M/82 and it is at page -- if we could go to page 13, please {M/82/13}. If you could go down to paragraph 34. Perhaps if I could invite the Tribunal to read paragraph 34, including the citation from *Napp*. It might be convenient again to have this on two sides.

THE PRESIDENT: Yes, of course. (Pause)

MR JOWELL: Now, one area where the authorities emphasise that it is important to pay particular attention to the principle of proportionality is when the regulator proposes to impose a fine that goes above the turnover of the products that are directly concerned by the

infringement. It is established that it may be necessary to impose a fine, that in certain cases that imposes a deterrence on an undertaking that does go above the relevant turnover. But once one starts to look at overall turnover rather than the turnover, the particular turnover that the infringement affects, it is particularly important to bear in mind the principle of proportionality. To make that good, if we could go to page 34 in this judgment, please {M/82/34} and if I could invite you to read paragraph 92. (Pause)

Perhaps if you would not mind creating it on both sides, and then if we can go through to paragraph 100 {M/82/37}. (Pause)

THE PRESIDENT: Do we need to read the intervening paragraphs, or just --

MR JOWELL: I think if you would not mind, Mr Chairman. I think it is an important passage.

THE PRESIDENT: Of course. (Pause)

MR JOWELL: I think it is perhaps not necessary to read the last bit of 100, but ...

THE PRESIDENT: Yes.

MR JOWELL: We take from that essentially four points: first of all, that the Tribunal must step back and make a holistic assessment of proportionality of the fine. Secondly, that the real impact of the infringing

activity is a relevant consideration, and one cannot substitute for that the total worldwide turnover of an undertaking, otherwise there is just no point in looking at the relevant turnover to begin with.

If one has a very large foreign multinational company which is involved in diverse fields of activity such as Allergan, one has to be very cautious about applying penalties based upon worldwide turnover.

Finally, although one can shift the penalty up a bit for a deterrent effect on the larger undertaking, one must not lose sight of the need for the penalty properly to reflect also the culpability of the undertaking and the scale of the infringement.

Now, I do not want to take you to even more authority, but again for your reference we say all of that is also reflected in the *Kier* judgment of the Tribunal at paragraph 175, which is in the bundle at {M/81/1}.

I think I am now coming to the end of the principles, and if you bear with me for two minutes then I can finish them today.

We say that there is one final point about these three principles which is an obvious one really, and that is that they interrelate because particularly the first two, legal certainty, and if you like, seriousness

and culpability, they enter into the assessment of proportionality. Proportionality, if you like, takes those prior principles of legal certainty and culpability and it does so in a manner that is not binary, it is not all or nothing. It also says, well, it can say there is a very significant degree of legal uncertainty or there is a very small amount of culpability, and that is something that then feeds in to the assessment of what is proportionate when it comes to the fine.

One certainly sees that reflected in both the European and the English case law when it comes to legal certainty, where there are cases where the courts have taken into account the lack of legal certainty in setting the appropriate level of the fine.

Just to give you two examples, there is the *Akzo* case in Europe, which is in bundle {M/9/1} at paragraph 163, and in the *Generics (UK) and Glaxo* decision of the CAT which is in the bundle at {M/183/1} at paragraphs 81-82.

Now -- and of course we say that where the liability of the parent is derived purely from its subsidiary then the principle that it may be that the subsidiary's fault can be imputed, if you like, to the parent for the period where it has decisive influence, but it then

follows from that that the liability of a parent should generally be the same and the fine should be the same as that which is imposed on its subsidiary for which it is derivatively liable.

You saw that principle referred to in *Bellamy & Child*. The fine on the parent can be greater than on the subsidiary, but there has to be an additional factor specific to the culpability of the parent that justifies that, such as a culpable encouragement of the infringement or at least a culpable failure of supervision.

That, which I will be coming on to, is something that is completely absent here and therefore there was no basis, we will say, for any elevation of the fine on the parent beyond that imposed on the subsidiary.

Mr Chairman, that is all I wanted to say by way of those three concepts, and that is a convenient moment.

THE PRESIDENT: Thank you very much. 10.30 again tomorrow morning. Thank you very much. We will see you all then.

MR JOWELL: Thank you.

THE PRESIDENT: Thank you.

(4.37 pm)

(The hearing adjourned until Thursday, 15 December at 10.30 am)