Neutral citation [2024] CAT 17

Case Nos: 1407/1/12/21, 1411/1/12/21, 1412/1/12/21, 1413/1/12/21, 1414/1/12/21

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

8 March 2024

Before:

SIR MARCUS SMITH
(President)
PROFESSOR SIMON HOLMES
PROFESSOR ROBIN MASON

Sitting as a Tribunal in England and Wales

BETWEEN:

ALLERGAN PLC
(The **Allergan Appellant**)
AMDIPHARM UK LIMITED
AMDIPHARM LIMITED
ADVANZ PHARMA SERVICES LIMITED
ADVANZ PHARMA CORP LIMITED
(The **Advanz Appellants**)
CINVEN (LUXCO 1) SARL
CINVEN CAPITAL MANAGEMENT (V) GENERAL PARTNER LTD
CINVEN PARTNERS LLP
(The **Cinven Appellants**)
AUDEN MCKENZIE (PHARMA DIVISION) LIMITED
ACCORD-UK LIMITED
(The **Auden/Actavis Appellants**)
INTAS PHARMACEUTICALS LIMITED
(The **Intas Appellant**)

Appellants

- and -

THE COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Salisbury Square House on 26 and 27 October 2023, with subsequent written submissions from the parties in November 2023.

JUDGMENT

(DUE PROCESS)

APPEARANCES

Mr Daniel Jowell, KC and **Mr Tim Johnston** (instructed by **Addleshaw Goddard LLP**) appeared for the Allergan Appellants

Mr Robert O'Donoghue, KC, **Ms Emma Mockford** and **Mr Max Schaefer** (instructed by **Clifford Chance LLP**) appeared for the Cinven Appellants

Ms Sarah Ford, KC and **Ms Charlotte Thomas** (instructed by **Macfarlanes LLP**) appeared for the Auden/Actavis Appellants

The Intas Appellant did not appear and was not represented at the hearing

Mr Mark Brealey, KC (instructed by **Morgan, Lewis & Bockius UK LLP**) appeared for the Advanz Appellants

Mr Tristan Jones and **Ms Daisy Mackersie** (instructed by the **legal department of the Competition and Markets Authority**) appeared for the Competition and Markets Authority

A. INTRODUCTION

(1) Background

1. This is the third decision rendered by this Tribunal arising out of the CMA's Hydrocortisone Decision. The Hydrocortisone Decision found that the various Appellants listed above had infringed UK competition law in various respects in regard to the sale of hydrocortisone tablets. The competition law infringements concerned abuse of dominance (in the form of excessive pricing) and cartel infringements (in the form of an agreement to stay out of the market). The different Appellants played different roles in these infringements. When considering specific instances of infringement, it was necessary to differentiate between Appellants. However, for the purposes of exposition in the case of this judgment, we will seek to refer to the Appellants generally and without differentiation.

2. The Appellants appealed against many of the findings in the Hydrocortisone Decision, including the findings of abuse of dominance and the findings of cartel infringements. As regards the abuse of dominance infringements, we substantially rejected these appeals for the reasons given in our judgment of 18 September 2023 (which we refer to as the Judgement (Abuse of Dominance Infringements)). It had been our intention to deal with all of the appeals – both in regard to the abuse of dominance infringements and the cartel infringements – in one go. The Hydrocortisone Decision deals comprehensively with both classes of infringement; and the appeals were similarly in respect of both aspects. However, this proved not to be possible in the judgments we have rendered. The cartel infringements were provisionally determined, separately from the abuse of dominance infringements, in our judgment of 29 September 2023 (which we refer to as the Judgment (Cartel Infringements)). This, as is clear from the dates of the two judgments, shortly followed the Judgment (Abuse of Dominance Infringements).

3. The reason for separate judgments was not, therefore, in order for the Tribunal to render judgment on certain issues more swiftly than in relation to other issues. The two judgments were handed down barely ten days apart. The reason for the separate judgments was because the Tribunal did not finally determine the appeals in regard to the cartel infringements, but only made provisional findings dismissing the Appellants' various appeals.

4. The Judgment (Cartel Infringements) was provisional because the Tribunal was concerned that a central aspect of the Hydrocortisone Decision – indeed, what we consider to be the central finding of the Hydrocortisone Decision (but which the CMA contests is not) – was never put to the two witnesses called by the Appellants (Mr Beighton and Mr Sully). The Tribunal never heard what they had to say about this central finding. Mr Beighton and Mr Sully were, we should make clear, available to answer questions on this point. They were cross-examined by the CMA on a range of other matters: but not this one.

5. The Tribunal therefore had substantial concerns as to due process, which were expressed in the Judgment (Cartel Infringements). Those concerns were that the (expressly provisional) findings that the Tribunal had made in the Judgment (Cartel Infringements)

were unsafe because they had been reached without the benefit of cross-examination of two witnesses able and available to give evidence on a central point live and in dispute before the Tribunal. No Tribunal in such a position can say whether the conclusions it reached without the benefit of such evidence would have been maintained had this evidence been received. This is a typical instance of Mr Rumsfeld's "known unknown". We know that Mr Beighton and Mr Sully had relevant evidence to give on this point; we do not know what that evidence would have been.

6. At this point, two questions will inevitably be asked: first, why did the Tribunal not simply decide the appeals in the Appellants' favour because the CMA had failed, in a material respect, to put its case to witnesses before the Tribunal; and, secondly, why did the Tribunal – having identified a failure of due process – not arrange for the recall of Mr Beighton and Mr Sully, so that points that had not been put could, belatedly, be put?

7. The answer to these two questions is similar. The CMA's position is, and always has been, that its case has been fully and properly put, and that it is the Tribunal that is in error in raising this question as a concern. The CMA says that there is nothing in the point, and the Tribunal should hand down an "open" version of the Judgment (Cartel Infringements), and make clear that the judgment is no longer provisional, but final.[1] Although we do not accept the CMA's position in this regard – our reasons are set out extensively in this Judgment (Due Process) – we have already indicated that this is a point on which permission to appeal ought to be given, and clearly the CMA must be entitled to contend, before the Court of Appeal, (i) that the Tribunal's due process concerns are wrong, and (ii) that the Judgment (Cartel Infringements) ought therefore to stand, unqualified. For this reason, it would be wrong not to have a clear statement of the findings that the Tribunal would have made on the basis of the evidence before it (i.e., without the cross-examination of Mr Beighton and Mr Sully). If on appeal the CMA are found to be right on the question of due process, then the Judgment (Cartel Infringements) can stand as a record of the findings of fact made by the Tribunal on this basis. Given the intensely factual nature of the issues and findings in the Judgment (Cartel Infringements), this is a matter of importance.

8. The CMA's position in relation to the question of due process also informed the question of the recall of Mr Beighton and Mr Sully. The Tribunal could not itself undertake the kind of cross-examination the CMA could (and we consider should) have undertaken. The Tribunal would be descending into the arena, as an advocate, if it did so. The only party able to undertake the cross-examination of Mr Beighton and Mr Sully was the CMA, and the CMA's stated and continued position was that such cross-examination was not necessary. We disagree – for reasons we will give, but we can scarcely compel the CMA to cross-examine on a basis they actually disavow.

9. The Judgment (Cartel Infringements) was handed down as a "closed" judgment, pending determination of the due process question. That was because that Judgment makes a series of provisional findings that are damaging to both the Appellants and to the witnesses they called. The order "closing" the Judgment (Cartel Infringements) was

[1] In fact, the CMA's position goes a little beyond this. The CMA contends that the Judgment (Cartel Infringements) is not in fact provisional at all, but final; and that the Tribunal can do nothing else but dismiss the appeals. This point is addressed in Section L below.

time-limited and falls to be re-considered in the light of this judgment. For the reasons we give at the end of this judgment, we consider that it is now appropriate to publish the Judgment (Cartel Infringements) as an "open" judgment.[2] Although the Judgment (Cartel Infringements) will be handed down as an "open" judgment at the same time as this judgment, we have deliberately drafted this judgment as a self-standing document, that can be read on its own terms. However, in order fully to be understood, it does need to be read in the light of (i) the Judgment (Abuse of Dominance Infringements) and (ii) the Judgment (Cartel Infringements).

10. The provisional findings of fact in the Judgment (Cartel Infringements) are – because of the conclusions reached in this judgment – unsafe in the most fundamental way. We have found a very serious failure of due process, which renders the findings in that judgment not to be relied upon. For the reasons we have already given – and which we expand upon – what is said in the Judgment (Cartel Infringements) cannot and should not be unsaid. But we do intend that a "health warning", making clear the status of the Judgment (Cartel Infringements), appear at the beginning of the "open" version of that judgment and in the header of every page.

(2) The Judgment (Abuse of Dominance Infringements) and the Judgment (Cartel Infringements)

11. As we have already described, this judgment is consequential upon two earlier judgments:

    (1) Our Judgment (Abuse of Dominance Infringements), which was handed down on 18 September 2023 under Neutral Citation Number [2023] CAT 56. This Judgment determined various appeals in regard to what were described in that judgment as the Abuse of Dominance Infringements. The Judgment did not determine the appeals in regard to the Cartel Infringements (as they were described), for the reasons given in Judgment (Abuse of Dominance Infringements)/[16].

    (2) A second judgment – the Judgment (Cartel Infringements) – which was handed down on 29 September 2023 under Neutral Citation Number [2023] CAT 57. This Judgment determined the Cartel Infringements on an explicitly provisional basis. The Judgment (Cartel Infringements) was handed down on a "closed" basis by an order of the Tribunal dated 29 September 2023.

12. This Judgment (Due Process) adopts the terms, abbreviations and descriptions used in the Judgment (Abuse of Dominance Infringements), as set out in Annexes 1 and 2 thereto.

[2] We should make clear that we heard submissions on this. This judgment was circulated in draft and all persons interested in the "closed" / "open" status of the Judgment (Cartel Infringements) were given the opportunity to be heard on this point.

13. All of the facts and matters decided in the Judgment (Abuse of Dominance Infringements) are adopted herein without reservation and are referred to as necessary. They are not repeated but are taken as read.

14. Because of the presently "closed" status of the Judgment (Cartel Infringements), this judgment does not adopt or take as read the findings in the Judgment (Cartel Infringements). The following points – although they are implicit in what we have already said – do need to be stressed:

    (1) The Judgment (Cartel Infringements) upheld the findings of Cartel Infringement in the Hydrocortisone Decision[3] and found that all the grounds of appeal failed.[4] Nevertheless, these conclusions were expressed to be provisional because of a concern, expressly articulated in the Judgment (Cartel Infringements), that the CMA's conduct of the proceedings had so fundamentally failed to observe certain requirements of due process that the provisional conclusions on the Judgment (Cartel Infringements) could not (as a matter of natural justice) stand.

    (2) Subject to the point of due process that is the subject matter of this judgment, the Judgment (Cartel Infringements) makes findings of fact from which we do not consider ourselves able to depart. If, on an appeal this Judgment (Due Process) is overturned, then (assuming no other successful appeals on other points) the Judgment (Cartel Infringements) would stand as the factual basis for the determination of the appeals in relation to the findings of Cartel Infringements.

    (3) The Judgment (Cartel Infringements) could not determine the question of due process, because the matter had not been the subject of argument or submission, particularly on the part of the CMA. The Judgment (Cartel Infringements) could only articulate the problem as it was understood by the Tribunal[5] in light of very limited submissions, and it would have been wrong to proceed without hearing further from the parties.[6] The Judgment (Cartel Infringements) therefore stated:[7]

        "It would be inappropriate to proceed further without hearing from all interested parties. We therefore propose and direct that:

            (1) This Judgment be circulated within an extremely tight confidentiality ring, so that if the appeals are allowed, but for reasons not appearing in the grounds of appeal, the damaging findings we have made do not receive wide circulation. On this basis, although of course we would welcome submissions, the Judgment would always remain a "closed" one.

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[3] Judgment (Cartel Infringements)/[154].

[4] Judgment (Cartel Infringements)/[156].

[5] Judgment (Cartel Infringements)/[157].

[6] Judgment (Cartel Infringements)/[158].

[7] At [158].

(2) The appeals be restored to us for further argument on these matters, so that we can (in light of those submissions) properly determine the appeals."

15. The question of due process, including its effect on the Judgment (Cartel Infringements), was thus left open, to be determined in a further judgment after a further hearing. We heard argument on the question of due process on 26 and 27 October 2023, with further written submissions following that hearing. The question of due process, which this Judgment determines, and any consequences that follow, is referred to herein as the Due Process Question.[8]

B. OUR CONCLUSIONS

16. We unanimously conclude that the appeals against the findings of Cartel Infringement in the Hydrocortisone Decision succeed; and that the provisional findings in the Judgment (Cartel Infringements) upholding those findings cannot stand. This is because of a failure, on the part of the CMA, to put the adverse findings in the Hydrocortisone Decision in regard to the Cartel Infringements to two witnesses (Mr Sully and Mr Beighton)[9] who had been expressly called, by the Appellants, to refute those very findings of Cartel Infringement. This failure of due process fatally undermines the conclusion, otherwise open to the Tribunal (and the basis for the provisional findings in the Judgment (Cartel Infringements)) that there was sufficient material to uphold the Hydrocortisone Decision when considering (in substance) the documentary evidence alone.

17. In short, we have resolved the Due Process Question against the CMA and have concluded that the consequence of this is that the findings of Cartel Infringement in the Hydrocortisone Decision cannot stand and must be set aside.

18. We appreciate that it is extraordinary for a decision of a regulator to be set aside in such circumstances. As the CMA put it in a letter to the Tribunal dated 6 November 2023:

"The Tribunal has found that the Hydrocortisone Decision was correct on the merits and that all the grounds of appeal fail. For the Tribunal to allow the appeals and set aside the Hydrocortisone

[8] The Judgment (Cartel Infringements) did not deal with the question of penalty – also under appeal – because it expressly left open whether – because of the Due Process Question – this finding inevitably followed: Judgment (Cartel Infringements)/[159]. The Judgment (Cartel Infringements) clearly contemplated the provisional dismissal of the appeals being reversed because of the Due Process Question.

[9] The evidence Mr Sully and Mr Beighton gave is broadly described in Judgment (Abuse of Dominance Infringements)/[26(1)] and [26(2)]. Both Mr Sully and Mr Beighton were called by the Advanz Appellants. However, the Due Process Question is one that affects all Appellants in that all participated in the hearing before us, albeit to different extents and in relation to different issues. For this reason we refer throughout this judgment to the "Appellants" and not to the "Advanz Appellants". Although the CMA sought to contend that the effects of the Due Process Question (were it to succeed at all) should be limited, we reject that proposition. The point must hold against all Appellants, not least because the Hydrocortisone Decision itself draws no distinction between actors.

Decision,[10] enabling the Appellants to claim that they have been vindicated and to avoid paying into public funds over £100 million in penalties for an infringement that the Tribunal has found was "flagrantly anti-competitive" (Judgment/[156]) and intentional (Judgment/[15(4)], would be unjust and damaging to the public interest the CMA represents in enforcing against such infringements.

The CMA therefore respectfully asks the Tribunal to issue a further judgment dismissing the appeals and confirming the Hydrocortisone Decision, and to publish the Judgment in full."

19. We are unable to confirm the Hydrocortisone Decision in regard to the findings of Cartel Infringement, but instead set the Hydrocortisone Decision aside in this regard, for these reasons:

(1) The Hydrocortisone Decision found that the Chapter I prohibition had been infringed by an agreement having as its object the prevention, restriction or distortion of competition. Because that agreement related to the sale of 10mg hydrocortisone tablets it was generally referred to as the "10mg Agreement", a term which we use also.

(2) According to the Hydrocortisone Decision, the 10mg Agreement was initially between Auden (the supplier of 10mg hydrocortisone tablets) and Waymade (the purchaser of those tablets). The 10mg Agreement subsisted orally between Auden and Waymade between 23 October 2012 and 30 October 2012. It thus had a life – as between these counterparties – of only a single week. Waymade did not appear before the Tribunal in these appeals and the findings by the CMA in regard to Waymade were not challenged by Waymade. The decision by Waymade not to appeal cannot prejudice the Appellants' challenge to the Hydrocortisone Decision, and the CMA has never suggested otherwise.

(3) On 31 October 2012, AMCo replaced Waymade as party to the 10mg Agreement. According to the Hydrocortisone Decision, the 10mg Agreement continued between Auden (as supplier of tablets) and AMCo (as purchaser of tablets) until 24 June 2016. As between Auden and AMCo, the 10mg Agreement (although initially oral) was put into written form in what we refer to as (respectively) the First Written Agreement and the Second Written Agreement. Mr Sully and Mr Beighton, on behalf of AMCo, were centrally involved in the negotiation and conclusion of these two agreements.

(4) The Hydrocortisone Decision did not find, and the CMA never contended, that these written forms of agreement in themselves infringed the Chapter I prohibition. Rather, the Hydrocortisone Decision found that these written agreements were incomplete statements of the true arrangement between the parties and that there was, in addition to the terms of the written agreements, a collateral understanding between Auden and AMCo.

[10] We are not setting aside the Hydrocortisone Decision in regard to the Abuse of Dominance Infringements. The Judgment (Abuse of Dominance Infringements) substantially upheld the Hydrocortisone Decision in this regard and stands as the final articulation of the Tribunal's judgment in regard to these infringements. The CMA's letter is addressing the provisional conclusions set out in the Judgment (Cartel Infringements).

(5) Whilst the Appellants – and the witnesses called by them, Mr Sully and Mr Beighton – accepted the existence of the First and Second Written Agreements and also the express terms of those written agreements, the existence of the collateral understanding was denied by the Appellants and by Mr Sully and Mr Beighton personally. Mr Sully and Mr Beighton were called to give evidence by the Appellants on precisely this point. They denied, in terms, that the collateral understanding found by the CMA in the Hydrocortisone Decision had ever existed. Their detailed witness statements deal almost exclusively with this point. These witness statements are not bare denials, but are redolent with detail.

(6) The collateral understanding found in the Hydrocortisone Decision was that:

(i) Auden would supply AMCo with 10mg hydrocortisone tablets on terms that amounted to monthly payments (or "value transfers") to AMCo. The CMA's term "value transfer" is a good one, as it captures the illicit nature of the arrangement said to have been reached:

(a) According to the express terms of the First and Second Written Agreements, AMCo (as the recipient of the tablets) was contractually obliged to pay Auden (as supplier).

(b) The point being made by the CMA was that the price paid by AMCo to Auden was so low, compared to the price AMCo could obtain by selling the tablets into the market, that although AMCo was nominally the payer and Auden nominally the payee, the mismatch between the price paid and the value received by AMCo amounted to a "value transfer" from Auden to AMCo.

(ii) What, then, did Auden receive in return for this "value transfer"? The Hydrocortisone Decision found that in exchange for these payments (directionally from Auden to AMCo) AMCo would not enter the market independently with its own 10mg hydrocortisone tablets. In short, the value transfer was a payment by Auden to AMCo to induce AMCo to stay out of the market.

(7) The CMA found this to be an extremely serious infringement. The Hydrocortisone Decision found a subjective intention on the part of AMCo to stay out of the market:[11]

> "The subjective intentions of Auden/Actavis, Waymade and AMCo support the assessment of the Agreements' content and objective. The evidence shows that each acted in full knowledge of the objective of the Agreements, which was to make substantial payments to Waymade and AMCo in exchange for each of Waymade and AMCo agreeing not to enter the market independently with its own hydrocortisone tablets."

[11] Hydrocortisone Decision/6.930.

This enabled Auden to maintain abusively high[12] prices for hydrocortisone tablets over an extended period of time:[13]

> "This evidence demonstrates that Auden/Actavis had a consistent intention when dealing with its potential competitors: it would make payments available to a counterparty in possession of an MA which it perceived as a threat to its position as sole supplier, with the expectation that in return the potential competitor would refrain from entry and allow Auden/Actavis to prolong its position as sole supplier and associated ability to charge high prices."

(8) It was generally accepted that AMCo paid far less than the economic value of the tablets. Mr Beighton in particular accepted this in his evidence. Mr Beighton's evidence was that this was an extraordinarily good deal for AMCo, in that AMCo was paying much less for the tablets than Auden might have demanded, which deal AMCo would have been mad to question or refuse. He regarded Auden's behaviour as commercially inexplicable and, in his evidence, could not explain it. But he (and Mr Sully) refuted in terms that they individually or AMCo generally had given anything in return for the uncommercial generosity demonstrated by Auden. The essence of the point made by Mr Sully and Mr Beighton was that there was no collusion of any kind between AMCo and Auden, and that both parties were acting entirely unilaterally. AMCo knew it was getting a good deal, even an inexplicable deal, and it did not know why. AMCo did not inquire.

(9) The CMA, as it was entitled to, regarded this explanation as insufficient. We have every sympathy with that position. The existence of the collateral understanding was inferred from the "value transfer". The Hydrocortisone Decision records, on multiple occasions, that "[n]o party or individual has given a credible explanation for this discount [i.e. the "value transfer"], other than that it was to buy off [Auden's] entry". To be absolutely clear, we consider it perfectly possible to draw robust and powerful inferences from the value transfer alone.

(10) The value transfer was the only basis for inferring the existence of the collateral understanding. AMCo was, at no time during the pendency of the First or Second Written Agreements, in a position to supply 10mg hydrocortisone tablets independently of the supply AMCo received from Auden. Although the CMA attempted to show (through the cross-examination of Ms Lifton, another witness called by the Appellants) that the reason for this failure to obtain an alternative supply could be laid at AMCo's door (and so generate further inferences against

[12] The Hydrocortisone Decision found an abuse of dominance in this regard; and the Judgment (Abuse of Dominance Infringements) affirmed that finding.

[13] Hydrocortisone Decision/6.932.

AMCo),[14] that effort failed in light of Ms Lifton's clear and emphatic denials of this. Ms Lifton, as the Judgment (Cartel Infringements) makes clear, was no stooge of AMCo's but gave evidence as to Aesica's inability to deliver a product to AMCo, and her evidence was compelling and honest.

(11) As we have said, we consider that the inference of the existence of a collateral understanding out of the "value transfer" to be a strong one. Uncommercial dealings – particularly as skewed as these were in favour of AMCo – call for explanation. The Judgment (Cartel Infringements) provisionally concluded that the Hydrocortisone Decision made the right findings in regard to the Cartel Infringements.

(12) In these circumstances, the CMA was, we consider, obliged to put the existence of the collateral understanding to Mr Sully and to Mr Beighton:

(i) Although we appreciate that the Hydrocortisone Decision expressed the view, on multiple occasions, that the Appellants' version of events was simply not credible,[15] the CMA has never suggested this as a reason for not cross-examining on the existence of the collateral understanding.

(ii) Whilst the weight of the inference for the existence of a collateral understanding from the "value transfer" was considerable, that constituted a good reason for cross-examining. The Tribunal needed to be assured that alternative explanations from the witnesses could not hold water. As will be seen, Mr Beighton (in response to questions put neutrally to him by the Tribunal) articulated reasons for the arrangement between AMCo and Auden from the perspective of AMCo. He gave evidence for the non-existence of the collateral understanding that cannot be dismissed out of hand.

(iii) The Tribunal will never know – because the point was not put – how Mr Sully and Mr Beighton would have defended themselves (and the Appellants) from the inference of an anti-competitive collateral understanding. It may be that they would have had compelling answers or persuaded the Tribunal that notwithstanding appearances, their assertions of unilateral conduct in the face of a skewed commercial transaction in AMCo's favour were, indeed, true.

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[14] There were times when the CMA, in submission, sought to disavow that it was making this argument. The CMA was not entitled to disavow this point. The CMA had to take this point in defence of the Hydrocortisone Decision, given the express findings made in the Decision. Thus, Hydrocortisone Decision/6.842 states:

> "In paragraphs 6.725 to 6.783 above (and in the SSO) the CMA concluded that following its entry into the Second Written Agreement, AMCo suspended its Aesica development of 10mg hydrocortisone tablets for the UK and only rekindled the project at points when it was concerned that the 10mg Agreement with Auden/Actavis might come to an end."

It was to rebut this finding that the Appellants adduced the evidence of Ms Lifton, and the CMA put the substance of the findings to Ms Lifton when she came to give evidence.

[15] The mantra "[n]o party or individual has given a credible explanation for…" is frequently to be found in the Hydrocortisone Decision, at for example Hydrocortisone Decision/6.12.

What the Tribunal does know is that both Mr Sully and Mr Beighton denied in terms the essential finding of the Hydrocortisone Decision; and did so in detailed witness statements filed months before the appeals were heard.

(13) In this judgment, we focus on the evidence of Mr Beighton, and will describe in detail how he was cross-examined. It is necessary to do so in order to establish the negative proposition that Mr Beighton was not cross-examined on the critical question of collateral understanding. Mr Sully, as it emerged, had a far more ministerial or administrative role in regard to both the First and the Second Written Agreements. Had the CMA's case been properly put to Mr Beighton, but not to Mr Sully, we doubt whether we would be deciding the Due Process Question against the CMA. But the CMA's case as stated in the Hydrocortisone Decision was put to neither witness.

(14) Points fundamental to a decision in regard to a serious allegation of competition law infringement should be put when they can be. When that opportunity is not taken, then the risk of serious injustice is manifest:

(i) The existence of the collateral understanding was, as we have noted, a fundamental part of the Hydrocortisone Decision in regard to the findings of Cartel Infringement.

(ii) The findings of Cartel Infringement were serious ones, and of great public importance, as the CMA has both accepted and asserted.

(iii) The Appellants, recognising this, produced as witnesses two persons central to the negotiation of the agreements said (by the CMA) to contain the "value transfer" that was the payment for the illegal benefit conferred or created by collateral understanding. Each of these persons signed a witness statement denying the existence of the collateral understanding and each of these persons was tendered for cross-examination.

(iv) The Appellants were entitled, as a matter of basic justice, to have the CMA test the robustness of the Hydrocortisone Decision by putting, in detail, the substance of the Cartel Infringements to these witnesses, so that they could (if this was possible) refute the Hydrocortisone Decision and explain why it was wrong.

(v) The Tribunal was entitled to have the best evidence before it in order to determine the appeals that the Appellants had brought in regard to this very point: the existence of the collateral understanding. The Tribunal was entitled to have the assertions of Mr Beighton (and, ideally, Mr Sully) in their witness statements tested, so that the Tribunal could, in a reasonable and defensible manner, reject that evidence. The CMA's conduct deprived the Tribunal of that opportunity.

20. In these circumstances, we conclude that the appeals against the Cartel Infringement findings in the Hydrocortisone Decision should be allowed.

21. If this were a less serious case, then it may be that the foregoing reasons would be sufficient to resolve the Due Process Question without further consideration. However, the Due Process Question is an important one. We have already indicated that we would be minded to grant the losing party (the CMA, as it turns out) permission to appeal. Accordingly, despite the repetition this undoubtedly entails, we expand upon the reasons given above in the following sections of this judgment, which deal with the following points in the following order:

(1) Section C describes the findings of the Hydrocortisone Decision which the CMA was obliged to defend on these appeals. It is important to note that the burden of establishing the Cartel Infringements lay on the CMA, and that in defending the Hydrocortisone Decision the CMA could not seek to justify the decision on other grounds.[16]

(2) Section D describes the positive evidence adduced by the Appellants on appeal, gainsaying the inference of collateral understanding made by the CMA in the Hydrocortisone Decision.

(3) Section E describes the purpose of cross-examination, and the duty of a party to litigation to put their case. The points are trite, but since they are central to the Due Process Question, we set them out in some detail.

(4) Section F describes some of the history of the proceedings in which it was made clear to the CMA that the finding of collateral understanding in the Hydrocortisone Decision was resisted by the Appellants at the most fundamental level, and that there was an expectation (not only in the Appellants, but in the Tribunal) that the existence of the collateral understanding would be explored with the witnesses called by the Appellants.

(5) Section G considers the question of what the CMA's defence on appeal actually was. In any ordinary case, there would be no need for such a section, since the CMA's case ought to have been a straightforward defence of the findings it made in its own Hydrocortisone Decision. However, precisely what case the CMA thought it was putting became a question of some complexity and difficulty when it came to the hearing of the Due Process Question. Everyone agreed what the Hydrocortisone Decision found. Notwithstanding that absence of controversy, there was enormous disagreement about whether the CMA had properly defended that Decision on appeal. It is, therefore, necessary to set out, in some detail, what the CMA said its defence of the Hydrocortisone Decision was.

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[16] The Appellants contended that the CMA, in closing, effectively sought to resile from the Hydrocortisone Decision. We can see why the Appellants made this contention. For instance, the description of the First and Second Written Agreements as "shams" was one that the CMA sought to re-frame in closing. We do not consider this point to be relevant. The fact is that the Hydrocortisone Decision made extremely serious findings against the Appellants, which needed to be put to the witnesses called by those Appellants. It is the failure to put essential parts of the Hydrocortisone Decision that is the crux of the Due Process Question, and it is on this that we focus.

(6) Section H considers what was, and what was not, put by the CMA to Mr Beighton. It was the CMA's position that its case was fully and fairly put to the witnesses. We – for reasons that we give – disagree. This disagreement explains the importance of both Sections G and Section H. It is necessary to articulate what the CMA was obliged to put to witnesses in defence of its Decision, before considering what in fact was put.

(7) When the relevant part of the CMA's cross-examination of Mr Beighton had concluded, the Tribunal (as it had indicated it would) had a number of questions for Mr Beighton to answer. In substance, the Tribunal sought to put to Mr Beighton that which the CMA had not put. These questions are described in Section I. It is necessary to make two (related) points in regard to these questions:

(i) First, it was no part of the Tribunal's role or function to descend into the arena and carry out the CMA's own duty to put its case. The Tribunal did not do so. The necessarily limited process embarked upon by the Tribunal did enable Mr Beighton to answer the substance of the findings of the Hydrocortisone Decision, albeit that his answers were not tested in the crucible of cross-examination.

(ii) Unsurprisingly, and this is the second point, Mr Beighton's answers expanded upon and elucidated the denial of the collateral understanding already contained in his witness statement.

Not having cross-examined upon these points – and having declined to further cross-examine Mr Beighton after his answers repudiating the CMA's case were given – the CMA cannot now look behind those answers and say they were untrue for reasons not put to him. That is a constraint that also ought to apply to the Judgment (Cartel Infringements).

(8) Section J describes the closing submissions of the CMA and the Appellants, which is when the Due Process Question emerged as a real problem that needed to be grappled with (albeit without resolution) in the Judgment (Cartel Infringements).

(9) Section K briefly describes why it was necessary to write the Judgment (Cartel Infringements) in the detail that it has been written.

(10) Section L considers the CMA's contention that this Tribunal is functus and that it has no power to do anything other than affirm the Judgment (Cartel Infringements) and dismiss the Appellants' appeals against the findings of Cartel Infringement.

(11) Section M considers the force of the substantive findings in the Judgment (Cartel Infringements) as against the procedural defects that are established in this Judgment (Due Process). Substantive soundness is only achieved through procedural propriety and – unless a failure to put a case is a mere technical failure or for some other reason unnecessary – a material procedural failing will

undermine a substantive decision no matter how sound that substantive decision appears.

(12) Section N states how we dispose of the appeals in relation to the Cartel Infringements, and deals with some concluding points.

C. FINDINGS OF THE HYDROCORTISONE DECISION

(1) The CMA's "collateral understanding" case

22. The Judgment (Cartel Infringements) found that the Hydrocortisone Decision itself found that the Chapter I prohibition had been infringed by an agreement having as its object the prevention, restriction or distortion of competition (the 10mg Agreement).

23. According to the Hydrocortisone Decision, the 10mg Agreement existed between 23 October 2012 and 24 June 2016. The 10mg Agreement was initially oral but was later put into written form as (respectively) the First Written Agreement and the Second Written Agreement. The CMA did not contend that these written forms of agreement in themselves infringed the Chapter I prohibition.[17] Rather, the Hydrocortisone Decision found that these written agreements were incomplete statements of the true arrangement between the parties, and that there was, in addition to these written agreements, a collateral understanding.[18]

24. The CMA did not particularly like this term, but was prepared to use it. We want to be clear that when the Tribunal uses the term "collateral understanding", it is referring to an arrangement between Auden and AMCo that might fall far short of the contractual. Such an arrangement or understanding may be neither formal, nor a promise nor agreement (although they can be) but which (whether on its own or in conjunction with the First and Second Written Agreements) constituted an infringement of the Chapter I prohibition. More specifically:

(1) As the Judgment (Cartel Infringements) made clear,[19] an agreement in the context of the Chapter I prohibition is not confined to legally binding contracts but covers any morally binding commitment.[20] It is sufficient if the undertakings have expressed their joint intention to conduct themselves in the market in a particular way. An agclreement may be written or spoken or inferred from the

[17] Hydrocortisone Decision/[2.27(c)].

[18] Hydrocortisone Decision/[6.831] to [6.832], [6.884] and [6.885] (by way of example).

[19] At [10].

[20] We derive this expression from Whish and Bailey, *Competition Law*, 10th ed (2021) at 356, but even this may put matters too highly: it is dangerous to speak of a "morally binding commitment" when what is at issue is an unlawful infringement of competition law. The point we are trying to get at is that collusion, even informal, nuanced and difficult to detect collusion, is sufficient to amount to an infringement. What is not sufficient is purely unilateral conduct.

circumstances and can consist in a continuing course of business dealings between the parties.[21]

(2) It is not necessary for the infringement to be located entirely within the collateral understanding. It is sufficient if, read in a wider context (including, here, the First and Second Written Agreements), the collateral understanding gives rise to an infringement. In this case, because of the "value transfer" contained in the First and Second Written Agreements, those agreements were of particular importance to the existence of the collateral understanding.

(3) However, nothing in the Chapter I prohibition deprives undertakings of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors. This important statement, derived from the *Wood Pulp* decision,[22] emphasises that unilateral conduct, even if coincident, is not enough to engage the Chapter I prohibition:[23]

> "…a concerted practice refers to a form of coordination between undertakings which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them…the criteria of coordination and cooperation must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the Common Market."

(4) In terms of understanding the nature of the Chapter I prohibition, and the extent to which something <u>beyond</u> unilateral conduct had to be demonstrated by the CMA, the burden being on it, the Judgment (Cartel Infringements) said this at [18]:

> "(1) It is fundamental to the Chapter I prohibition that unilateral conduct does not constitute an infringement of that prohibition. What needs to be demonstrated is some form of (not necessarily contractual) common understanding. In closing, the Tribunal suggested that it was important to focus on communications "crossing the line". This is a phrase used by the Court of Appeal in *K Lokumal & Sons (London) Ltd v. Lotte Shipping Company Pte Ltd, The "August Leonhardt"* in the context of estoppel:[24]
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> > "All estoppels must involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and did rely. In this sense all estoppels may be regarded as

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[21] To draw from Whish and Bailey, *Competition Law*, 10th ed (2021) at 356. The quotation is set out in footnote 20 of the Judgment (Cartel Infringements).

[22] Case C-89/85, *A Ahlström Osakeyhtiö v Commission of the European Communities* at [71]

[23] *Wood Pulp* at [63]. See also Cases C-2/01P and C-3/01P, *Bayer AG v. European Federation of Pharmaceutical Industries' Associations.*

[24] [1985] 2 Lloyd's Rep 28 at 34. Cases C-2/01P and C-3/01P, *Bayer AG v. European Federation of Pharmaceutical Industries' Associations*, and other such cases in EU jurisprudence, follow a similar approach, in not treating purely unilateral conduct as an infringement of the Chapter I prohibition/Article 101 TFEU.

> requiring some manifest representation which crosses the line between representor and representee, either by statement or conduct. It may be an express statement or it may be implied from conduct, e.g. a failure by the alleged representor to react to something said or done by the alleged representee so as to imply a manifestation of assent which leads to an estoppel by silence or acquiescence. Similarly, in cases of so-called estoppels by convention, there must be some mutually manifest conduct by the parties which is based on a common but mistaken assumption."

We accept that the Chapter I prohibition is very different in nature from either contract or estoppel. Nevertheless, this is a helpful passage, because it articulates very well the need for the arrangement said to constitute the infringement of the Chapter I prohibition to "cross the line" between the parties to it.

(2) How that arrangement was reached, how it manifested itself, and how it is established on what may be limited and exiguous evidence will depend on the specific facts of any case. But some arrangement crossing the line must be shown. Unilateral conduct will not suffice.

(3) In this case, whilst the First and Second Written Agreements are obviously enormously important background facts, and undoubtedly do cross the line, they remain background facts insufficient in themselves to establish the Cartel Infringements found in the Hydrocortisone Decision. Taken into account with other facts, the First and Second Written Agreements may (and, indeed, in this case are) highly significant.

(4) It is obvious that this kind of arrangement can only arise through some form of intentional conduct. There will have to be conduct of some sort resulting in the arrangement augmenting the terms of the First and Second Written Agreements. That, as it seems to us, is the unavoidable consequence of the Hydrocortisone Decision. The arrangement augmenting the terms of the First and Second Written Agreements cannot have been immaterial. In order to give rise to an infringement, the First and Second Written Agreements must have been materially added to or augmented."

25. When we use the term "collateral understanding", we use it to reference an understanding that, in some way, "crosses the line" in the manner we have described. Anything without that element amounts to no more than unilateral conduct which, even if coincident, is not enough to engage the Chapter I prohibition. In most cases, the point does not need to be laboured. In this case, it does, because of the unequivocal stance taken by Mr Beighton and Mr Sully in their evidence. As we have noted – but the point bears repetition – both Mr Beighton and Mr Sully refused to accept, and positively denied, that the inference of collusion drawn from the "value transfer" was right. It may be that that inference was unanswerable, which (in effect) was the CMA's position. But the Tribunal can only properly reach that conclusion and reject as false the sworn statements of Mr Sully and Mr Beighton if the supposedly unanswerable case is put to them.

26. The fact is that Mr Sully and Mr Beighton did have an answer: they were unilaterally taking advantage of inexplicable commercial behaviour by Auden; and they covered

themselves by setting out the arrangements in writing (i.e. the First and Second Written Agreements) and by taking legal advice in relation to those agreements.

27. We certainly do not say that no collateral understanding could subsist in such an environment. The Judgment (Cartel Infringements) makes clear that it could. But, for that conclusion to be a safe one, in accordance with due process, given the presence in the witness box of witnesses able to speak to the point and denying the very collateral understanding being asserted, there is no option but to critically consider and test the disputed terrain in detail. As Megarry J said in *John v. Rees*:[25]

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained, of fixed and unalterable determinations that, by discussion, suffered a change."

(2) No positive articulation by the CMA of its "collateral understanding" in the Hydrocortisone Decision

28. The Hydrocortisone Decision, whilst finding a collateral understanding, left open (i) the precise nature of that understanding and (ii) how that understanding had crossed the line. The Hydrocortisone Decision did not articulate, in any positive way, how the collateral understanding and the Cartel Infringements had come to be. The Decision was based on inference. That, as it seems to us, was a perfectly proper position for the CMA to take in the Hydrocortisone Decision. A regulator like the CMA can only investigate and state as fact those facts it has been able to find on the material before it. It received no admissions as to collusive behaviour from the actors it interviewed, who denied in their interviews any improper conduct. The Hydrocortisone Decision makes very clear that the existence of the collateral understanding was being inferred from the circumstances of the case.

29. On appeal, the Appellants continued to deny the existence of <u>any</u> collateral understanding. On appeal, the Appellants were not simply "putting the CMA to proof"; or suggesting that the facts from which the collateral understanding had been inferred in the Hydrocortisone Decision were insufficient to bear the weight of that inference.[26] Both of these would have been proper grounds of appeal. But the Appellants went much further than this - they adduced a positive case (in the form of the evidence of Mr Beighton and Mr Sully) that, whatever the basis for the inference in the Hydrocortisone Decision, it was incorrectly drawn. That was a point on appeal that the Appellants were also entitled to run. It reflected the position of the Appellants throughout the course of the proceedings.

30. Although it was for the Appellants to articulate their grounds of appeal, it was the CMA that bore the burden of proof in regard to the facts underlying the Hydrocortisone Decision. As the competition authority, the CMA would not easily be able to adduce

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[25] [1970] Ch 345 at 402.

[26] Although we consider that both these points were also being made by the Appellants.

any factual witness evidence of its own.[27] We consider that the CMA could perfectly properly not adduce witness evidence of its own but rely simply on the documents arising out of its investigation as recorded in the Hydrocortisone Decision in its defence. In short, the CMA's defence of the Hydrocortisone Decision in the appeals could continue to rest on inference. At the outset of the hearing, the CMA could continue to be non-committal as to the true nature of the collateral understanding it had found in the Hydrocortisone Decision to exist. But, given the positive case advanced by Appellants, and given the evidence called by the Appellants, the CMA then had to defend its Decision by putting its case to the Appellant's witnesses. It could not leave a decision based on inference untested in the light of expressly contradictory evidence adduced by the Appellants. In an ideal world the CMA would have articulated, at the beginning of the appeal, its line of attack: although we do not consider that the CMA was obliged to do so and (as we shall see) the CMA did not do so.[28]

31. Where an Appellant has adduced witness evidence of its own in rebuttal of the CMA's Decision, it is incumbent upon the CMA to put its case to those witnesses fully and fairly. We do not understand the CMA (or, indeed, any of the Appellants, who positively asserted this) to dissent from or disagree with these trite, but fundamental, points.

(3) The findings of the Hydrocortisone Decision: detail

32. The Judgment (Cartel Infringements) concluded that the Hydrocortisone Decision made the following findings:[29]

> "(1) From 23 October 2012 to 24 June 2016, Auden entered into an agreement that had as its object the prevention, restriction or distortion of competition (so infringing the Chapter I prohibition).[30] This is what the Hydrocortisone Decision and we refer to as the "10mg Agreement".
>
> (2) The 10mg Agreement was, initially, between Auden and Waymade (from 23 October 2012 to 30 October 2012).[31] On 31 October 2012, AMCo replaced Waymade as party to the 10mg Agreement, and the agreement continued between Auden and AMCo until 24 June 2016.[32] We should be clear that so far as the Cartel Infringements were concerned, there was no dispute between the parties as to the existence of the agreements said by the CMA to be infringing. What was in dispute was the nature of those agreements (i.e. what in fact was agreed) and what the implications, in terms of infringement of the Chapter I prohibition, were.[33] For this reason, the distinction we

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[27] A point the Tribunal readily appreciates, and sympathises with: see Judgment (Cartel Infringements)/[18] to [20] and [23].

[28] The Judgment (Abuse of Dominance Infringements)/[26(2)] found this omission to be a "matter of some regret, and great concern". Had there been effective cross-examination of Mr Beighton and Mr Sully then it is likely that this concern would have evaporated.

[29] At [7].

[30] Hydrocortisone Decision/1.4(d).

[31] Hydrocortisone Decision/1.4(d)(i).

[32] Hydrocortisone Decision/1.4(d)(ii).

[33] In other words, it was denied by the Appellants that the 10mg Agreement did infringe the Chapter I prohibition.

drew in the Judgment (Abuse of Dominance Infringements)[34] between affirmed findings of fact and cross-references in the Hydrocortisone Decision becomes impossible to maintain, because many references are uncontroversial in part (i.e. there was an agreement) and controversial in part (i.e there was a dispute as to whether the agreement was or was not an infringing agreement). This Judgment (Cartel Infringements) therefore necessarily abandons the distinction we draw in the Judgment (Abuse of Dominance Infringements) between findings of fact which we accept, and mere cross-references. We trust, however, that the findings in the Hydrocortisone Decision that we accept, and those that we do not accept, emerges with clarity from this judgment.

(3) The 10mg Agreement involved the supply, by Auden, to Waymade and then AMCo, of 10mg immediate release hydrocortisone tablets at a significant discount to the market price of that product. The sales of this product by Waymade/AMCo into the market is described in Judgment (Abuse of Dominance Infringements)/[149] to [150] and in the white on dark red entries in Annex 3. The Annex 3 entries disclose only the sale price achieved by Waymade/AMCo (which was at around, and usually a little above, the price level that AM Pharma charged when selling the same product).

(4) The discount on the sale of 10mg immediate release hydrocortisone was a payment by Auden to Waymade/AMCo to stay off the market. The Hydrocortisone Decision expressly records:[35]

> "In that agreement, Auden/Actavis agreed to make substantial monthly payments to Waymade and AMCo in exchange for each of Waymade and AMCo agreeing not to enter the market independently with its own 10mg hydrocortisone tablets."

It is important to appreciate that the Hydrocortisone Decision finds that the "substantial monthly payments" manifested themselves by way of the difference between what Waymade/AMCo paid for the supply (which price varied, but which never exceeded £1.78/pack) and the price they achieved on sale to the market (which Annex 3 shows was never less than £30/pack and generally far more than this). The maximum supply of product by Auden to AMCo was 12,000 packs/month. On this basis, the "substantial monthly payments" can conservatively be reckoned at £338,640.[36]

(5) Two matters emerge by necessary implication out of these passages in the Hydrocortisone Decision:

(i) First, that the "substantial monthly payments" were disguised. The 10mg immediate release hydrocortisone tablets were provided to Waymade/AMCo at so low a price as to enable Waymade/AMCo to generate considerable profits simply by on-selling this product into the market. There was never any direct payment by Auden to Waymade/AMCo.

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[34] Judgment (Abuse of Dominance Infringements)/[19].

[35] Hydrocortisone Decision/1.4(d).

[36] I.e. 12,000 x £30 = £360,000 minus 12,000 x £1.78 = £21,360, which gives £338,640. The figure is conservative because the per pack price of £30 is low.

(ii) Secondly, and relatedly, because of the manner in which these payments were made (effectively disguised as supply agreements) the promise not to enter the market independently is not express. On its face, the 10mg Agreement is for the supply of product by Auden to Waymade/AMCo at what could be characterised[37] an undervalue.

(6) The Hydrocortisone Decision made these implications express later on in the Hydrocortisone Decision:[38]

> "In October 2012 – at the latest by 23 October 2012 – Auden and Waymade entered into a further agreement, relating to 10mg hydrocortisone tablets, on essentially the same common understanding as the 20mg Agreement (and through some of the same individuals, especially Amit (Auden) Patel and Brian McEwan). Auden paid Waymade through the monthly transfer of margin on a specified volume of 10mg hydrocortisone tablets, which it supplied to Waymade at £1 per pack: a 97% discount to its price to Waymade prior to October 2012 and to its price to all other customers.
>
> No party or individual has given a credible explanation for this discount, other than that it was to buy off Waymade's entry. The CMA finds that in exchange Waymade agreed that it would not enter the market independently with its own 10mg hydrocortisone tablets."

(7) The Hydrocortisone Decision found that this arrangement continued with AMCo:[39]

> "From 31 October 2012 until 24 June 2016, the agreement continued, with AMCo replacing Waymade as Auden's counterparty. Mr McEwan continued to administer the agreement for AMCo, negotiating with Auden a threefold increase in monthly volumes at the £1 supply price with effect from January 2013 onwards under the supervision of John Beighton, who subsequently took over negotiating further increases with Auden in 2014."

The substance of Hydrocortisone Decision/6.12 was then repeated at Hydrocortisone Decision/6.16, namely that there was no credible explanation for this discount, "other than that it was to buy off AMCo's entry. The CMA found that in exchange AMCo agreed not to enter the market independently with its own 10mg hydrocortisone tablets."

(8) The CMA then made the following express finding as to common understanding:[40]

> "The CMA therefore concludes that between 23 October 2012 and 24 June 2016, Auden/Actavis shared a common understanding first with Waymade, and then with AMCo, that:

[37] Although this was disputed.

[38] Hydrocortisone Decision/6.11 – 6.12.

[39] Hydrocortisone Decision/6.14.

[40] Hydrocortisone Decision/6.17. Some form of common understanding is required in order to establish an infringement of the Chapter I prohibition.

a. Auden/Actavis would supply first Waymade, and then AMCo, with 10mg hydrocortisone tablets on terms that amounted to monthly payments (or "value transfers") to them; and

b. In exchange for these payments, each of Waymade and AMCo would not enter the market independently with its own 10mg hydrocortisone tablets."

(9) The 10mg Agreement was initially oral. It was later put into written form in what we refer to as the "First Written Agreement" and the "Second Written Agreement". The CMA did not go so far as to contend that these written forms in themselves infringed the Chapter I prohibition.[41] Rather, the Hydrocortisone Decision finds that these written agreements were incomplete statements of the true arrangement between the parties. Thus, the Hydrocortisone Decision records:[42]

> "6.831 The CMA has found that throughout the period from 31 October 2012 to 24 June 2016, Auden made monthly payments to AMCo in exchange for AMCo agreeing not to independently enter the market with its own 10mg hydrocortisone tablets. This common understanding is the 10mg Agreement.
>
> 6.832 As explained in paragraph 6.714 above, **the Second Written Agreement is not in itself the 10mg Agreement**. It represented continued and increasing payments from Auden to AMCo. In exchange for these continued and increasing payments **AMCo renewed its commitment not to enter**, as is clear in particular from the evidence documenting the negotiations leading up to the conclusion of the Second Written Agreement and AMCo's conduct after entering into the Second Written Agreement. These two elements together – payment in exchange for non-entry – constitute the common understanding defined as the 10mg Agreement. The Second Written Agreement must be read in the context of that common understanding."

(10) The Hydrocortisone Decision expressly records that the "10mg supply agreements were a sham: their true purpose was for Auden/Actavis to make substantial monthly payments to Waymade and AMCo".[43] The Hydrocortisone Decision recognises that this finding raised a question of *bona fides* when rebutting contentions made by AMCo and Cinven:[44]

> "AMCo and Cinven made extensive representations to the effect that the supply deals were bona fide and not a sham, dealing with the actual terms of the 10mg Agreement only as a secondary point. They submitted that the CMA had not established, as it must to sustain the allegation that the supply deals were a

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[41] Hydrocortisone Decision/2.27(c). The CMA was able to reconcile this finding with the finding of the Cartel Infringements by finding that the First and Second Written Agreements were shams, "meaning that their true purpose was for Auden/Actavis to pay Waymade and AMCo, rather than simply to give them product to sell as a genuine bona fide distribution deal." See also Hydrocortisone Decision/6.889.

[42] Emphasis in **bold** added. Underlining as in the original.

[43] Hydrocortisone Decision/6.884.

[44] Hydrocortisone Decision/6.921 to 6.923.

sham, that everyone involved in the negotiation of the First and Second Written Agreements, including external counsel, was engaged in an elaborate deception to cloak their true intentions.

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

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

The "elaborate conspiracy" argument run on behalf of AMCo and Cinven is a common forensic argument in cases of dishonesty and fraud, whereby the respondents to the accusation seek to cause the evidential bar to be raised by suggesting that the dishonesty or fraud can only have involved a vast array of (generally clearly innocent) characters. For traction, such points rely on improbability though overstatement, for it is perfectly possible to have a case of dishonesty or fraud involving only a few characters at its heart, with the rest of the world innocent of any dishonesty. Hydrocortisone Decision/6.923 represents a straightforward rejection of this forensic argument, and we quite accept that the Hydrocortisone Decision at no point even comes close to suggesting any kind of "elaborate conspiracy". The establishment of the Cartel Infringements does not require any such finding. But this is not sufficient to enable the CMA to escape the consequences of the findings that they did make, namely that some (perhaps a very limited number of) human actors must have had the common understanding that:

(i) The First and Second Written Agreements said less than what had been promised.

(ii) The agreements hid the true purpose of the arrangement which, so the CMA found, was "for Auden/Actavis to pay AMCo, rather than simply to give it product to sell as in a genuine bona fide distribution deal".[45]

Put another way: the Hydrocortisone Decision found a "common understanding" going beyond the written agreements.[46] That common understanding must reside somewhere."

33. We do not understand anyone, including the CMA, to dispute this articulation of what the Hydrocortisone Decision in fact decided.

[45] Quoting from Hydrocortisone Decision/6.922.

[46] See [7(7)] above.

D. FACTUAL EVIDENCE GAINSAYING THE CMA'S INFERENCE OF COLLATERAL UNDERSTANDING

34. As we have already stated on multiple occasions, the Appellants called two witnesses – Mr Sully and Mr Beighton – both of whom denied in unequivocal terms the existence of any collateral understanding over-and-above what had been expressly agreed in the First and Second Written Agreements. In other words, there was nothing beyond those agreements. We make no apology for this repetition, for the role of Mr Sully and Mr Beighton in these proceedings is fundamental. It is, in our experience, rare for those centrally involved in allegations of serious cartelist misbehaviour to expose themselves to the rigor of cross-examination, and tribunals are often obliged to make serious findings of fact on the documents alone and by inference. This is fairly common in competition cases. The Judgment (Cartel Infringements) is the judgment we would have written (and written without qualification) had Mr Sully and Mr Beighton not been called to give evidence.

35. This case is different from the norm. In this case, Mr Sully and Mr Beighton did attend for cross-examination on the basis of written statements filed well in advance of the hearing. The collateral understanding was denied. These denials were set out in very full witness statements. We do not propose to set these out in any great length, but it is important to note that both denied the findings of the Hydrocortisone Decision in unequivocal terms, supported by a wealth of narrative detail. The essential thrust of the entirety of the witness statements of Mr Sully and Mr Beighton was to gainsay the conclusion in the Hydrocortisone Decision that there was a collateral understanding. Thus:

(1) Mr Sully stated:[47]

> "**D. THE 10MG AGREEMENT DID NOT EXIST**
>
> 23. Contrary to what the CMA says, AMCo did not have an unwritten agreement with Auden not to enter the market independently with its own 10mg HT in return for substantial monthly payments from Auden. This inferred agreement that the CMA calls the 10mg Agreement did not exist, and no one (outside of the CMA) ever suggested to me that it did.
>
> 24. AMCo had two written agreements with Auden for the supply of its full indication (adult and child's version) 10mg HT product: the First Written and the Second Written Agreement. As I will describe below, these were prepared with the assistance of Pinsent Masons who also cleared them from a competition law perspective. I did not arrange for those agreements with the knowledge or intention that they were "sham" supply agreements intended to disguise the CMA's inferred 10mg Agreement. If that was the purpose of the two written supply agreements, that was never communicated to me.
>
> 25. AMCo always strove to complete the development of its reduced indication 10mg HT product with Aesica. However, as I explain below, AMCo did not

[47] Sully 1.

receive saleable reduced indication 10mg HT from Aesica until late November 2015 and AMCo did not receive any customer interest in it until April 2016. Immediately AMCo had saleable product from Aesica and there was market demand for it, we supplied."

(2) As regards Mr Beighton:

(i) At [4] of Beighton 1, he stated:

"I am providing this witness statement in connection with the application by Advanz to appeal the CMA's infringement decision dated 15 July 2021 in Case 50277 ("Decision"). I understand that in its Decision the CMA determines that AMCo entered into an anti-competitive agreement with Auden/Actavis ("Auden") whereby the CMA says that Auden and AMCo had an unwritten agreement whereby Auden would make substantial monthly payments to AMCo in exchange for AMCo not entering the UK market independently with its own 10mg hydrocortisone tablets ("HT") and that the CMA calls this unwritten agreement the "10mg Agreement". I also understand that the CMA says Auden and AMCo were party to the 10mg Agreement from around 31 October 2012 until 24 June 2016 whereupon it ceased ("Relevant Period") and that the 10mg Agreement had as its object the prevention, restriction or distortion of competition thereby infringing Chapter I of the Competition Act 1998. As I explain below, there was not a 10mg Agreement."

(ii) At [11] of Beighton 1, Mr Beighton set out the various matters covered by his statement "[i]n order to explain that there was not the 10mg Agreement the CMA says there was…". This serves to underline the point made above that the substance of Mr Beighton's statement (and also Mr Sully's) was to address and rebut the finding of a collateral understanding. In particular, in Beighton 1/[11(c)], Mr Beighton stated that one of the areas covered by his (detailed) witness statement is that "AMCo's primary intention was always to enter the market independently with its own 10mg HT and in the alleged infringement period we invested in numerous routes in order to try and achieve that". Large tracts of the statement then address this point specifically, notably Beighton 1/[31]ff. This point contradicts, at the most fundamental level, the basis on which the Hydrocortisone Decision rests.

E. THE POINT OF CROSS-EXAMINATION AND THE DUTY TO PUT ONE'S CASE

36. Where a witness is called by a party, it is incumbent upon the opposing party or parties to "put their case" to that witness, to the extent that that witness is able to give relevant evidence on any point. The general position is clearly put in *Phipson on Evidence*:[48]

"In general, a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted

[48] Malek (ed), *Phipson on Evidence*, 20th ed (2022), [12-12].

on that point. The rule applies in civil cases as it does in criminal. In general, the CPR does not alter that position.

This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected. Thus where, during trial, a witness has not been challenged as inaccurate, it was not appropriate for that evidence to then be challenged in closing speeches.

However, the rule is not an inflexible one. For example, if there is a time-limit imposed by the judge on cross-examination it may not be practicable to cross-examine on every minor point, particularly where a lengthy witness statement has been served and treated as evidence-in-chief. Thus, in practice there is bound to be at least some relaxation of the rule.

Failure to put a relevant matter to a witness may be most appropriately remedied by the court permitting the recall of that witness to have the matter put to him."

37. The rule is not an absolute and inflexible one. It is always a matter of fact and degree how far a witness should be cross-examined, in the circumstances of the case, so as to achieve fairness between the parties. Empty technicalities are to be avoided.[49]

38. If serious allegations are to be made against a party who is called as a witness, they must be both fairly and squarely pleaded and put to that witness in cross-examination.[50] "Serious allegations" include allegations of dishonesty. The rule is not limited to such allegations: in this case, the allegation of involvement in the Cartel Infringements was a serious one, even if it did not involve an allegation (express or implied) of dishonesty.[51] Unpacking this, the following points can be made:

    (1) As a good "rule of thumb", the more serious the allegation and the more important it is to the case in issue, the greater the care with which a case must be put in cross-examination to a witness.

    (2) It is important to bear in mind that the interests of the protagonist to the litigation and the witness must be borne in mind. Putting a case is, on that level, a matter that arises between litigants: if *A* is making a claim against *B*, then that claim must be established, and the relevant points put to *B*'s witnesses, if they are able to respond. In addition, *B*'s witness has an interest – over and above that of *B* –

[49] *Williams v. Solicitors Regulation* Authority, at [2017] EWHC 1478 (Admin), [70] to [76], and the authorities there cited.

[50] *Williams v. Solicitors Regulation* Authority, at [2017] EWHC 1478 (Admin), [70], and the authorities there cited.

[51] As is well-known, infringements of the Chapter I prohibition require no state of mind at all. However, establishing the fact of such an infringement may (depending on all the circumstances) oblige the putting of allegations of some seriousness.

to be able to defend themselves against imputations against their character or person.[52]

(3) Some matters inevitably involve assertions of dishonesty, such as a claim in equity of dishonest assistance and some forms of conspiracy. Other matters do not require dishonesty to be established: but involve questions which, in order to be resolved, raise questions of integrity and misconduct. Infringements of the Chapter I prohibition are "strict liability", but can raise issues of integrity and/or misconduct. The Judgment (Cartel Infringements) considered this, and made the following points, both generally and as regards this case, namely:

(i) That a distinction could appropriately be drawn between "Overt Chapter I Infringements" and "Covert Chapter I Infringements".[53] Specifically:[54]

"(1) In the case of Overt Chapter I Infringements, the alleged infringement is plain to see; and the argument is whether the evident arrangement does, as a matter of law, infringe. In other words, the alleged infringer does not deny the arrangement – indeed, positively avers it – but does deny that it is either a by object or by effect infringement. This is the case as regards the multilateral interchange fee litigation that has been before this Tribunal on a number of occasions;[55] and also as regards most favoured nation clauses.[56] Overt Chapter I Infringements usually give rise to difficult and technical legal and economic argument, but they do not tend to involve the Tribunal in ascertaining the scope of the arrangement said to constitute the infringement.

(2) By contrast, Covert Chapter I Infringements generally involve a high degree of careful factual inquiry and inference from established fact. That is because the very nature of the agreement – and so, the nature of the infringement – is controversial and controverted. It may very well be the case that even when the true nature of the arrangement has been found, difficult questions of characterisation remain – does the arrangement, as found, infringe or does it not? But it is difficult to underestimate the importance of the factual inquiry that must be undertaken when seeking to ascertain precisely what the nature of the allegedly unlawful arrangement actually was."

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[52] In the context of adjournments, it is clear that a witness has an interest – independent of the protagonists/litigants – in attending a trial to give evidence and to face allegation in which they are involved: *Bilta (UK) Limited v. Tradition Financial Services Ltd*, [2021] EWCA Civ 221.

[53] Judgment (Cartel Infringements)/[10].

[54] Judgment (Cartel Infringements)/[10].

[55] See, for example, *Sainsburys Supermarkets Ltd v. Visa Europe Services LLC*, [2020] UKSC 24 at [100]: "That [i.e. the MIF] minimum price is non-negotiable…It is a known common cost which acquirers know they can pass on in full and do so. Merchants have no ability to negotiate it down"; *Sainsbury's Supermarkets Ltd v. Mastercard Incorporated*, [2016] CAT 11 at [102(2)]: "It is also worth bearing in mind that price-fixing cartels (the classic "by object" restriction) are almost invariably secret. The MasterCard Scheme Rules, including the provisions regarding the MIF, are not secret. They are extant in every relevant licence agreement and the MIFs (as well as the Scheme Rules) are published by MasterCard on its website."

[56] [2022] CAT 36 *BGL (Holdings) Limited v. Competition and Markets Authority* (referred to in Annex 1 as "*BGL*").

(ii) Covert Chapter I Infringements, as the Judgment (Cartel Infringements) stated, "require the decision-maker (here: the CMA) and any reviewing court (here: the Tribunal) to exercise an extraordinarily high degree of care in finding the facts".[57]

(iii) That, in this case, precisely this degree of care was required:[58]

> "We appreciate that the Chapter I prohibition is a strict liability tort, and that it is not necessary to show any intention to infringe. However, in this case, the CMA were – rightly, and inevitably, given the findings in the Hydrocortisone Decision – alleging and finding an intentional infringement. The point that we make is that the nature of the CMA's findings – given that they were, in this regard, denied in their entirety by the Appellants – might come very close to or in fact amount to an allegation of dishonesty against someone. We have no desire to run ahead of ourselves, but this was, we consider, was an obvious risk from the outset of these appeals: indeed, it was obvious from the moment the Hydrocortisone Decision was published. That would be the case whether or not the term "sham" was used: but its use, with all the pejorative connotations the term has, makes the point very well."

39. Turning then, to the care that must be given when alleging some form of misconduct,[59] the starting point is the decision in *Browne v. Dunn*,[60] where Lord Herschell LC said this:

> "Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him the opportunity of making any explanation which is open to him; and at it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an

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[57] Judgment (Cartel Infringements)/[11].

[58] Judgment (Cartel Infringements)/[16].

[59] There is no need for a technical allegation of dishonesty (i.e. what would amount to dishonesty as a matter of law) nor for dishonesty to be a necessary element in the cause of action alleged. In this case, for the reasons given, dishonesty was no necessary part of the CMA's findings of infringement, and no-one sought to argue – before the CMA or us – that this was a case where the common law test of dishonesty was or was not met. These points are, quite simply, irrelevant.

[60] (1893) 6 LR 67 at 70ff. See also, and to similar effect: *Vogon International Ltd v. The Serious Fraud Office*, [2004] EWCA Civ 104; *Dempster v. HMRC*, [2008] STC 2079; *Abbey Forwarding Ltd v. Hone*, [2010] EWHC 2029 (Ch); *The Mayor and Burgesses of the London Borough of Haringey v. Hines*, [2010] EWCA Civ 1111.

intention to impeach the credibility of the story which he is telling. Of course, I do not deny for a moment that there are cases in which notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted."

40. The need for a sense of proportion and an avoidance of technicality applies even here.[61] In *Chen v. Ng*,[62] the question was whether the grounds articulated by the Judge for disbelieving a witness ought to have been put in cross-examination. As the Privy Council put the argument, "[was it] unfair for the Judge to have relied on either of them as reasons for disbelieving Mr Ng; accordingly, [would it] be wrong to let the decision of the Judge stand. The Court of Appeal accepted this argument, and, albeit with some hesitation, the Board consider that they were right to do so."[63] The reason for the hesitation was as follows:[64]

"In a perfect world, any ground for doubting the evidence of a witness ought to be put to him, and a judge should only rely on a ground for disbelieving a witness which that witness has had an opportunity of explaining. However, the world is not perfect, and, while both points remain ideals which should always be in the minds of cross-examiners and trial judges, they cannot be absolute requirements in every case. Even in a very full trial, it may often be disproportionate and unrealistic to expect a cross-examiner to put every possible reason for disbelieving a witness to that witness, especially in a complex case, and it may be particularly difficult to do so in a case such as this, where the Judge sensibly rationed the time for cross-examination and the witness concerned needed an interpreter. Once it is accepted that not every point may be put, it is inevitable that there will be cases where a point which strikes the judge as a significant reason for disbelieving some evidence when he comes to give judgment, has not been put to the witness who gave it."

Going on:[65]

"At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the relevant case both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of the material to be put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds."

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[61] Emphasised in the authority cited above.

[62] [2017] UKPC 27.

[63] At [51].

[64] At [52].

[65] At [55].

41. Where the failure to cross-examine is a culpable one and not a mere technicality, it is very difficult for the court to rectify the deficiency in due process, save by recalling or causing to be recalled the witness to whom the matter ought to have been put. That, in and of itself, may be extremely difficult: and if it is not possible, a court will not have any option but to dismiss the claim (where a trial) or allow the appeal. There is a wealth of authority to this effect, helpfully set out by Sir Michael Burton in *P v. D*,[66] where it was emphasised that it is not for the court to make good omissions in procedure. As to the authority:

(1) In *The Vimeira*,[67] Ackner LJ stated:

> "Where there is a breach of natural justice, as a general proposition it is not for the courts to speculate what would have been the result if the principles of fairness had been applied. I adopt, with respect, the words of Megarry J in *John v. Rees*, [1970] Ch 345 at 402, where he said:
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> > "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained, of fixed and unalterable determinations that, by discussion, suffered a change.""

We quoted Megarry J above. In many cases, the benefits of putting a case to "live" witnesses are unavailable because those witnesses do not appear, and it may be that when it takes place, the cross-examination is unilluminating. But where the witnesses are available and cross-examination can take place it is wrong for a case not to be put, for precisely the reason given by Megarry J, as well as for the basic reasons of fairness that are also stressed in the case law.

(2) In *Vee Networks Ltd v. Econet Wireless International Ltd*,[68] Colman J said:

> "It is unnecessary and in the circumstances undesirable for me to express a view as to whether the arbitrator came to the right conclusion, even if by the wrong route, or whether, had he ignored the 2003 amendments, he should have reached the same or a different conclusion. The element of serious injustice in the context of section 68 does not in such a case depend on the arbitrator having come to the wrong conclusion as a matter of law or fact but whether he was caused by adopting inappropriate means to reach one conclusion whereas had he adopted appropriate means he might well have reached another conclusion favourable to the applicant. Thus, where there has been an irregularity of procedure, it is enough if it is shown that it caused the arbitrator to reach a conclusion unfavourable to the applicant which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is at least reasonably arguable. Above all, it is not normally appropriate for the court to try the material issue in order to ascertain whether substantial injustice has been caused. To do so would be an entirely inappropriate inroad into the autonomy of the arbitral process."

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[66] [2019] EWHC 1277 (Comm).

[67] [1984] 2 Lloyd's Rep 66 at 76.

[68] [2005] 1 Lloyd's Law Rep 192 at [90].

Sir Michael Burton himself stated in *P v. D*[69] that "I cannot possibly say that if Mr E had been properly cross-examined and given the opportunity to deal with what were in the event seen as weaknesses by the arbitrators in his case and/or deal with the alternative case which Mr Berry did not run, there might not have been a different outcome."

42. After the conclusion of the oral hearing, the Appellants helpfully drew our attention to the decision of the Supreme Court in *Tui UK Ltd v. Griffiths*,[70] contained in a judgment handed down on 29 November 2023. The judgment affirmed the long-established rule articulated in *Phipson* and quoted above, and also helpfully articulated a series of exceptions where cross-examination does not need to take place. Although this case concerned the cross-examination (or failure to cross-examine) an expert, and not (as here) witnesses of fact centrally involved in the story, it is worth quoting the Supreme Court's judgment setting out the exceptions to the rule (if only to show that there is nothing, in this case, to cause the general rule that cross-examination ought to take place to be departed from), as well as providing a helpful distillation of the relevant law:

> "61. From this review of the case law it is clear that there is a long established rule as stated in *Phipson* at [12-12] with which practising barristers would be familiar, as Bean LJ suggested in [87] of his judgment. There are also circumstances in which the rule may not apply. Several come to mind. First, the matter to which the challenge is directed is collateral or insignificant and fairness to the witness does not require there to be an opportunity to answer or explain. A challenge to a collateral issue will not result in unfairness to a party or interfere with the judge's role in the just resolution of a case; and a witness in such a circumstance needs no opportunity to respond if the challenge is not an attack on the witnesses character or competence.
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> 62. Secondly, the evidence of fact may be manifestly incredible, and an opportunity to explain on cross-examination would make no difference. For example, there may be no need for a trial and cross-examination of a witness in a bankruptcy application where the contemporaneous documents properly understood render the evidence asserted simply incredible: *Long v. Farrer & Co*, [2004] EWHC 1774 (Ch); [2004] BPIR 1218 at [60], in which Rimer J quotes from the judgment of Chadwick J in *Re A Company (No 006685 of 1996)*, [1997] 1 BCLC 639, 648.
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> 63. Thirdly, there may be a bold assertion of opinion in an expert's report without any reasoning to support it, what the Lord President (Cooper) in *Davie v. Magistrates of Edinburgh* described as a bare *ipse dixit*. But the reasoning which appears inadequate and is open to criticism for that reason is not the same as a bare *ipse dixit*.
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> 64. Fourthly, there may be an obvious mistake on the face of an expert report. Bean LJ referred to this possibility in [94] of his judgment and cited *Wooley v. Essex County Council*, [2006] EWCA Civ 753 as a useful example. In *Hull v. Thompson*, [2001] NSWCA 359 ("*Hull v. Thompson*"), Rolfe AJA at [21] expressed the view that such a circumstance would be where the report was *ex facie* illogical or inherently inconsistent. See also *A/S Tallinna Laevauhisus v. Estonian State Steamship Line*, (1946) 80 Ll L Rep 99, 108 ("*Tallinna*"), where Scott LJ spoke of the court rejecting an expert's

[69] At [39].

[70] [2023] UKSC 48.

evidence if "he says something patently absurd, or something inconsistent with the rest of his evidence".

65. I would add that what is said about the evaluation of expert evidence of foreign law in *Tallinna* and the other cases cited by the parties in argument in this appeal may now need to be read in the light of the recent guidance of this court in *Brownlie v. FS Cairo (Nile Plaza) LLC*, [2021] UKSC 45, [2022] AC 995 and of the Board in *Perry v. Lopag Trust Reg*, [2023] UKPC 16, [2023] 1 WLR 3494.

66. Fifthly, the witnesses' evidence of the facts may be contrary to the basis on which the expert expressed his or her view in the expert report. Rolfe AJA in *Hull v. Thompson*, [21], spoke of the report being "based on an incorrect or incomplete history, or where the assumptions on which it is founded are not established".

67. Sixthly, as occurred in *Edwards Lifesciences*, an expert has been given a sufficient opportunity to respond to criticism of, or otherwise clarify his or her report. For example, if an expert faces focussed questions in the written CPR Part 35.6 questions of the opposing party and fails to answer them satisfactorily, a court may conclude that the expert has been given a sufficient opportunity to explain the report which negates the need for further challenge on cross-examination.

68. Seventhly, a failure to comply with the requirements of CPR PD 35 may be a further exception, but a party seeking to rely on such a failure would be wise to seek the directions of the trial judge before doing so, as much will depend upon the seriousness of the failure.

69. Because the rule is a flexible one, there will also be circumstances where in the course of a cross-examination counsel omits to put a relevant matter to a witness and that does not prevent him or her from leading evidence on that matter from a witness thereafter. In some cases, the only fair response by the court faced with such a circumstance would be to allow the recall of the witness to address the matter. In other cases, it may be sufficient for the judge, when considering what weight to attach to the evidence of the latter witness, to bear in mind that the former witness had not been given the opportunity to comment on that evidence. The failure to cross-examine on a matter in such circumstances does not put the trial judge "into a straitjacket, dictating what evidence must be accepted and what must be rejected": *MBR Acres Ltd v. McGivern*, [2022] EWHC 2072 (QB), [90], *per* Nicklin J. This is not because the rule does not apply to a trial judge when making findings of fact but because, as a rule of fairness, it is not an inflexible one and a more nuanced judgment is called for. In any event, those circumstances, involving the substantive cross-examination of the witness, are far removed from the circumstances of a case such as this in which the opposing party did not require the witness to attend for cross-examination.

70. In conclusion, the status and application of the rule in *Brown v. Dunn* and the other cases which I have discussed can be summarised in the following propositions:

(i) The general rule in civil cases, as stated in *Phipson*, 20th ed, [12-12], is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses.

(ii) In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair.

(iii) The rationale of the rule, i.e. preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness.

(iv) Maintaining the fairness of the trial includes fairness to the witness whose evidence is being impugned, whether on the basis of dishonesty, inaccuracy, or other inadequacy. An expert witness, in particular, may have a strong professional interest in maintaining his or her reputation from challenge of inaccuracy or inadequacy as well as from a challenge to the expert's honesty.

(v) Maintaining such fairness also includes enabling the judge to make a proper assessment of all the evidence to achieve justice in the cause. The rule is directed to the integrity of the court process itself.

(vi) Cross-examination gives the witness to opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty.

(vii) The rule should not be applied rigidly. It is not an inflexible rule and there is bound to be some relaxation of the rule, as the current edition of *Phipson* recognises in [12-12] in the sub-paragraphs which follow those which I have quoted in [42] above. Its application depends upon the circumstances of the case as the criterion is the overall fairness of the trial. Thus, where it would be disproportionate to cross-examine at length or where, as in *Chen v. Ng*, the trial judge has set a limit on the time for cross-examination, those circumstances would be relevant considerations in the court's decision on the application of the rule.

(viii) There are also circumstances in which the rule may not apply: see [61] to [68] for examples of such circumstances."

43. This is a helpful articulation of the principles on which we were addressed by the parties at the Due Process Question hearing. We see no need for further submissions on the law. The rule as to cross-examination is one that needs to be applied flexibly and proportionately, having in mind the overriding question of maintaining the integrity of the trial process and (in this case) being fair to both the Appellants and the witnesses they called. The importance of cross-examination is so central to this judgment that – at the risk of further repetition and the risk of stating the obvious – we make the following points:

(1) There was in this case no time pressure on the CMA in terms of the cross-examination of Mr Sully and Mr Beighton. Mr Sully and Mr Beighton were cross-examined across three days, and the CMA never suggested that its cross-examination was at risk of being curtailed by reason of time pressure.

(2) The existence of a collateral understanding in addition to the First and Second Written Agreements was the single most important factual question in relation to the Cartel Infringements. The CMA accepted (as it had to, given this was a

finding of the Hydrocortisone Decision itself) that in and of themselves the First and Second Written Agreements did not infringe competition law. They could only do so (notwithstanding the "value transfer" that the CMA found they contained) if there was a collateral understanding. The collateral understanding was inferred out of the "value transfer" but was not otherwise contained in the written agreements.

(3) The existence of the collateral understanding was denied by the Appellants and was one of the grounds of appeal before the Tribunal which the Tribunal was obliged to resolve. This was no secondary or collateral issue: it was an issue central to the decision under appeal, and that central finding in the decision was explicitly the subject of an appeal.

(4) The denial of the existence of the collateral understanding, and the assertion by the Appellants that the Hydrocortisone Decision was wrong in inferring the existence of such an understanding, was not a bare denial on the part of the Appellants. The Appellants advanced a positive case of no collateral understanding. The Appellants adduced the evidence of Mr Sully and Mr Beighton, who were tendered for cross-examination, in support of that positive case (which they advanced in their written evidence). The CMA, rightly, obliged them to attend the hearing, to be cross-examined. It was obliged to put the basis for inferring the common understanding fully to those witnesses. Put another way: the CMA was obliged, in order to defend the Hydrocortisone Decision, to mount a frontal attack on the positive case advanced by the Appellants.

(5) The CMA knew, well in advance of the hearing, what Mr Sully and Mr Beighton's evidence would be. It comprised, in each case, a detailed rebuttal of the central finding of the Hydrocortisone Decision. Detailed cross-examination of that evidence in the form of a challenge to the factual narrative advanced by Mr Sully and Mr Beighton was necessary.

(6) Whilst we are quite prepared to accept that the inference of a collateral understanding arising out of the "value transfer" is a strong one, that rendered the obligation to cross-examine on the collateral understanding greater, not less. It cannot be said that the evidence of Mr Sully and Mr Beighton was a bare denial, or that their evidence was so incredible that cross-examination would be otiose. If this was the CMA's position, then the CMA should have said so: the point would have received extremely short shrift, and that is clear from the Tribunal's repeated concerns, articulated during the course of the hearing, that the findings of the Hydrocortisone Decision were not being put. We describe these concerns in the following sections of this judgment.

(7) If the grounds of appeal articulated by the Appellants were to be rejected and the findings of Cartel Infringement in the Hydrocortisone Decision upheld, the Tribunal would be obliged to reject as untrue (although not necessarily dishonest) the statements of Mr Sully and Mr Beighton. That being the case – which it inevitably is - Mr Sully and Mr Beighton denied the existence of the collateral understanding expressly – a detailed cross-examination of the basis for their denials was called for to ensure fairness and a proper substantive outcome on the merits.

44. Given the references to the possibility of recalling witnesses to whom a case has not been put, it is worth articulating why this did not occur in the present case. The reason is set out briefly in paragraph 8 above: the CMA never sought the recall of either Mr Beighton or Mr Sully and – even now – maintains that its case was fully and properly put. In these circumstances, it would be difficult for the Tribunal to compel the CMA to put a case that it was contending did not need to be put.

45. Had an application to recall Mr Beighton and/or Mr Sully been made by the CMA, even during the course of closing submissions, then that application would have received careful consideration by the Tribunal. Doubtless, recall would have been opposed by the Appellants, but given the centrality of the point it would be difficult to see what prejudice would accrue, and a strong case for recall could have been made.

F. THE EARLY STAGES OF THE HEARING OF THE APPEALS

(1) Introduction

46. The extent to which cross-examination is required is determined by the matters in issue and what needs to be put to a witness in order to elucidate or establish those matters. Given the unequivocal findings of the Hydrocortisone Decision and the statements of Mr Sully and Mr Beighton contradicting those unequivocal findings, the CMA evidently had to put in cross-examination the collateral understanding that the Hydrocortisone Decision had found to exist.

47. In fact, the position was more extreme than this. There was, as we have described, stark disagreement between the inferred findings in the Hydrocortisone Decision and the witness statements of Mr Sully and Mr Beighton. That disagreement was unsurprisingly highlighted by both the Appellants and the Tribunal. Given what transpired in closing, it is appropriate to set out these points out in some detail.

(2) The grounds of appeal and the pleadings

48. The Advanz Appellants set out their understanding of the Hydrocortisone Decision in their Notice of Appeal, as follows:

> "10. The CMA's case is based on a subtle yet fundamental point, which is that two written lawful supply agreements between Auden and AMCo for Auden's 10mg HT were a sham. In the period 2013 – 2015, Aesica, the contract manufacturing organisation ("CMO") contracted by AMCo to develop and manufacture 10mg HT for it, had failed to develop saleable product for AMCo. The 10mg HT Product Aesica was contracted to manufacture was a reduced indication (child's version) 10mg HT which is the HT product for which AMCo had a Marketing Authorisation ("MA"). During this time, AMCo purchased an interim supply of full indication (adult and children) 10mg HT from Auden under two agreements, one from January 2013 to March 2014 and the other from June 2014 to June 2016. Auden had an MA for full indication (adult and children) 10mg HT.
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> 11. The Decision refers to these two written supply agreements as the "supply agreements". Pursuant to both supply agreements, AMCo agreed to buy full indication (adult and children) 10mg HT exclusively from Auden and agreed not to sell "any third party

product which competes with Auden's 10mg hydrocortisone tablets". Both agreements were terminable on three months' notice. There was no express provision preventing AMCo from developing and selling its own product. On the contrary, this was expressly envisaged under the terms of both supply agreements. Under the second supply agreement, AMCo committed to give three months' written notice of its intention to commence supply of its own version of hydrocortisone product.

12. The CMA expressly states that the terms of the two supply agreements are not restrictive of competition and so are lawful. This is so, notwithstanding on the CMA's case, that AMCo was a potential competitor of Auden. The case proceeds on the basis that the exclusive purchase obligation and the non-compete restriction are lawful, but the lawful supply agreements are a "sham" intended to disguise the unwritten 10mg Agreement inferred by the CMA. The CMA says that Auden and AMCo had an unwritten understanding by which they understood the "true purpose" of the lawful supply agreements was for Auden to pay AMCo to stay out of the market with a 10mg HT product. The CMA seeks to prove these unwritten understanding and that these were sham agreements by inferences drawn from the parties' conduct.

13. It is important at the outset to point out that there is not one single document on the case file (which comprises many thousands of documents obtained during a length and highly intrusive investigation) that directly supports unwritten understandings between Auden and AMCo that the supply agreements were a sham and that AMCo would stay out of the market. This is telling because there is a mass of communications between AMCo and Auden and within both companies internally. But there is not one slip by any employee that displays any such common understandings. The lack of any direct contemporaneous evidence of any common understandings of the type alleged indicates that the CMA's case against AMCo is weak from the start."

49. This puts the decision that the Tribunal was faced with very clearly:

(1) The term "sham" was used by the CMA in the Hydrocortisone Decision. It expresses the findings of the Decision well. The First and Second Written Agreements were not the complete statement of the relationship between Auden and AMCo. The Agreements were both misleading and incomplete:

(i) They were misleading because the true transfer of value was not money (from AMCo) in exchange for hydrocortisone tablets (from Auden), but "value" from Auden (in the form of tablets sold at a gross undervalue) in exchange for a nominal price and something else not stated in the Agreements (from AMCo) (i.e. the content of the collateral understanding nowhere referenced in the First and Second Written Agreements). The term "value transfer" is a loaded one – rightly used in the Decision – that expresses the misleading nature of the Agreements here in issue.[71]

(ii) They were incomplete because their express (or indeed implied) terms did not express the true nature or full extent of the Agreements. Put another way, something in addition to the obligations in those

[71] See paragraph 19(6)(i) above, where this part of the Agreements is described.

Agreements was "agreed" (no matter how informally - an informal, extra-contractual, "understanding" would be entirely sufficient). That, the Decision found, was the collateral understanding. Without the existence of the collateral understanding the Decision cannot stand.[72]

(2) Both of these aspects were positively denied by the Appellants, who adduced evidence directly contradicting the inferred collateral understanding. The Appellants' position was that:

(i) The terms of the written Agreements were extraordinarily beneficial to AMCo, which was receiving valuable product at a fraction of the price that Auden could itself achieve by selling that same product in the market. However, that was simply a good deal for AMCo, which AMCo could not commercially explain but which it was entitled to derive the benefit of.

(ii) There was no collateral understanding of any sort. The written Agreements represented a "stop-gap" intended to fill AMCo's temporary inability to manufacture and supply to the market its own 10mg hydrocortisone tablets. Once AMCo was able to do so, it would (according to Mr Beighton and Mr Sully) enter the market and seek to contest about half of it, at a marginally lower price than that charged by Auden. In this way, AMCo would make far more money than under the First and Second Written Agreements. Thus, the basic premiss of the collateral understanding – the AMCo would stay out of the market – was refuted.

(3) Assuming a supply from Aesica (which was never forthcoming during the pendency of the Agreements), AMCo would pay for a supply from Aesica more or less the same as it was paying Auden under the Agreements. However, AMCo would receive from Aesica, at this low supply price, not 12,000 packs of tablets, but around 40,000 (around half the market for 10mg hydrocortisone tablets). AMCo would therefore make much more money, because although its profit in the marginal case would be more or less the same, that marginal profit would be multiplied by 12,000 under the Agreements and by 40,000 under the hoped-for arrangement with Aesica.[73] On this basis, AMCo would want the Agreements to run for as short a period as possible.

(4) We have put AMCo's case as it was put to us. Absent the evidence of Mr Beighton and Mr Sully, it is not a case that we have accepted, as the Judgment (Cartel Infringements) shows. But that judgment draws inferences from facts which were never put to Mr Beighton and Mr Sully. It is a decision which – had Mr Beighton and Mr Sully never been called – we would have been entirely comfortable with. But they <u>were</u> called; the points on which the Judgment

[72] See paragraph 19(6)(ii) above.

[73] AMCo would therefore make over three-times more money.

(Cartel Infringements) turned were never put; and the Judgment is provisional for that reason.

(3) Written opening submissions

50. In their written opening submissions, the Cinven Appellants said this:

> "23. …The CMA's case is simply that there "must have been" some unwritten counter-performance agreed by AMCo: that is a clear invitation to the Tribunal to infer the existence of the Alleged Promise from the surrounding circumstances. This case which the CMA has built runs into two substantial difficulties, however.
>
> 24. The first difficulty is that the critical inference which the CMA has drawn (that there is no other credible explanation for the low supply price) is contradicted by its own previous assessment of the evidence. In particular, the CMA's 3 March 2017 SO provisionally found that the Auden/AMCo supply agreements were intended to "incentivise" AMCo not to enter the market…The SO's analysis has since been abandoned by the CMA. But the point stands that it nonetheless provides another explanation for the supply price, on which the CMA bases its case; namely that Auden, unilaterally, hoped to incentivise AMCo but, crucially, there was no agreement or meeting of minds on AMCo's part that it would not enter.
>
> 25. The second difficulty is that the inference that the CMA draws has to be weighed against the wealth of positive and direct evidence that contradicts the existence of the Alleged Promise…This large body of contemporaneous documentation contradicting the Alleged Promise creates a serious issue for the CMA; it cannot be forever "airbrushed" as the CMA has done in the Decision and the Defence. The Cinven Appellants therefore expect the CMA to put its case in this regard to the Advanz witnesses of fact at trial. In their submission, however, when one considers the evidence as a whole, it is obvious that the CMA's inferential case is unsustainable and that there was no Alleged Promise made by AMCo."

These paragraphs capture the essence of what was in issue on these appeals. The CMA's inferential collateral understanding was challenged on two bases:

(1) First, that the inference was – in and of itself – an unsound one, not to be drawn. For the reasons given in the Judgment (Cartel Infringements), we have rejected that contention.

(2) Secondly, that the inference – no matter how soundly drawn from the evidence available to the CMA at the time of the Hydrocortisone Decision – was wrong and contradicted by the evidence of Mr Beighton and Mr Sully. It is that attack that the CMA never really defended the Hydrocortisone Decision against.

(4) Oral exchanges

51. During cross-examination, the following oral exchanges took place whilst Mr Sully was in the witness box:[74]

The President [1][75]	Ms Demetriou, before you begin, it always annoyed me intensely when judges did this to me, so do please feel free to show your annoyance, but you are going to formally put the CMA's case theory to the witness about the side agreement?
Ms Demetriou, KC [2]	Sorry, about the…?
The President [3]	Well, we spent this morning going through the compliance rules.
Ms Demetriou, KC [4]	Yes, I am getting on to all of that, so…
The President [5]	No, what I mean is there are, as it seems to me, three theories. One is that the written agreement was the written agreement and there was nothing more. The first alternative is that Mr McEwan used the latitude given to him by the failure to monitor his conversations to agree something which was not in the written agreement; and the second alternative is that actually that was done, but with the witness' compliance and I would like the denial of that formally on the record at some point.
Ms Demetriou, KC [6]	Sir, yes, thank you. Exactly how I put it will depend on where we get to, but I understand. Thank you for raising it.
The President [7]	I am sorry for raising it. I am sure that…
Mr Brealey, KC [8]	It is an important point – sorry – that actually what the agreement is should be put to the witnesses, so Mr Sully and Mr Beighton, because it will be apparent that there is some confusion as to what actually is the agreement that is alleged to infringe the competition rules. We know it is in an agreement not to enter, but in the light of the CMA's written observations there is still a degree of confusion as to what their case is on the agreement. I think – I do not think, I submit, that their case has to be put squarely to both witnesses.
The President [9]	Ms Demetriou, you have heard what Mr Brealey has said. I am sure you will do that.
Ms Demetriou, KC [10]	Sir, of course, I totally understand the points you have put to me and I will cover those points off. I was intending to. Mr Brealey has certain submissions he is making about our case being unclear and if he thinks, ultimately, that I have not put our case clearly, he can say that in closing, but I am not going to be

[74] Transcript Day1/pp.79ff.

[75] For ease of reference, we will number the exchanges that we set out.

guided by what Mr Brealey thinks I should put. I will put what I think I need to put.

The President [11] Of course: but it does seem to me that even if it involves a short denial from the witness and – to be clear – I am going to expect that from the witness, we know where the battle lines are. What the side agreement was is something which does need to be put, to the extent it is different from the written agreement. So that we know where we stand. So, when the witness says, and we all know – when the witness says "No, it was the written agreement and nothing else", we know what we are tilting at in terms of the battle lines. So I am sorry for interrupting, because…

Ms Demetriou, KC [12] No, not at all. That is understood…

52. The three "theories" put by the President bear expansion:

(1) If the CMA demonstrated no more than the First and Second Written Agreements, then (on the terms of the Hydrocortisone Decision itself) the CMA would lose the appeals. The Hydrocortisone Decision found that these agreements were non-infringing. Accordingly, the CMA had to show an understanding or arrangement going beyond the First and Second Written Agreements in order to have any prospect of upholding the decision. That is unequivocally clear from everything we have said so far and – importantly – was not gainsaid by the CMA at any point.

(2) <u>How</u> the CMA made good the existence of a collateral understanding was a matter for it. As we have said, the terms of the Hydrocortisone Decision left the CMA considerable latitude in that regard. But make it good the CMA had to do, in the face of the Appellants' positive case. The Judgment (Cartel Infringements) put the point clearly in [7(10)], quoted in paragraph 32 above. The Appellants were right in saying that the CMA had not been particularly clear in the collateral understanding it was alleging, merely that there <u>was</u> a collateral understanding of some sort. As we have said, we regard that as entirely appropriate at the beginning of an appeal, where the relevant factual witnesses have yet to be cross-examined. Essentially, the CMA was faced with a choice between two case theories:

(i) First, it could mount a full-frontal attack on the evidence of Mr Sully and Mr Beighton. Mr Sully and Mr Beighton had gone out of their way to <u>deny</u> the collateral understanding, and they were the persons centrally involved in the negotiation, conclusion and agreement of the First and Second Written Agreements. It would be possible for the collateral understanding to arise without their involvement, and for their denials to be true according to their understanding, but factually incorrect when considering the involvement of other persons. But it would be necessary to recognise that Mr Sully and Mr Beighton were explicitly and from their own personal knowledge (i) denying the existence of the collateral understanding and (ii) asserting that, had it existed, they would have known of it. It is difficult to see how such an attack on the evidence of

Mr Beighton and Mr Sully could properly be mounted without suggesting some form of serious misconduct.

(ii) Secondly, and very much in the alternative, the evidence of Mr Sully and Mr Beighton could be collaterally undermined along the lines of: "There was a collateral understanding, but one or both of you didn't know about it". Given the evidence Mr Sully and Mr Beighton gave in their witness statements, that might seem an unpromising line of attack: but it might well have been the case that others were involved at the time of the negotiation of the First and Second Written Agreements, and that the collateral understanding arose not involving Mr Sully and Mr Beighton; or it might be that the collateral understanding was created at an altogether earlier point in time by someone else (say between Waymade and Auden), and that it somehow continued when AMCo stepped into Waymade's shoes without the appreciation of Mr Sully or Mr Beighton.

53. Which case theory the CMA espoused in defence of the Hydrocortisone Decision was a matter for it. The second course we have described would not, on the face of it, involve allegations of bad conduct: it would involve asserting that a serious competition law infringement had been going on under the noses of Mr Sully and Mr Beighton, and would really amount to a case that Mr Sully and Mr Beighton had been "sleeping at the wheel". The first course, however, would involve asserting that Mr Sully and Mr Beighton's denial was wrong and that they had either by themselves entered into the collateral arrangement or watched whilst others did so. That involves alleging serious misconduct, namely the sanctioning of a serious infringement of competition law – collusion between two competitors, whereby one be paid to stay out of a market dominated by the other.

54. As we say, which case the CMA put was a matter for it.[76] Our point is the more fundamental one, namely that the essence of the Hydrocortisone Decision's finding of infringement – the existence of a cartel infringement arising out of a collateral understanding supplementing the non-infringing written Agreements – had to be put somehow.

55. Given the history, it would have been helpful to the Tribunal in determining the appeals if – prior to cross-examination – the CMA had made its position clear. Given that resolving the appeals in the CMA's favour (i.e. dismissing them) would involve the Tribunal rejecting Mr Sully's and Mr Beighton's evidence, it would have been helpful had the CMA been more expansive in regard to its proposed course of conduct during the opening phases of the appeals.[77]

[76] The Hydrocortisone Decision certainly favours the first way of putting it – namely that Mr Sully and Mr Beighton, amongst others, were complicit. We never got to the point of considering the second way in which the case might have been put, and whether this was consistent with the Hydrocortisone Decision. Our sense is that it was – but we were never addressed on the point.

[77] This point was expressly raised with the CMA: see the exchanges at paragraph 51 above.

G. THE CMA'S CASE

(1) The position before cross-examination

56. As we have noted, the CMA had, in our judgment, every right to keep its options open up to the commencement of cross-examination of Mr Sully and Mr Beighton. The CMA had unequivocally found that there was a collateral understanding. The Hydrocortisone Decision was (we consider rightly) unspecific about how that collateral understanding had come to be. The CMA was entitled to run an unspecific case alleging serious competition law infringements. Had no witnesses been called, the CMA would (quite properly) have made a much less specific case based upon inference from the documentary material. The presence of witnesses changed the dynamic and made cross-examination inevitable. As we have noted previously, on these appeals, the CMA was faced with a positive case from the Appellants, buttressed by evidence, that the inferences drawn in, and the findings of, the Hydrocortisone Decision were wrong.

57. The CMA has substantial investigatory powers. Those powers were used in this case (both Mr Sully and Mr Beighton were interviewed under section 26 of the Competition Act 1988). Although the CMA could – and perhaps should – have put a strong positive case to Mr Sully and Mr Beighton during the course of these interviews, we do not say that the CMA was under any obligation to do so. How the CMA chooses to investigate is – within very the broad parameters of judicial review – a matter for it, and this Tribunal will be slow to second-guess the fairness or otherwise of those processes. But it may well be in the CMA's own interests[78] to "put the case" to those it summons to give evidence so that matters are clear, at least in the CMA's own mind, as to what is contentious and what is not contentious. In the event, such questions and such probing did not take place. That was the CMA's call during the investigatory phases.

58. The upshot was that at the commencement of these appeals, the CMA – in the Hydrocortisone Decision – had clearly and unequivocally determined that there was a collateral understanding going beyond the First and Second Written Agreements. However, the CMA had made no determination at all as to how that collateral understanding had come to be. We make no criticism of this: it is a comprehensible gap.

59. Had the Appellants called no evidence from Mr Sully and Mr Beighton, the CMA could have rested on the inferences it drew from the evidence it had articulated in the Hydrocortisone Decision. As we have noted, the CMA was under no obligation to call witness evidence of its own; and the Appellants did not have to and could not be compelled to call rebuttal evidence of their own.

60. But – with the help of Mr Sully and Mr Beighton – the Appellants put the existence of the collateral understanding positively in issue. Both Mr Sully and Mr Beighton set out their understanding of the case being made against AMCo by the CMA; and they then explained why that case was wrong in fact. Given their involvement in AMCo's affairs, this was a case made against them also, in which they had an interest and the ability to

[78] Subject to questions of incrimination, etc.

speak directly to the facts in dispute. They could have chosen to duck out of giving evidence: but they did not do so.

61. As we have noted, at no point did the CMA say that Mr Sully and Mr Beighton's understanding of the case against them was wrong, in the sense that the witnesses had misunderstood the gravamen of the CMA's findings. We stress that these were not allegations, but findings made by a regulator tasked with the upholding of competition law in the United Kingdom.

62. We say "against them" because – in giving evidence – Mr Sully and Mr Beighton put themselves in the line of fire. We recognise that they were defending the position of the Appellants, and that is why they were called to give evidence. But nevertheless, the reality of the situation is that Mr Sully and Mr Beighton personally entered these proceedings as witnesses for AMCo. The following points are clear:

    (1) We do not consider that Mr Sully and Mr Beighton's understanding of the findings in the Hydrocortisone Decision was in any way wrong, and they tackled those findings "head on" in their witness statements. The CMA never said: "No, you are wrong in your understanding: the findings of the Hydrocortisone Decision say something else".

    (2) Mr Sully and Mr Beighton did not seek to side-step their involvement in the findings that the Hydrocortisone Decision made. This was not a case where the "It's nothing to do with me" defence was articulated. Neither Mr Sully nor Mr Beighton were saying that the findings in the Hydrocortisone Decision might be right, but they were ignorant of them. If that had been the position, doubtless they would not have been called, because this would not have helped the Appellants. Mr Sully and Mr Beighton were saying to the CMA: "We were involved. We know what we are talking about. You and your decision are wrong". The passages we have quoted from Mr Sully and Mr Beighton's statements could not be clearer in this regard.

(2) What was the nature of the CMA's defence?

(a) Approach

63. Because the CMA's continued position is that its case against Mr Sully and Mr Beighton was fully put, the nature of the CMA's defence of the Hydrocortisone Decision continues to be a source of difficulty. The CMA's submissions at trial ought to be a robust defence of the terms of the Hydrocortisone Decision, the findings of which we consider to be extremely clear.

64. We do not understand how the Decision can be defended without explicitly dealing with the denials of the collateral understanding, and so of the Cartel Infringements, by Mr Sully and Mr Beighton. The Hydrocortisone Decision, as we have described, rests essentially on an inference from the "value transfer". (The CMA had the further point that AMCo stopped developing an alternative supply because of the collateral understanding, but Ms Lifton killed that point.) Mr Beighton and Mr Sully denied that any collateral understanding could, properly, be inferred from the value transfer for the

reasons we have summarised in paragraph 49 above. Those denials had to be challenged in cross-examination, otherwise we consider the inference drawn by the CMA could not properly be sustained.

65. The problem that we face is that there is, as we understand it, no disagreement (i) as to the findings of the Hydrocortisone Decision or (ii) as to the evidence of Mr Beighton and Mr Sully in denying the essence of the findings in that very Decision. Yet the CMA maintains that cross-examination of those denials was not necessary. Hence our concern that we have failed to understand the manner in which the CMA was purporting to defend the Hydrocortisone Decision.

66. There is some temptation in cutting the Gordian knot and saying that if the CMA cannot explain what its defence of the Hydrocortisone Decision was, months after that case was put, the chances of that case having been put properly during the course of the appeals are vanishingly small. Cross-examination is difficult enough when one knows what one is seeking to elicit. A cross-examination without focus is both unfair to the person being cross-examined and liable to end in failure for the cross-examiner themselves.

67. In these circumstances, it may be that the Tribunal should have determined the Due Process Question at the end of the Judgment (Cartel Infringements), by saying that the procedural uncertainties were so evident and so fundamental that there was nothing to be done to cure the problems, and that the appeals must simply be allowed.

68. That would be to accept the submission of the Allergan Appellant that, given the CMA's procedural failings, "the findings beyond [24] of the Closed Judgment cannot lawfully be sustained. They should be withdrawn and the remainder of the Judgment replaced with a finding that the appeal is allowed and the Decision set aside as regards the 10mg Agreement".[79] Although Mr Johnston, counsel for Allergan, did not press this approach in oral argument before us, preferring to align himself with the less extreme position of the other Appellants, the point made by the Allergan Appellants was properly made, and an explanation as to why we have not accepted it is warranted:

    (1) The unequivocal denial of the collateral understanding by two witnesses called for that purpose by the Appellants made this a point that it was impossible not fully to explore with the witnesses in cross-examination.

    (2) The Tribunal was entitled to assume, during the course of cross-examination, that the CMA would put its case properly. As we shall see, during the course of the hearing, the Tribunal's concerns with the course that the CMA had taken were manifest. We have thought long and hard about whether the Tribunal could and/or should have taken a more active role in the cross-examination. Even with the benefit of hindsight, however, we consider that, had the Tribunal taken this course, it would have erred, in that it would, inappropriately, have descended "into the arena", ceased to be an adjudicator, and become an advocate.

[79] See the Allergan Appellant's written submissions at [54].

(3) Given that the CMA was insisting – as it continues to do – that its defence of the Hydrocortisone Decision had fully and properly been put, it would have been inappropriate for the Tribunal simply to conclude – without considering the actual evidence – that because it appeared that the case had not been properly put, the appeal should succeed on purely procedural grounds. We consider that to have summarily determined the appeals on the grounds of procedural deficiency in the Judgment (Cartel Infringements) would not have been just to the CMA.

(4) In those circumstances, the Tribunal was forced provisionally to decide, in the Judgment (Cartel Infringements), extremely difficult questions of fact on the basis of an incomplete record. We want to be clear what we mean by this:

(i) Had the witness statements of Mr Sully and Mr Beighton been adduced under Civil Evidence Act notices, such that their statements were admitted, but there was no cross-examination of them, then we remain completely comfortable with the terms and outcome of the Judgment (Cartel Infringements).

(ii) It is precisely because Mr Sully and Mr Beighton were called but not properly cross-examined on their evidence and so were never permitted to state their version of events in the face of a full articulation of what the CMA were contending that we are so concerned about procedural due process. Key questions were never put; the evidence of Mr Sully and Mr Beighton was never tested in the crucible of cross-examination; and we cannot presume to guess what Mr Sully and Mr Beighton would have said had the case against them fully been put.

(iii) The conduct of the CMA – failing to put a case fully, whilst asserting that that case had fully and properly been put – forced the Tribunal to decide the case on an incomplete record, leaving over the question of whether the deficiency in the CMA's cross-examination of Mr Sully and Mr Beighton was so great as to oblige us to find that the conclusions provisionally expressed in the Judgment (Cartel Infringements) are so unsafe that they cannot, as a matter of procedural propriety, stand.

(5) It is for these reasons, that we consider that the submission of the Allergan Appellant must be rejected. But we want to be clear that we consider that submission to have been appropriately made; and that the Tribunal and the Appellants are in the position they are in because there are procedural problems the existence of which – even now – the CMA comprehensively denies.

69. Although far from ideal, we see (even with the benefit of hindsight) no better way for the Tribunal to have proceeded than:

(1) To have rendered a substantive but provisional judgment on the Cartel Infringements. The CMA denies any failure of due process and wants a substantive judgment dismissing the appeals. We do not consider that we can

properly refuse to render such a substantive judgment on the facts in these circumstances.

(2) To have left the Due Process Question open for later submission and consideration. That is what the Judgment (Cartel Infringements) expressly does, and the purpose of this judgment is to determine that question.

(3) To leave the fate of the appeals to the outcome of this judgment and – recognising the prospects of an appeal – to ensure that our findings of fact (on the assumption that this judgment is wrong) are fully set out, as they are, in the Judgment (Cartel Infringements).

70. As we have described, everyone is clear and in agreement as to what the Hydrocortisone Decision finds. Where there is disagreement is what the implications of the findings of that Decision are, in terms of what should and should not have been put to the witnesses called by the Appellants. Here, there is massive disagreement, which goes to what the CMA needed to do to defend the Decision. We therefore turn to consider what the CMA's defence was or what it should have been on these appeals. We then come to describe what case was put, and the extent to which the case that the CMA was obliged to put was not put.

(3) The case the CMA was obliged to put

(a) After the event formulations of the CMA's case: the Tribunal's formulation

71. In an attempt to understand the CMA's case on the defence of the Hydrocortisone Decision, the Tribunal sought (in the absence of any formulation by the CMA itself) to assist the CMA by framing the case itself. The Tribunal's formulation was as follows:[80]

> "AMCo promises not to enter the market even if able to do so, provided Auden supplies AMCo in accordance with the First and Second Written Agreements."

(b) The CMA's response: four qualifications

72. The CMA considered that the CMA's case was "broadly captured" by this formulation,[81] but the CMA articulated no less than four qualifications to this formulation, which suggests that the framing by the Tribunal was not how the CMA saw its case. We consider the four qualifications in turn below, in an effort to understand the CMA's defence. As will be seen, although the CMA is quite prepared to critique someone else's formulation of the CMA's own case, the CMA remains unable to frame what its defence of the Hydrocortisone Decision actually was.

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[80] Due Process Hearing Day 1/p.141.

[81] CMA's Supplemental Submissions/[11].

73. It is, therefore, necessary to consider these qualifications with some care and in some detail.

(c) The first qualification

74. It was suggested that the use of the term "promise" introduced "unnecessary complexity".[82] We do not understand this point, which is not consistent with the terms of the Hydrocortisone Decision:

(1) The Tribunal accepts that a promise is no necessary part of a Chapter I infringement. The Judgment (Cartel Infringements) makes clear that something far less will suffice to constitute an infringement of competition law.

(2) But that is not the point. The point is, what did the Hydrocortisone Decision decide? As we understand the Hydrocortisone Decision, the CMA was deciding that the collateral understanding was (i) an "agreement",[83] (ii) constituting a "by object" infringement of competition law,[84] (iii) the terms of which were that disguised payments[85] would be made "in exchange for AMCo agreeing not to independently enter the market with its own 10mg hydrocortisone tablets".

(3) The Hydrocortisone Decision says nothing about the nature of the agreement (promise, arrangement, "nod and a wink"), save to say that it was one infringing of competition law. Put another way, the Hydrocortisone Decision (for reasons we have described) is entirely agnostic as to what the arrangement was; and does not exclude the case of there actually being a formal collateral promise. The Hydrocortisone Decision simply infers some kind of arrangement:

> "No party or individual has given a credible explanation for this discount, other than that it was to buy off AMCo's entry. The CMA finds that in exchange AMCo agreed not to enter the market independently with its own 10mg hydrocortisone tablets."

In short, the Hydrocortisone Decision infers an agreement infringing of competition law, but says nothing more than that. It does not exclude any kind of arrangement – whether a promise or something less formal. If and to the extent that the CMA considered on the appeal that the Hydrocortisone Decision was limited in this way, then it erred in understanding its own decision.[86] If

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[82] CMA's Supplemental Submissions/[11(a)].

[83] Hydrocortisone Decision/[1.4(d)]; [6.831] ("…in exchange for AMCo Agreeing…")

[84] Hydrocortisone Decision/[1.4(d)].

[85] This is a term not used in the Hydrocortisone Decision, but which is necessarily implicit in that Decision. See [32] above, quoting from [7(5)(i)] of the Judgment (Cartel Infringements). We are unsure how far the CMA continues to dispute this characterisation of the Hydrocortisone Decision. We would only say that (i) the matter has been decided and (ii) on re-consideration of the CMA's point it remains obviously wrong. The point of the collateral understanding is that a re-sale arrangement was at a deliberate undervalue, and that the only credible explanation for this was that a collateral understanding had been reached.

[86] The CMA's Supplemental Submissions/[11(a)] constitute a correct description of the law. Even so, cartel infringements can and usually do arise out of arrangements that involve elements of deliberation and intention.

anything, the Hydrocortisone Decision was finding a collateral understanding at the higher end of formality.[87]

75. The practical upshot is that when defending the Hydrocortisone Decision, it was open to the CMA to cross-examine on the most aggressive basis – the existence of an actual promise between AMCo and Auden – if it chose to do so. As the Judgment (Cartel Infringements) shows, there was ample material for such a defence of the Decision to be pressed. When we come to consider the cross-examination that was undertaken by the CMA, we will articulate what questions could properly have been put, and which should have been put, but which were not.

(d) The second qualification

76. It was suggested that the reference to Auden supplying AMCo in accordance with the First and Second Written Agreements was correct, "but that description by itself does not capture the point that Auden was thereby *transferring value* to AMCo". As to this:

(1) The Tribunal accepts this point. Clearly, if 10mg hydrocortisone tablets had been supplied at a realistic market price, and not a discounted price, the inference drawn by the CMA could not have been drawn.

(2) The discount was so great that the CMA was able to draw an inference that something more than was articulated in the First and Second Written Agreements was being offered by AMCo and accepted by Auden.[88]

(3) In effect, the price was a disguised payment for something not stipulated in the First and Second Written Agreements.

77. This point underlines the seriousness of the findings in the Hydrocortisone Decision; and makes clear how difficult it would be to maintain the findings in the Hydrocortisone Decision without some allegation of impropriety.

(e) The third qualification

78. The point is made that the 10mg Agreement preceded the First and Second Written Agreements. This is correct, but irrelevant. So far as Mr Sully and Mr Beighton (and AMCo) were concerned, there was no agreement other than that expressed in the First and Second Written Agreements, and they had to be challenged on this. The fact that there may or may not have been an anterior, purely oral, agreement between Waymade and Auden is nothing to the point.

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[87] That is clear from the "value transfer" found and the incomplete articulation of the "arrangement" in formal written contracts. The term "sham" – whatever its technical meaning – was appropriate, for it states exactly what the Decision found: an ostensibly legal written agreement "fronting" an unlawful cartel.

[88] We appreciate that this is the language of formal promise, and that an infringement could exist with a less formal understanding. However, the Hydrocortisone Decision is, as we have said, agnostic about the level of formality of the arrangement.

(f) The fourth qualification

79. The words "even if able to do so" are said to be correct but (i) an unnecessary addition and (ii) "not the way that the CMA characterised the Agreement in the Decision". This is an important point, which it is necessary to address with some care, for it goes to the question of what (over and above the obligations in the First and Second Written Agreements) AMCo was promising in return for the disguised payments under those agreements.

80. The fundamental problem with the CMA's fourth qualification is that it fails to articulate what, according to the CMA, was the content of the collateral promise. It might be asked what the purpose of the collateral understanding could be if AMCo could not actually enter the market. How could AMCo promise something it could not in fact deliver. That would be a naïve point, and one which (rightly) never troubled the CMA: the Hydrocortisone Decision accepts that AMCo was, at the time of the Agreements, in no position to supply the market with its own product.[89] The point of the collateral understanding (assuming it existed) is that Auden was buying off AMCo's potential future entry into the market, and AMCo was agreeing not to enter the market in the future. Assuming the existence of the collateral understanding – which AMCo denied – the question then becomes "Why did the parties settle on a value transfer of 12,000 packs of hydrocortisone at a gross undervalue, and not some other figure?"[90] Assuming precisely the conduct at issue and disputed by the Appellants, Mr Beighton and Mr Sully, the following must be the case:

(1) If there was no risk of future entry on the part of AMCo, then no self-respecting cartelist in the position of Auden would pay anything to avoid future entry.

(2) AMCo had obtained the benefit of a marketing authorisation and that (in the eyes of Auden, and as the CMA found) significantly increased the risk of future entry and (as the Hydrocortisone Decision records) made it worth Auden's while to pay for AMCo's future non-entry.

(3) As the perceived risk of AMCo's future entry increased (hence Mr Beighton's "bluff" as to ability to deliver), so too would Auden's willingness to pay for future non-entry. That could be the explanation for the increased volumes of underpriced hydrocortisone supplied by Auden to AMCo over time. In other words, the scale of the "value transfer" increased over time, and one would expect there to be an explanation for this, which ought to have been put to the relevant person – who was Mr Beighton.

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[89] See Hydrocortisone Decision/6.723*ff* and 6.842*ff*.

[90] This was the final volume agreed in the Second Written Agreement. As can be seen from the Judgment (Cartel Infringements), we attached significance to the fact that Mr Beighton – with apparently no bargaining strength – managed to get Auden to sell more hydrocortisone, not less. We inferred from this precisely the sort of promise here being discussed: a promise not to enter the market in the future, the price of that promise being calibrated by reference to the risk of entry.

(4) Rationally, once AMCo was in a position to supply the market[91] the parties (again, assuming that which was in issue, an unlawful agreement) would have split volumes 50% - 50% but maintained Auden's price.

The qualification "even if able to do so" is thus an important one. The CMA was right to accept that it was correct, but wrong to state that this formed no part of the Decision.

81. We now set out the CMA's qualification in full, and then make a number of points in relation to it:

> "In relation to AMCo agreeing not to enter the market "even if able to do so", that is correct but it is also an unnecessary addition and not the way that the CMA characterised the agreement in the Decision. The reason why it is unnecessary is because the CMA found that AMCo (i) believed it would imminently be in a position to enter the market at the time the second written agreement was concluded;[92] and in any event (ii) had real concrete possibilities of entering the market, such that it was a potential competitor to Auden, throughout its time as a counterparty to the 10mg Agreement…Accordingly, the whole premise of the parties discussions was that AMCo *would* be able to enter, and the parties were focussed on what AMCo would do in *that* scenario…The CMA apprehends that the suggested use of the words "even if it was able to do so" might arise from the Tribunal thinking that the CMA's case at trial was that the parties had agreed that AMCo would not pursue its project with Aesica: if that is the thinking behind the words then it is wrong, as that was never the CMA's case."

We make the following points in regard to this:

(1) The CMA's apprehension regarding the words "even if it was able to do so" is misconceived. There has never been a suggestion – whether in the Decision or in the Tribunal's reasoning in the Judgment (Cartel Infringements) – that a promise to "go slow" with Aesica constituted the collateral understanding. It is true that the CMA cross-examined Ms Lifton on this basis – namely that the speed of developing a drug was slowed due to AMCo's conduct, not Aesica's – presumably to buttress the suggestion that there was a promise not to enter the market. But (i) that was gainsaid by Ms Lifton (to the evident concern of the CMA) and (ii) was expressly found to be not the thinking of AMCo by the Tribunal.[93] The CMA has misread the point of the words "even if able to do so" and – in doing so –again gives rise to concerns on our part that it is unable to say what the content of the collateral understanding was.

(2) The assertion that the CMA found that AMCo "believed it would imminently be in a position to enter the market at the time the second written agreement was concluded" contradicts the Decision and is not a point that the CMA can properly make.

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[91] And ignoring the problems generated by the orphan drug designation.

[92] This is not consistent with the Hydrocortisone Decision and is not a point that the CMA can properly make. We remind ourselves again of the finding in the Decision at Hydrocortisone Decision/6.842 that "AMCo suspended its Aesica development of 10mg hydrocortisone tablets for the UK and only re-kindled the project when it was concerned that the 10mg Agreement with Auden/Actavis might come to an end".

[93] See Judgment (Cartel Infringements)/[66] to [69].

(3) To the contrary, the point of the words "even if it was able to do so" was to identify that AMCo would not enter the market even if it lawfully could by (i) giving notice under the Second Written Agreement and (ii) having an alternative product to provide to the market. This is the critical question: suppose, contrary to what occurred,[94] AMCo had a deliverable product at the time of the First and/or Second Agreements. The question is, what would have happened, in that case?

(4) The effect of the collateral arrangement found by the Decision is that in those circumstances AMCo would not enter the market, and this is what AMCo "promised". We disagree with the CMA in suggesting that these are points that are "unnecessary" to explore. The fact that AMCo hoped/was confident of entering the market is a fact (Mr Beighton described it as a "bluff") which could be deployed to threaten Auden with competitive entry. What matters is what AMCo was undertaking in return for the very significant value that was being transferred to it by Auden; and this was a "promise"[95] not to enter the market.

(5) It is at this point that it becomes clear what the CMA failed to put. Of course, Mr Beighton wanted a rival supply; and of course he bluffed to persuade Mr Patel that such a supply was imminent. But these are, as we have said, background facts. The key question is the one we have framed: was there a promise not to enter the market. The Decision puts it very clearly. Quoting for example from Hydrocortisone Decision/1.4(d):[96]

> "…In that agreement, Auden agreed to make substantial monthly payments to Waymade and AMCo in exchange for **each of Waymade and AMCo agreeing not to enter the market independently** with its own 10mg hydrocortisone tablets…"

82. Having articulated what we find (again) to be the collateral arrangement, it is necessary that we stress certain points that were articulated in the Judgment (Cartel Infringements) and above:

(1) The collateral arrangement, promise, call it what you will, had to cross the line.

(2) The one point that we consider arises unequivocally out of the Hydrocortisone Decision, and from which the CMA cannot resile, is the existence of some form of understanding collateral to the First and Second Written Agreements. As to this:

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[94] What in fact occurred was that Aesica took so long to manufacture the 10mg tablets that other "skinny label" producers entered the market first, and brought competition to the market. The details are set out in Judgment (Abuse of Dominance Infringements), in particular at Annex 3.

[95] Again, we stress that the Hydrocortisone Decision was agnostic as to whether there was a "promise" or something less. We see nothing in the Decision to gainsay such a finding. The CMA was perfectly entitled, when putting its case, to put a lesser "understanding".

[96] Emphasis added in **bold**.

(i) Self-evidently, the CMA cannot successfully defend the Hydrocortisone Decision by reference only to the terms of the First and Second Written Agreements. The CMA has found that these agreements did not infringe the Chapter I prohibition. That is the starting point for these appeals – and is not a finding we are going to look behind or second guess. The CMA has made a decision, and it is not appealed to us.

(ii) The critical question, therefore, is what arrangement – if any – subsisted that went beyond the terms of the First and Second Written Agreements. As we have seen, the Appellants denied any such arrangement existed at all: the burden therefore was on the CMA to show not only that such an arrangement existed, but that it was as had been found in the Hydrocortisone Decision itself.[97]

(3) Unpacking this still further:

(i) It is fundamental to the Chapter I prohibition that unilateral conduct does not constitute an infringement of that prohibition. What needs to be demonstrated is some form of (not necessarily contractual) common understanding.

(ii) Common understanding is a term used in this context, including by us in this judgment. It is important that it is appreciated that independently arrived at understandings, that are common in the sense that they are the same, but involve no kind of communication, do not constitute infringements of competition law.

(iii) During the course of these proceedings, we were presented with an example of exactly such a case where there could be a common understanding without anything crossing the line. Mr Beighton had a clear and sophisticated knowledge of the markets in which he was operating, and he described exactly such a practice in an exchange with the Tribunal. Mr Beighton explained the approach he would have taken if AMCo had been in a position to enter the market for "immediate release" hydrocortisone tablets in competition with Auden. The evidence that we quote did no more than repeat – in terms helpfully responsive to the questions put to him – the content of Beighton 1/85:[98]

> **A: Mr Beighton** [1] …Typically what happens in these circumstances when only one competitor comes to market and this is – remember I am a generics guy so I am used to bringing these products to market. Usually there are – when a patent expires, there are 10 or 12 competitors come out, coming in at the same time and the market immediately shoots down to barely above cost of goods. In a situation

[97] It is trite that the CMA is defending the decision it has made, not advancing a new case to be affirmed on appeal.

[98] Day 3/pp.49 – 52.

like this where only one competitor comes in, clearly depending on the – how rational that competitor is, he or she, me, would have come in with Hydrocortisone, for example, at a discount of whatever I felt was needed to take half of the business. I would not go for more than that for rational reasons, because I did not want to see the competitor backlashing in some way and then ending up in that downward spiral just between the two of us. So I would take 50% at, let us say a 10% or 15% discount. So there is obviously always a danger that Auden McKenzie in this circumstance start fighting with me and we end up just at cost of goods, but I do not think that would have happened. That sort of thing usually happens when the competitor is – does not really care too much or they've got – they have so many other products. They've got junior product manager looking after them. In this case, Mr Patel would have been very eager to have maintained the value in his business, I am sure.

Q: The President [2] So…

A: Mr Beighton [3] So do you see? What I am trying to say is that the price in this case would not have dropped substantially.

Q: The President [4] You would not have had the spiral down to just above cost in your view?

A: Mr Beighton [5] Yes, exactly, and I think it is a proven view with lots of evidence supporting that that does not happen with two competitors.

Q: The President [6] Putting ourselves for a moment, and I appreciate that we are speculating here, in Auden's shoes, they might – if your product entered the market at, say, a 10% to 15% discount on their price, they might have stuck at their existing price.

A: Mr Beighton [7] Yes.

Q: The President [8] Provided they maintain their 50% market share on that basis.

A: Mr Beighton [9] Exactly.

Q: The President [10] But if the nature of the demand was such that a 10% to 15% discount for what is in effect the same product results in a move away from Auden's product to yours, such that you get -- and I am sure you will be very pleased about this – 80/90% rather than 50%, then you would have to reconsider your position as Auden?

A: Mr Beighton [11] He would, though I think that what my position would be, as the competitor, as I have been on a number of occasions, is not to go for -- not to take 80% or 90% of the market, but to take half of it.

Q: The President [12]	Indeed. What I am putting to you is you might have the intention at a 10%/15% discount on the competitor rate to only get 50%, but you cannot be absolutely confident?
A: Mr Beighton [13]	You cannot. With pharmaceutical supply chains you put your forecast in, you say how much stock you have got and you cannot just turn on the tap. So you have to forecast well in advance of how many – how much product you are going to sell, so, effectively, you would only be able to sell 50% of the market.
Q: The President [14]	It is Keynes' point about in the long run we are all dead. You are saying that in the short run the ability to take over the market on your part is going to be constrained by how much you produce.
A: Mr Beighton [15]	Choose to produce.
Q: The President [16]	Choose to produce, indeed.
A: Mr Beighton [17]	Yes.
Q: The President [18]	But, of course, if they're flying off the shelves, then you will choose to produce more after the short term.
A: Mr Beighton [19]	There is a balance, isn't there, because what I do not want to do is to provoke the other party to have this downward spiral.

Thus, Mr Beighton disagreed with the suggestion (put to him by the President) that a rival to an incumbent would seek to contest the entire market, rather than a proportion of it.[99] Supply would be unilaterally limited by the competitor, according to Mr Beighton, in order to avoid a price war and to maintain margin for both the incumbent and the competitor. Thus, a new entrant, able to contest the whole market, would voluntarily contest only half (or, at least, less than the whole) in order to avoid a price war. In effect, the market would be "carved up" in a manner that can scarcely be said to be desirable, but which does not involve an infringement of competition law.

(iv) This underlines the problem with the term "common understanding". In this case, whilst the First and Second Written Agreements are obviously enormously important background facts, and undoubtedly do cross the line, they remain background facts insufficient in themselves to establish the Cartel Infringements found in the Hydrocortisone Decision. Taken into account with <u>other</u> facts, the First and Second Written Agreements may be (and, indeed, in this case are) significant.

[99] Other markets – with a more elastic demand – would be different. Here, however, demand was constrained by medical need as articulated by prescriptions from doctors.

(v) Although the Hydrocortisone Decision did not find that the supplemental agreement so "overwrote" the First and Second Written Agreements as to render their terms entirely irrelevant, the Hydrocortisone Decision did find that the First and Second Written Agreements were supplemented or augmented by an additional arrangement so as to render those agreements materially different from their written terms. The label "sham", used in the Hydrocortisone Decision, was, in these circumstances, appropriate as a sound conclusory statement encapsulating the factual basis for the Cartel Infringements.

83. Mr Jones for the CMA did not disagree with the above description. If and to the extent that the CMA considers or has ever considered that it was possible for it to defend the Decision on the grounds that there was an uncommunicated common understanding, this stance was not open to the CMA:

(1) As we have noted, such an uncommunicated common understanding does not, in our judgement, represent a competition law infringement. The contrary might be arguable, but this has never been argued by the CMA.

(2) The position was not one that was open to the CMA to take. That position had been taken by the CMA in its first Statement of Objections (namely that the First and Second Written Agreements were in and of themselves infringing of competition law) and had been abandoned by the CMA towards the end of its investigation. It was not subsequently open to the CMA, on these appeals, to defend the Hydrocortisone Decision on this ground.

(3) What is more, the CMA never gainsaid or contradicted the Tribunal's and the parties' understanding of the Decision.

84. This has been a long discussion to get to a short conclusion as regards the CMA's fourth qualification. The conclusion is this: the Hydrocortisone Decision found that there was (i) a collateral understanding between Auden and AMCo, that (ii) "crossed the line",[100] whereby (iii) in contradiction to the express evidence of Mr Sully and Mr Beighton, (iv) AMCo promised[101] not to enter the market with its own 10mg hydrocortisone tablet product even if it could do so (which, at the time of the First and Second Written Agreements, it could not). It was this finding that the CMA was obliged to defend by putting it to the witnesses called by the Appellants. The question now turns as to whether that case was put.

[100] The Hydrocortisone Decision did not use this terminology: but it is, we consider, necessarily implicit in the term "common understanding", which the decision does use. We stress the point here because of the ambiguity in the term "common understanding" which (at least for the purposes of this case) needs to be clearly exposed.

[101] This would be the case at its highest: something far less would do, but we consider that it would have been open and proper to the CMA to cross-examine on the basis of a "promise". Equally, however, the CMA could have put some lesser arrangement, crossing the line, but something crossing the line would have to be put.

H. THE CASE THAT WAS PUT BY THE CMA

85. Over the course of oral submissions, Mr Jones for the CMA identified various passages in which it was contended that the case as we have described it was put. We are satisfied that the CMA never put the case as we have identified it. We set out (with commentary) the passages that were relied upon by the CMA, together with our explanation was to why the essential was not put:

Day 2/pp.132ff

Q: Ms Demetriou, KC [1]	So you would have understood that Auden could have supplied these tablets that it was selling to AMCo direct to the wholesalers instead and received a lot more money for them?
A: Mr Beighton [2]	Yes.
Q: Ms Demetriou, KC [3]	So, to put it simply, if I am Amit Patel at Auden and I can either sell a packet of 10mg tablets to AMCo at £1/pack or I can sell them to Alliance at £34/pack, you would imagine you would choose Alliance at £34/pack?
A: Mr Beighton [4]	You would for sure.
Q: Ms Demetriou, KC [4]	So, in actually choosing to sell these volumes to AMCo, that translated, did it not, into a substantial loss of profit for Auden? You understood that?
A: Mr Beighton [5]	Yes
Q: Ms Demetriou, KC [6]	In effect – you understood that the effect of it was that those profits that Auden was losing, it was in effect transferring to AMCo, because it was able to sell the product on at market price to its own customers?
A: Mr Beighton [7]	We were.

86. Pausing there, this is nailing down the transfer of value to AMCo by Auden. Whilst Mr Beighton could not plausibly deny the point – and did not – this is no more than establishing what the First and Second Written Agreements recorded.

The cross-examination continues:

Q: Ms Demetriou, KC [8]	When you first became aware of this arrangement, and in particular the price, did you ask Mr McEwan or Mr Vijay Patel why Auden had been prepared to do the deal?
A: Mr Beighton [9]	I do not actually remember having that conversation. I assume I did and I assume that Vijay probably would have said "I persuaded him to do so". I do not actually specifically remember that conversation.
Q: Ms Demetriou, KC [10]	So, you do not remember a conversation, but you assume that you would have wanted to have understood why Auden was prepared to do this deal?
A: Mr Beighton [11]	I wanted to – I wanted to understand that the deal was going to continue. That was my main…

87. Pausing again, the cross-examination is on the cusp of asking the critical question. Why was the deal done? What was promised? Granted, the point in time under consideration is well-before the Second Written Agreement – at which Mr Beighton achieved the deal that he did – but the line of attack works as well here.

88. In order to make clear what points the CMA could have – and should have – cross-examined on, we set out a few of the questions that could (and should) have been put. They are obviously hypothetical. The answers are the denials that we would have expected Mr Beighton to make, given his witness evidence. We cannot speculate on the answers Mr Beighton might have given had these questions been put, but it seems to us unlikely that he would have responded with the bare and unadorned denial we describe below:

Hypothetical Q [12]	I appreciate that you wanted the deal to continue. But that is not my question. My question is this: On face of the First and Second Written Agreements, AMCo is getting something for nothing. You have accepted that. So, what was AMCo promising in return for the margin that Auden was ceding to AMCo?
Hypothesised A [13]	We do not know what Mr Beighton would have said, but – unless he resiled from his witness statement- it would have been along the lines "AMCo promised nothing. That is what I say in my witness statement".
Hypothetical Q [14]	You have said that Vijay Patel might have claimed that he "persuaded" Auden to do the deal. But what could Vijay Patel have said to persuade Auden? He must have offered something? Don't you agree?
Hypothesised A [15]	No.
Hypothetical Q [16]	I am sorry, Mr Beighton, but that is totally implausible. Are you seriously suggesting to this Tribunal that Mr Patel (of Auden) said "please, do this commercially insane deal…for us", and AmCo just said "OK"? I suggest that Vijay Patel, on the part of AMCo, offered to Auden that AMCo stay out of the market; and that he (Mr Vijay Patel) told you (Mr Beighton) this when you (Mr Beighton) asked him?

89. We are in no doubt that Mr Beighton would have denied these points. What we do not know is what Mr Beighton would have said <u>further</u> to these denials. That is because Mr Beighton was never asked about the collateral understanding.

90. We continue with the cross-examination as it actually ran:

Q: Ms Demetriou, KC [17]	Sorry, you would have wanted to understand that the deal was going to continue?
A: Mr Beighton [18]	Yes.
Q: Ms Demetriou, KC [19]	As part of that, would you not have wanted to understand why Auden was prepared to sell – to enter into such an arrangement where it was losing money and effectively transferring profits to AMCo?

A: Mr Beighton [20]	At the time, I was intrigued by it, but, as I said, I did not delve any further. I accepted it on face value from what Vijay had told me that the deal had been done.[102]
Q: Ms Demetriou, KC [21]	Presumably it would have been obvious to you, would it not, that Auden was only offering this price because [AMCo] had a marketing authorisation for a 10mg product?
A: Mr Beighton [22]	No, I do not think so. I really did not know why he was doing it. There were some strange things going on at that time in the relationship with that – between those two companies. There was also another deal which was going the other way on carbimazole, which looked as if we were kind of doing the same as what Amit Patel was doing with Waymade…

91. Again, at this point the case could have been put.

Hypothetical Q [23]	So, AMCo had a marketing authorisation for 10mg hydrocortisone? Assuming a supply from Aesica, it could enter the market? I put it do you that AMCo was promising <u>not</u> to enter the market – even if it could, as and when that might be – in return for Auden's margin conferred pursuant to the arrangement between Auden and AMCo.[103]

92. We do not know what Mr Beighton would have said in response, because he was not asked this question – nor anything like it. We do not quote further from this passage of cross-examination. There were certainly other opportunities for the CMA's defence as to the collateral arrangement to be put – but those opportunities were not taken.

93. At this stage, the Tribunal was registering a degree of unease about the failure on the part of the CMA to ask questions which the Tribunal considered material. Thus:

Day 2/pp.154 to 155

Q: The President [24]	Are you moving on to a different topic, Ms Demetriou?
A: Ms Demetriou, KC [25]	Well…
Q: The President [26]	I appreciate that is a hard question.
A: Ms Demetriou, KC [27]	It is quite a hard question, because there are lots of…I am not leaving the topic of price totally, no, but I am moving on a bit in the chronology.
Q: The President [28]	It is just the reason I ask is – we have some questions, which I think we ought to put at some point regarding the inquiry or absence of inquiry into the arrangement that existed with Auden and I do not want to cut across any

[102] The question of Auden's reasons for entering the agreements was reverted to on a number of occasions: for example Day 2/pp.152 to 154.

[103] I.e. that set out expressly in the First and Second Written Agreements.

	questions that you have got, so it is a question of when we put those questions.
A: Ms Demetriou, KC [29]	Sir, I think if you would – it is probably a good time to take a break soon anyway, for the shorthand writer. I think, if it is all right, I would quite – I will have in mind that the Tribunal wants to put those questions, but if it is okay for me to carry on with where I am going first.
Q: The President [30]	Of course.
A: Ms Demetriou, KC [31]	Then I think it might be easier for me, if that is alright.
Q: The President [32]	We really do not want to interrupt your flow.

94. The process before this Tribunal is adversarial. The Tribunal does not conduct its own cross-examination of witnesses of fact, and questions of witnesses of fact are limited to the essentially elucidatory. The Tribunal was here intervening on a question that clearly involved putting to Mr Beighton the potentiality of a collateral understanding, and what that understanding might be.

95. Given the denials in Mr Beighton's witness statement, but given also the margin being ceded by Auden to AMCo, which Mr Beighton accepted, these questions might very well involve questions of Mr Beighton's integrity. Any Tribunal would, in such a case, want to tread very carefully, for fear of descending into the arena; and would want the burden of putting the point to lie where it should, on the party cross-examining.

96. Here, Ms Demetriou, KC was, entirely appropriately, warning the Tribunal off taking this course. The Tribunal rose for a shorthand writer break, and Ms Demetriou, KC's cross-examination resumed shortly thereafter. After some questions which are not material, Ms Demetriou, KC proceeded to ask about the level of competition between Auden and AMCo.[104]

Day 2/pp.157ff

Q: Ms Demetriou, KC [33]	So, subject to that point about the orphan designation, which we will come to, you accept that they were competing with Auden? But you say that the type of competition was a bit different because of the orphan designation, but they were competing[105] with one another to supply product to the market?
A: Mr Beighton [34]	Yes. I think – it does skew things a bit having that orphan indication thing, because it means there is not equal competition. Clearly, Auden have a huge advantage in this situation.
Q: Ms Demetriou, KC [35]	Okay. So, let me accept, for the time being – I am going to come on to talk about this – but let us accept for the minute that the competition is not equal. So I am accepting that bit

[104] At the conclusion of Day 2 (Day 2/p.202), the Tribunal reverted again to questions it had, and the point was again adverted to at the beginning of Day 3 (Day 3/p.3).

[105] The transcript says "keeping" not "competing", but that is a mistranscription.

	but, subject to that, you agree that they[106] are competing with Auden?
A: Mr Beighton [36]	Yes, the prescriptions that Alissa and maybe now Advanz are taking and AMCo are taking, they are taking from Auden.
Q: Ms Demetriou, KC [37]	And before the skinny label entrants come on to the market, they are potential competitors with Auden? You would accept that I think it follows?
A: Mr Beighton [38]	For those specific indications, yes.
Q: Ms Demetriou, KC [39]	We will come on to talk about that later?
A: Mr Beighton [40]	Yes, but it is kind of my point. For those indications, those products, that is all those products are able to compete in.
Q: Ms Demetriou, KC [41]	So you are saying that the competition was inhibited because of the skinny label, but they were, nonetheless, competing?
A: Mr Beighton [42]	They were taking…
Q: Ms Demetriou, KC [43]	…market share?...
A: Mr Beighton [44]	…prescriptions from Auden, yes.

97. One can see the importance of these questions. If AMCo did not (because of the limitations caused by the orphan designation) regard itself as Auden's competitor, and if Auden did not regard it as such, then a threat of market entry would (i) not be a meaningful threat to Auden and (ii) not be a threat sensibly capable of being uttered by AMCo.

98. The acceptance, by Mr Beighton, that there was at least a limited competitive relationship between Auden and AMCo was very important. It would form a basis for establishing that AMCo had a credible threat to buttress the value of any promise not to enter the market (i.e. the collateral understanding found in the Decision).

99. But, again, the collateral understanding was not cross-examined upon.

100. Ms Demetriou, KC returned to what Mr Beighton might have understood as Auden's reasons for entering the transaction. This line of questioning (basically, Auden was giving money away) is now distinctly odd: the premiss (but not put) is that Auden was not behaving irrationally, but rationally, because of some kind of collusive arrangement with AMCo (which is precisely what Mr Beighton was denying). Yet the cross-examination, which we set out below, does not come close to this central point.

Day 2/pp.167ff

Q: Ms Demetriou, KC [45]	…Mr Sully, yesterday, speculated as to what might have been in Mr Patel's head, so he had various things which he shared with us. Are you saying that you just did not give it any thought at all?

[106] It is clear from the transcript that counsel is referring to AMCo and all other skinny label competitors.

A: Mr Beighton [46]	I gave it thought, but I did not speculate. I really – this was – I asked Rob to sort out the agreements to make sure that they were legal because, as you say, it just looks a bit odd, but apparently it was.
Q: Ms Demetriou, KC [47]	When you say you gave it thought, what you would have thought at the time was that the reason that Mr Patel was willing to do this was because he was concerned that if he did not, you would enter the market with your own product because you had an MA?
A: Mr Beighton [48]	No, I actually think he was making a terrible mistake, because of the reasons I have just explained. Because, even though we had an MA, we had not launched. We obviously would have launched when we had the MA…

101. This is a critical exchange. Mr Beighton is denying – without the question having been asked – the collateral arrangement that is the foundation of the Hydrocortisone Decision. His evidence is entirely consistent with his witness statement.

102. At this point, having reviewed the transcript with care, we consider the CMA was obliged to put to Mr Beighton that the essence of the collateral understanding was that AMCo would not enter the market even if in a position to launch, and that AMCo's threats about market entry were to bolster the value of that promise.

103. Yet these points were eschewed and not put. Indeed, the notion that AMCo was promising anything appears to have been expressly eschewed.

Day 2/pp.168 to 169

Q: Ms Demetriou, KC [49]	…you would have known, would you not, that the reason he was doing this was because he knew you had an MA and could launch a product?
A: Mr Beighton [50]	No: my point is, why would that make any difference?
Q: Ms Demetriou, KC [51]	Mr Beighton, it would make a difference, would it not, because as soon as there is generic entry into the market, prices would collapse, so this is a way of keeping – for Auden to keep – volumes and to keep prices high?
A: Mr Beighton [52]	Yes, but unless he thinks I am completely bonkers, why would I not launch my product as soon as I got access to 40,000 packs a month? I promise you that the economics of this I would have – are hugely in favour of launching my own product.
Q: Ms Demetriou, KC [53]	Mr Beighton, we will take that in – we will come on to that. I want to take that in sequence, because we will look at whether the economics would have been beneficial for you in launching your own product a little bit later.

104. Again, Mr Beighton is denying the existence of the collateral arrangement in terms, in line with his witness statement. Indeed, he is going further and saying that it would not have been in AMCo's commercial interests to enter into any such arrangement. Those assertions were left to stand unchallenged by the CMA.

105. Ms Demetriou, KC then came to the Second Written Agreement, at which AMCo received even greater volumes of supply, again at a massive discount.

Day 2/pp.171ff

Q: Ms Demetriou, KC [54]	If we then go to the Hydrocortisone Decision/6.552. This says that: "…[Auden] paid Waymade around £70,000 during October 2012, and AMCo around £20.6 million over the three and a half years between 31 October 2012 and 24 June 2016 by way of heavily discounted supplies of 10mg hydrocortisone tablets." That, by any measure, is a very large amount of money, £20.6m, that Auden paid AMCo. You understand that that is the amount that was transferred under this supply deal?
A: Mr Beighton [55]	I understand these numbers. I do not agree with what they are suggesting from this that we were somehow paid.
Q: The President [56]	I think what you are getting is a foretaste for the submissions that counsel will be making in closing. So what is being put is that there was a "pay for delay" and "pay", therefore, is the appropriate verb to use. But I anticipate, and do correct me if I am wrong, I anticipate that you would say "No, you made a profit at Auden's expense", because they sold to you for a low price that which you then sold at a much higher price, which Auden could have done itself.
A: Mr Beighton [57]	Thank you. That is – yes, I would say that.
Q: Ms Demetriou, KC [58]	But your evidence is this, is it: That despite Auden agreeing to forego £20.6m worth of profit, and instead let you earn that money from its product, you did not give any real thought to why they might want to do it. That is your evidence to the Tribunal, is it?
A: Mr Beighton [59]	That is my evidence, and my evidence is also this: Whatever the number we made in profit from Hydrocortisone, would have been hugely exceeded by launching our own product with our own lower costs of goods and our own unlimited supply.

106. Mr Beighton is again asserting that there was nothing more than the express written agreements, and that AMCo was effectively receiving (for nothing) a windfall. At this point, as it seems to us, the CMA was obliged, again, to put its case if it had not already done so.

107. The Hydrocortisone Decision makes the point clear. Ms Demetriou, KC put paragraph 6.552 to Mr Beighton. The next paragraph (Hydrocortisone Decision/6.553) says this:

> "The counter-performance for these payments was that first Waymade and then (post sale of the Amdipharm business) AMCo, agreed with Auden/Actavis that it would not independently enter the market with its own 10mg tablets…thus preserving Auden/Actavis' position as the sole supplier of such tablets. The parties agreed to cooperate rather than to compete, substituting the certainties of cooperation for the uncertainties of competition."

108. There was an obligation to put this case, and it was not put. The furthest the CMA went was to suggest that Mr Beighton knew what was in Auden's mind. Mr Beighton denied this: but the point is not what Mr Beighton understood Auden to be thinking, but what thinking from AMCo crossed the line.

Day 2/pp.173ff

Q: Ms Demetriou, KC [60]	…You understood, did you not, that 6,000 packs, once that had been agreed, it was highly, highly unlikely that Auden was going to sell you more than 6,000, yes?
A: Mr Beighton [61]	Yes, as Mr Sully explained this morning. However, I think on a number of occasions our supply chain team did try to order more, and we got 6,000 packs.
Q: Ms Demetriou, KC [62]	You were not successful?
A: Mr Beighton [63]	We were not successful.
Q: Ms Demetriou, KC [64]	That is because they were making a loss, yes, on those products?
A: Mr Beighton [65]	I do not know why, I really do not know why, but I did not expect to…
Q: Ms Demetriou, KC [66]	Let us think about why you did not expect it. You did not expect it because Auden, in selling you those 6,000 packs for £1/pack, was losing out on a lot of profit it would have made if it had sold them at £34/pack to the market?[107]
A: Mr Beighton [67]	Those things are in Auden's mind. Look, we wanted more than 6,000 packs, as Mr Sully explained this morning. We would have wanted, as I have said earlier, 40,000 packs a month, but this was the amount that we were able to negotiate.
Q: Ms Demetriou, KC [68]	When you say that is in Auden's mind, but I did not know anything about it, I mean, that cannot be right can it, Mr Beighton?
A: Mr Beighton [69]	It is absolutely right, I have no idea what was in that man's mind.
Q: Ms Demetriou, KC [70]	But you would have tried to understand, would you not, because if you are trying to negotiate with someone, and you are asking for more product, you would want to know what is driving them, would you not? You do not negotiate in a vacuum.
A: Mr Beighton [71]	As I have said previously, this particular deal was set up by Vijay. When I came to negotiate the new volumes for the second supply agreement, which he asked for, I asked him for more, and he gave me more.[108]

[107] This is a "re-tread" of points already put.

[108] A similar point is put to Mr Beighton at Day 2/pp.194 and 195. We do not set out these passages any further. These passages show a fundamental misunderstanding about the terms of the Decision, which is not to the effect that AMCo could contest 100% of the market, but that it was promising not to.

109. This exchange is significant for what is not asked. Resorting to a counterfactual as to what could and should have been asked:

Q [72]	Mr Beighton, what could possibly have impelled Auden to give more product at this price to AMCo?
A [73]	We do not know what Mr Beighton would have said.
Q [74]	Mr Beighton, it was you who negotiated the increase in volume up from what was agreed in the First Written Agreement. Up from 6,000 packs/month to 12,000 packs/month? In circumstances where AMCo had previously sought to increase supply volume, and been rebuffed. I put it to you that in order to get this deal you must have offered something in return?[109]
A [75]	We do not know what Mr Beighton would have said.
Q [76]	Mr Beighton, what was offered – and I am suggesting it was offered by you – was an arrangement to stay off the market, even if AMCo could have entered with its own product?
A [77]	We do not know what Mr Beighton would have said.
Q [78]	Or let me suggest this: the arrangement was offered and accepted previously – without your involvement – and when you spoke to Mr Patel, he simply assumed that you were continuing an arrangement that had previously been agreed between Auden and Waymade? Do you accept that that is a far more realistic explanation of the arrangements between Auden and AMCo than the suggestion that Auden were gifting millions of pounds to AMCo?
A [79]	We do not know what Mr Beighton would have said.

110. It is quite possible to assume that Mr Beighton would have denied the substance of these points. But we doubt that he would have uttered a bare denial: and we are in no position to speculate as to what he would have said.

Q: Ms Demetriou, KC [80]	So, the premiss for a negotiation like this, Mr Beighton, is that if Auden agrees to supply AMCo, then AMCo will not enter the market with its own product, yes – that is the premiss of your negotiation? You are doing this instead of selling yourself?
A: Mr Beighton [81]	Yes, but I am not saying that to him.

[109] At Day 3/p.23, Ms Demetriou came close to asking this question:

"So, we are back to where we were before, Mr Beighton, which is how on earth were you able to secure this deal from Auden."

But, as the transcript shows, this was comment and not a question. The comment received no answer from Mr Beighton because none was sought by counsel.

111. The question at [80] is perhaps the closest the CMA gets to putting its case on collateral understanding. This simply underlines the insufficiency of the cross-examination. Mr Beighton – no surprise – denies the premiss ("…I am not saying that to him…"). What needed to be done was to give the Tribunal the material to enable it to say, in due course and if appropriate, that Mr Beighton's denial of the existence of the collateral understanding was not to be believed. The question at [80] represents, at best, the starting point for a cross-examination on this point. Instead, Mr Beighton's denial of the collusion is left to stand, unchallenged by the CMA.

112. Early on in Day 3, Mr Beighton was cross-examined about the extent to which he was bluffing about AMCo's ability to contest the market.

Day 3/p.27ff.

Q: Ms Demetriou, KC [82]	…when you [Mr Beighton] were talking to him [Mr Patel], you were telling him that if you could not get the supply agreement, you would contest the whole market, yes?
A: Mr Beighton [83]	Well…
Q: Ms Demetriou, KC [84]	Even though you described it as a bluff that is what you were saying?
A: Mr Beighton [85]	There was definitely a bluff, because our position was extremely weak. He was very dominant. He had the whole market. In hindsight, actually even at the time, I knew that he did not need to do this deal. It was a very risky situation for us.
Q: Ms Demetriou, KC [86]	So you say it was a bluff. We will come on to that separately.
A: Mr Beighton [87]	Yes, for sure.
Q: Ms Demetriou, KC [88]	But you were telling him that if you did not get this supply deal, you would come on to the market and you could contest 100% of the market, which is what Mr Clark is saying?
A: Mr Beighton [89]	I do not think I ever told him that, but clearly that was the implication of this.
Q: Ms Demetriou, KC [90]	But that is the impression you sought to give him?
A: Mr Beighton [91]	That he thought we had a product that was about to be launched?
Q: Ms Demetriou, KC [92]	Yes, so when you spoke to him on these various calls, you would have been keen to give him the impression that if he did not do the deal, you would come on to the market with your own product and you wanted him to believe you could contest the whole market with that product? That is right, is it not, Mr Beighton?
A: Mr Beighton [93]	I think that we wanted to put ourselves in the best light, and clearly we were not in the best situation.
Q: Ms Demetriou, KC [94]	So, when you say "put yourselves in the best light", you mean you wanted to give him the impression that you could contest the whole market and you were not inhibited by the skinny label, is that what you mean?

A: Mr Beighton [95]	I suppose what we were really trying to do is to give him the impression that we had some alternatives.
Q: Ms Demetriou, KC [96]	The alternative being that you were launching your own product?
A: Mr Beighton [97]	Yes, of course.

113. The problem – forensically – is that it could not be put to Mr Beighton that AMCo was – at the time of the negotiation of the Second Written Agreement and for a time thereafter – actually refraining from competing. AMCo was in no position to enter the market, as the CMA accepted. The question was what AMCo would do – and what it was promising to do – if and when it became possible for it to contest the market.

114. In these circumstances – the value of a promise – the bluff makes a degree of sense. If *A* is soon going to enter the market in competition to *B*, but is not quite able to do so immediately, then a promise not to enter has greater value than if there is no prospect of *A* entering the market or if that prospect was remote or fanciful.

I. THE TRIBUNAL'S QUESTIONS

115. As had been flagged a number of times during the hearing, the Tribunal had questions for Mr Beighton. It must have been clear that these questions concerned the essence of the case that the CMA was putting, and reflected a concern on the Tribunal's part that this case had not been put. We set out the relevant exchanges in full:[110]

Ms Demetriou, KC [1]	…just for the benefit of the Tribunal as well, what I want to do next, I thought this might be an appropriate time, if that suits the Tribunal, but what I was going to go on to next is look at the question of the bluff and whether or not – so this really goes to the question of whether or not there was a product ready to launch. So it is a slightly different area and so I wondered whether this would suit the Tribunal as a time to put your own questions, but I am happy to do it another way if you prefer?
The President [2]	No, we are very happy to proceed as you suggest.

116. Ms Demetriou, KC was thus making clear that her cross-examination of Mr Beighton was at an end so far as "common understanding" was concerned, the part of the CMA's case which had explicitly been denied by Mr Beighton, in circumstances where those denials had not overtly been challenged and certainly no case of dishonesty put.

[110] Transcript Day 3/pp.38ff. That involves repetition of the passage already extensively quoted in paragraph 82(3) above.

117. Mr Beighton was then asked a series of questions, but with the following preliminary from the President [3]:

> "Mr Beighton, I am going to start with a few questions, but I am going to start with an apology, and explanation and a warning. The apology is that you have been taken though the agreement which on Auden's side you have said, variously, was very odd and did not seem to make sense; and I am going to want to ask a few questions about that. But I am very conscious you have been asked a great deal about that and I apologise if I am retreading old ground.
>
> The reason I am doing that is because this is the only time I get the opportunity to enable you to put everything on the record. We are going to be going through what you say and what others say in closing submissions, but you will not be coming back then, so any questions that I have got I want to get sorted out now.
>
> …
>
> So that is why I am asking them. I am also going to ask them in a fairly pointed way, because we know very much what the CMA is going to be saying at the end of this case. You got a hint of it, if you needed it, in the questions yesterday, where the suggestion was that you were being paid by Auden whereas, on the face of it, the transaction was you were simply getting the opportunity to make a large profit at Auden's expense, but that difference in language shows exactly where the battle lines are drawn. And I want to make sure that I have got, on the face of it, all of the material that you can give me to assist us in deciding matters.[111]
>
> So that is where I am coming from.
>
> …
>
> Also, you should bear in mind that you have been making points and counsel have been making points about Auden's stance. We obviously haven't heard yet from Auden on what they say, and I am very conscious that we are part way through the process and all I am trying to do is ensure that when we debate this at the end, we have got as full a record as possible.
>
> So that is why I am asking these questions and I apologise, as I say, for any repetition.
>
> Lastly, the warning. It is simply this: judges need to be very careful when they ask questions of witnesses, because there is an unfortunate, no doubt it is out of politeness, there is an unfortunate tendency to agree with the judge when they put a question. I want to be very clear that – I am sure you will be as courteous as you have been throughout – but if you want to pushback hard, pushback hard. So I am hoping that you will do that.

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[111] This is the essence of the conflict between the findings of the Hydrocortisone Decision and the Appellants' positive defence through Mr Beighton (and Mr Sully). That divergence or conflict was not, in substance, put, as the President appreciated. At least with the benefit of hindsight, the President could and should have avoided the need for both this judgment and the previous Judgment (Cartel Infringements) by sending Mr Beighton out of the witness box, and asking the CMA then and there what exactly was and was not being put, and why. There are all kinds of excuses that can be advanced for this failure: it was early in the appeals; the CMA's counsel had a better understanding of the facts; and it was the CMA's call how it defended the Hydrocortisone Decision. Although the failure to take this course does not affect either the outcome of the Judgment (Cartel Infringements) nor this judgment, it is a matter of regret on the part of the President that this error was made.

I can pretty much predict what your answers are going to be to all of these questions, but I am keen to get your evidence in response to those. So that is a rather long introduction to what I hope will not be too many questions, but that is why I am asking them."

118. We turn to the questions.

Q: The President [4]	I am going back to the agreement which was put into writing later on, the First Written and Second Written Agreements, as we call them. I am interested in the involvement you had and the knowledge you had before the agreements were – the oral agreement was translated into writing. It is the point in time where you were beginning to be involved, so you were less involved than you were later on, but that is the area that I am really focussing on at the moment, just to give you a degree of context. Now, we had an exchange, I think yesterday, where you said, quoting me, I think, "You do not look a gift horse in the mouth". Now, one does not look the gift horse in the mouth when one knows exactly the nature of the horse that one is being gifted.
A: Mr Beighton [5]	True.
Q: The President [6]	So, if you had a written agreement, you would know exactly the obligations on each side. Going to the point in time before the agreement was reduced to writing, would it not have been important for you to understand exactly what Auden were expecting in return?
A: Mr Beighton [7]	Yes.
Q: The President [8]	So, yesterday, you said: "I thought it was very odd, but I did not really enquire any further". Now, my question to you is: why did you not really give either Mr McEwan or someone else an extremely hard time as to the reason for what is, on the face of it, an exceedingly one-sided transaction?
A: Mr Beighton [9]	Yes, and actually overnight, as I have had the chance to think about this again, when we were in the process of acquiring Amdipharm, Mr Sully and I discussed this and discussed a couple of arrangements that seemed to be – that seemed to be a little odd. One of them was carbimazole and the other was hydrocortisone, and there was at the time discussions between Mr Sully and I as to whether these two things might be reciprocal and whether there was an issue with that, which at the time was when we started to talk about making sure that first we would check and, actually, I do remember – not me, but Mr Sully, going through a process with Mr McEwan and maybe – I do not know – but maybe

Mr Patel, Mr Vijay Patel as well, to try and do exactly as you suggest.[112]

It was not done by me, but it was done by Mr Sully.

Which was then when we heard that, from both of – also from the Amdipharm guys – that the deals were not reciprocal, that they were both fine, and they were both OLS[113] agreements. So I think at that stage that was when Mr Sully decided, advised me, that we ought to put these into writing.

But we did not find out at that stage that – we did not get any hint – that this product was being – this hydrocortisone product was being supplied in any agreement not to launch.

Actually, again, my thinking at the time would have been the thinking of any person such as Mr McEwan or Vijay Patel that there would be no point at all in having an agreement that allows us not to launch the product in return for 2,000, 6,000 even 12,000 packs, when the market is 77,000. So I suppose – that kind of logic gave me some comfort.

Q: The President [10] So the comfort you are articulating is that you were getting less from Auden than you ought to get if you had a product to launch that was a rival?

A: Mr Beighton [11] Yes…Because instead of making 6,000 times £38 in sales, I would have made half of 77 times £38. By the way, if you remember, at that point the orphan issue was not known by us, so we assumed that in a normal generics launch, we would achieve 50% of the market, maybe more, maybe a tiny bit less.

…

So, I suppose, to put myself – I have been invited on a number of occasions to put myself into Mr Amit Patel from Auden's mind, and I have tried to do and I just do not get why he would do this, unless there was some, I do not know, somehow Mr Vijay Patel or somebody else in Amdipharm was able to persuade him for some other reasons.

119. There are then some questions on the detail of the arrangements, which it is not necessary to set out. Resuming:[114]

Q: The President [12] The last area that I just want to explore with you is this: you have said that you do not understand what Auden were getting out of this – very odd [arrangement] – we have got all sorts of labels, and I'm sure I will be hearing more about the Auden side in due course.

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[112] Mr Sully was not asked these questions, because a full case along these lines was not put to him.

[113] OLS stands for an own-label supply.

[114] Day 3/pp.47ff.

You also said yesterday that you did not see any particular advantage in the transaction or the unspoken transaction that is being put to you. You said that yesterday, and I think you said the same today, when you indicated that you had a contestable market.

If you had a contestable market of 100%, you would be gunning for half of 77 –

A. Mr Beighton [13] Yes.

Q. The President [14] - - not 12,000. Now I wonder if I could just unpack that a little with you to – just to test what you are saying?

You have said that Auden were, effectively, the only supplier of this type of hydrocortisone tablet, 10mg?

A: Mr Beighton [15] Yes.

Q: The President [16] You were trying, you say, to get something [onto the market][115] that was a rival, but there were various obstacles – and we have heard about those, and we will here more.

Production was one. Orphan product was the other. I understand that.

There is - and this is where I am really going to invite you to pushback – an advantage, is there not, in avoiding competition in that if you have a new entrant into the market, one of the things that happens is that the new entrant differentiates itself, amongst other things, in price – and so your new product would likely be sold at a lower price?

A: Mr Beighton [17] It would have been, yes.

Q: The President [18] Now that would – I will not say "no doubt", but could – have had an effect on Auden's own price, so the price goes down?

A: Mr Beighton [19] Can I…?

Q: The President [20] Please…

A: Mr Beighton [21] Yes. Typically, what happens in these circumstances, when only one competitor comes to market, and this is – remember, I am a generics guy, so I am used to bringing these products to market. Usually, there are – when a patent expires – there are 10 or 12 competitors come out, coming in at the same time, and the market immediately shoots down to barely above cost of goods.

In a situation like this, where only one competitor comes in, clearly depending on the – how rational that competitor is – he or see, me, would have come in with hydrocortisone, for example, at a discount of whatever I felt was needed to take half of the business. I would not go for more than that, for rational reasons, because I did not want to see the competitor backlashing in some way and then ending up in

[115] We are correcting here for a transcription error.

that downward spiral just between the two of us. So I would take 50% at, let us say, a 10% or 15% discount.

So there is obviously always a danger that Auden McKenzie in this circumstance start fighting with me, and we end up just at cost of goods, but I do not think that would have happened.

That sort of thing usually happens when the competitor is – does not really care too much or they've got – they have so many other products. They've got junior product manager looking after them? In this case, Mr Patel would have been very eager to have maintained the value in his business, I am sure.

Q: The President [22] So…?

A: Mr Beighton [23] So do you see? What I am trying to say is that the price in this case would not have dropped substantially.

Q: The President [24] You would not have had the spiral down to just above cost, in your view?

A: Mr Beighton [25] Yes, exactly, and I think it is a proven view, with lots of evidence supporting that does not happen with two competitors.

Q: The President [26] Putting, ourselves, for a moment, and I appreciate that we are speculating here, in Auden's shoes, they might – if your product entered the market at, say, a 10% to 15% discount on their price, they might have stuck at their existing price?

A: Mr Beighton [27] Yes.

Q: The President [28] Provided they maintain their 50% market share on that basis?

A: Mr Beighton [29] Exactly.

Q: The President [30] But if the nature of the demand was such that a 10% to 15% discount for what was in effect the same product results in a move away from Auden's product to yours, such that you get – and I am sure you will be very pleased about this – 80% to 90% rather than 50%, then you would have to reconsider your position as Auden?

A: Mr Beighton [31] He would, though I think that what my position would be , as the competitor, as I have been on a number of occasions, is not to go for – not to take 80% or 90% of the market, but to take half of it.

Q: The President [32] Indeed. What I am putting to you, is you might have the intention at a 10% to 15% discount on the competitor rate to only get 50%, but you cannot be absolutely confident?

A: Mr Beighton [33] You cannot. With pharmaceutical supply chains you put your forecast in, you say how much stock you have got, and you cannot just turn on the tap. So you have to forecast well in advance how many – how much product you are going to sell, so, effectively, you would only be able to sell 50% of the market.

Q: The President [34] It is Keynes' point about in the long run we are all dead. You are saying that in the short run, the ability to take over

the market on your part is going to be constrained by how much you produce?

A: Mr Beighton [35] Choose to produce.

Q: The President [36] Choose to produce, indeed.

…

But, of course, if they're flying off the shelves, then you will choose to produce more after the short term?

A: Mr Beighton [37] There is a balance, isn't there, because what I do not want to do is to provoke the other party to have this downward spiral.

Q: The President [38] Yes, I see, so you might voluntarily limit supplies in order to avoid provoking Auden from entering into a price death spiral?

A: Mr Beighton [39] Exactly.

Q: The President [40] Which is not in your interests?

A: Mr Beighton [41] Exactly.

Q: The President [42] That, I think, is in part an answer to where I was coming from as one of the advantages that Auden might see of this arrangement, which is that one advantage of supplying their product to you at an effectively nominal price was to ensure that you stayed out so that the price would remain at the level it was?

A: Mr Beighton [43] I suppose so.

Q: The President [44] But what you are saying is that actually the dynamic is such that they would lose market share, but that they would not necessarily lose very much in terms of headline price?

A: Mr Beighton [45] Yes, it was – especially as it was such a measly amount that I was getting. Maybe if he had sold me 50% of the market, then I may have thought twice, subject to my legal colleagues advising me, but you see what I mean.

The chances of him having a death wish – I do not know, I do not know what he would have done. I have not seen but I assume he would not have ended up in a price war with him.

Q: The President [46] That actually brings me very nicely to the last related area, which is this point that you are making, that you only got, well, 12,000 at the end?

A: Mr Beighton [47] At the end.

Q: The President [48] Now, I entirely understand that if you had a product ready to go, if you were reaching an agreement to keep the product off the market, assuming all things being equal – the products are identical, in other words, delete orphan status, delete production problems – you have got something ready to go, the deal, and I know your answer to this question, but the deal would be 50% / 50% if you had a product to go. In other words, I will (Auden) provide you on this arrangement with 50%, you stay out of the market?

A: Mr Beighton [49] Yes.

Q: The President [50] And we are all happy because we are all selling at the maximum price, and we are both…

A: Mr Beighton [51] **Although I am not a lawyer, I know for sure that is illegal.**[116]

Q: The President [52] Yes. So your point is, well, the 12,000 does not reflect this rational, if illegal, agreement that I am postulating?

A: Mr Beighton [53] Not to me, no.

[…]

Q: The President [54] What I am putting to you is how far is the 12,000 or 6,000 or 2,000 simply the reflection of a negotiated outcome between two apparent competitors who are carving up the market by reference to the commonly agreed probability that you are going to have a rival product to go in there, and that feeds into the point about bluff that we were talking about earlier. You see where I am coming from?

A: Mr Beighton [55] I do, and I think, what was happening to me in, I now know, remember, have been reminded of, is the beginning of 2014, was **I was starting to think and feel quite different to what I was feeling about this 6,000, because at that point it was really clear to me that it was no question, if we got our product, we'd launch it.**

As we started to get into these slightly more murky areas of – forget the production issues, I mean, we had those and you will hear about those later, but they were immensely frustrating, but the thing that started to become apparent was that that 50% / 50% scenario was not as likely as it would have been when I thought I'd just got a normal generic.

So that made me start to feel, well, you know, maybe until we resolve this issue of – because, as you heard from Mr Sully, this was my view as well, it seemed bonkers that we could not launch what effectively was essentially the same product because of something, not that Auden McKenzie had done with their product, but anyway, they were the rules, but we felt that somehow those rules should be changed.

But I was at that point being constrained by them and, therefore, the 12,000 seemed a little bit more attractive to me than – starting to look even more attractive than launching my own product.

Q: The President [56] I appreciate that we are moving into the realms of what is for you and also for me speculation, but does that answer give us some insight into why this was not an odd or nonsensical bargain on the part of Auden?

A: Mr Beighton [57] **I guess at that stage it was starting to look more sensible for him, but the piece that is missing is that there was not a commitment from me not to launch our product**

[116] The **bold** is our emphasis, both here and subsequently in this passage.

under any circumstances and we for sure would have done. I never, even in the early days, I never said to him that we would not launch and actually apart from the threatening behaviour, there was definitely never a kind of *quid pro quo* that has been alleged by the CMA. There just was not.

So I guess it was starting to look a little bit, but it was still starting to look a little bit more sensible from his point of view at that stage, yes.

Q: The President [58] In other words, if I can put it in black and white, so it is on the transcript, and you have a chance to push back. The 2,000 or 6,000 or 12,000 increase in product supplied to you was a reflection of the bargained outcome, and I appreciate you are going to deny this, was a reflection of the bargained outcome of how likely it was that you had the capacity to bring the product on the market and they wanted to buy you off.

In other words, if it is not going to happen…I mean, if I (for instance) were going to say "I am going to bring a rival into the market", and everyone knows I cannot do it, so you are not going to pay me anything, but if you are getting closer to the ability to introduce a rival, then you would pay more in order to obtain the assurance of the status quo continuing,

A: Mr Beighton [59] Yes. I suppose that what was developing could have been developed in Mr Patel's head as he started to realise that this orphan thing was even more critical, that he actually could do a deal with us that was not illegal, that was as you saw, the written agreement, but he is somehow, kind of – he can see a sense in us doing that deal as well.

Q: The President [60] That is what I am getting at. Mr Beighton, let me be clear, I am asking these hypotheticals because at some point after you have long departed this witness box and when we are writing our judgment, **we are going to have to work out who is right, whether the agreement as reduced to writing said it all or whether there was some sort of side agreement there.**

…

One of the things lawyers ask themselves is, why is it that a deal was transacted in a certain way, rather than another way. So what I am trying to do is articulate what might have been going through Auden's mind in order to explain what is otherwise a very odd transaction.

I quite appreciate that your evidence is that there was absolutely no promise going from you to Auden and that is something that I have got well on board, and we will obviously evaluate.

But granted that it would be an illegal deal, it does work in terms of rationality that you are getting more product at a lower price reflective of the probability of your being able to come into the market, the implied understanding being that you do not go in the market even if you can?

A: Mr Beighton [61]	Yes, I can see what you are getting at there. I guess that the difference is that we never stopped wanting to come into the market even though we were mightily relieved when the 12,000 pack second agreement was signed and the 12,000 packs started coming, because we continued to have doubts as to – well, not just doubts. We were told, as you heard from Mr Sully, that we were told by our customers they did not want it.
Q: The President [62]	So, I think what you are saying, and this is why I suspect the evidence of other witnesses may matter, what we ought to be paying quite a lot of regard to are whether the obstacles to your bringing a product to market were real obstacles or whether they were just…
A: Mr Beighton [63]	…Somehow fabricated…
Q: The President [64]	…fabricated…
A: Mr Beighton [65]	…by us.

120. Although there were other questions, it is appropriate to end the quotation of this exchange at this point. There was then a short (transcriber) break;[117] and Ms Demetriou, KC had the opportunity of asking further questions herself.[118] However, although further questions were asked, none took the point here under consideration any further.

121. The following points need to be made:

(1) The Tribunal waited with its questions until that part of Ms Demetriou, KC's cross-examination on this point had concluded. The Tribunal had no desire to interfere in counsel's cross-examination. Equally, Ms Demetriou, KC was afforded the opportunity to ask questions arising out of the Tribunal's questions.

(2) The Tribunal was conscious that it could not "descend into the arena" and actually advance a case of dishonesty against Mr Beighton, in the manner that the CMA could have done had it chosen to do so. However, it was possible to explore with Mr Beighton the case that was being run by the CMA and the Appellants' response to that case. The position, as we have set it out in summary form above, was as follows:

(i) The issue in dispute was whether the First and Second Written Agreements stated the complete position as between Auden and AMCo, or whether there was an additional collateral understanding. The Hydrocortisone Decision found, in terms, that such a collateral understanding existed; and Mr Beighton (together with Mr Sully) denied this explicitly.

[117] Day 3/p.61.

[118] Day 3/pp.61*ff*.

(ii) It was common ground between all, that if Mr Beighton and Mr Sully were right, and there was no collateral arrangement, then the entire Hydrocortisone Decision must fail. In other words, this was the critical point in the entire proceedings regarding the Cartel Infringements.

(iii) The difficulty faced by the CMA was that there was no conduct, independent of the parties' intentions, capable of shedding light on those intentions. The fact was – despite the CMA's cross-examination of Ms Lifton – that the CMA could not show that AMCo had been deliberately "going slow" in developing a rivalrous product. Had that point been made good – if it could have been shown that AMCo had (for no good reason) been delaying going to market, then that would have been evidence in support of the Hydrocortisone Decision. In the event, the evidence went against the CMA on this point.[119]

(iv) In terms of the external conduct of AMCo, it was agnostic between the positions advanced by the parties. AMCo's position was that it needed the First and the Second Written Agreements in order to continue supplying the market with a product it could not otherwise provide. The CMA's position was that this was, indeed, the case, but that when and if AMCo was in a position to supply the market, it nevertheless would not do so. That is the essence of the collateral understanding, and that is point that the President explored with Mr Beighton.

(v) Mr Beighton's answer was that the arrangement suggested by the CMA was entirely irrational on the part of AMCo and that Auden's conduct was inexplicable. Mr Beighton could say very little on the latter point – and made that clear in his evidence. He did say a great deal about the irrationality of the collateral understanding alleged against AMCo. In this regard, his point was that once AMCo had a deliverable product, it would enter the market (hence, no collateral understanding) and contest 50% of it, at a slight (10% to 15%) discount to Auden's price. Auden would (without any collusion between Auden and AMCo) see exactly what AMCo was doing, there would be no price war: both Auden and AMCo would preserve their margins against the prevailing (very high) market price. This is not very attractive conduct, but – for the reasons we have given, assuming no understanding between AMCo and Auden in this regard – it is not an infringement of competition law; indeed, it is not even something that the CMA came close to alleging was an infringement of competition law.[120]

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[119] For reasons given in the Judgment (Cartel Infringements), we do not think that it would have been rational for AMCo to "go slow", even if the collateral understanding (as found by the Decision) had existed. In order to pressure Auden, AMCo would have needed its own product to threaten to bring to market. Thus, the CMA's cross-examination of Ms Lifton is understandable, but its failure was not nearly as significant as the CMA appears to have thought.

[120] In this, the CMA was absolutely right. There is no such finding in the Hydrocortisone Decision, even if the point was an arguable one (on which we heard no submissions). For present purposes, our understanding of the law and of the position of all of the parties before us is that they did not gainsay this legal position.

(3) The Tribunal's questions enabled Mr Beighton to put AMCo's position with considerable clarity. If AMCo's position was right, then there could be no collateral understanding of the sort alleged by the CMA. AMCo's position was that it was unable to deliver its own product to the market (common ground), but that the moment it could do so, it would.

(4) There is thus, on the record, an articulated, reasoned, denial by the witness of the collateral understanding. The CMA at no time accepted Mr Beighton's version of events. To do so would be to concede that the Hydrocortisone Decision was wrong and needed to be set aside. But it was not open to the CMA to decline to accept Mr Beighton's evidence and assert that it was not to be believed until after Mr Beighton had left the witness box. Mr Beighton's rationalisation for AMCo's market entry as soon as AMCo had product to supply needed to be challenged if the CMA was ultimately to say that that evidence was not to be accepted. The CMA did not do so.

122. We do not see how the CMA's case could have been put without either suggesting:

(1) That Mr Beighton was so uninvolved in the process that an infringement of competition law took place under his nose (a case that could be advanced without an assertion of dishonesty); or

(2) That Mr Beighton was lying when he said that AMCo would enter the market the moment it had a deliverable product. We do not see how Mr Beighton's assertions to this effect could be contradicted without putting dishonesty. Mr Beighton's answers were too unequivocal for this. Dishonesty forms no part of an infringement of the Chapter I prohibition, which is a "strict liability" tort. But that is not the point. The point is that the denial of the collateral understanding by Mr Beighton needed to be challenged in cross-examination.

123. With hindsight, a great deal of subsequent effort could have been avoided had the President, at this point, adjourned the evidence of Mr Beighton, so as to enable clarity to be obtained from the CMA as to precisely the nature of the case the CMA were running – and how they intended to put that case to Mr Beighton:

(1) The Tribunal – and the Appellants – had articulated concerns and the matter should have been brought to a head at this point. Such a course might have avoided two lengthy decisions on the part of the Tribunal, and enabled a single judgment (dealing with the Cartel Infringements and, so far as necessary, the Due Process Question).

(2) However, to be clear, we do not consider that this could have avoided the Due Process Question. All it would have done is bring matters to a head sooner, rather than later.

(3) The CMA itself had indicated no concerns in light of the issues articulated by the Appellants and the Tribunal; and the hearing was in its very early stages (the evidence was still being adduced). In the event, therefore, the Tribunal did not take this course, and the hearing proceeded.

Whilst, therefore, matters could, procedurally, have been handled differently, and probably better, nothing would have affected the truly fundamental point: namely that the findings in the Hydrocortisone Decision needed to be put to the witnesses called for that specific purpose.

124. In the event, matters did not come to a head until the closing submissions.

J. CLOSING SUBMISSIONS

(1) Written submissions

125. The CMA submitted substantial written closing submissions. Those submissions rightly maintained the case that had been articulated in the Decision, namely that both AMCo and (prior to AMCo, Waymade) had – in exchange for substantial value provided by Auden to Waymade/AMCo – agreed not to enter the market independently with their own 10mg hydrocortisone product.[121] The problem, as we have described, is that this case was not put.

126. The relevant parts of the closing say this:

> "16. The CMA found in the Decision that:
>
> (a) Waymade/AMCo were potential competitors to Auden in the market for the supply of 10mg hydrocortisone;
>
> (b) In October 2012, Auden (through Amit Patel) and Waymade (through Brian McEwan) agreed that Auden would supply Waymade with a specified volume of 10mg hydrocortisone (2,000 packs/month) at a 97% discount to the prevailing market price (being the price at which Auden had supplied Waymade from July 2011 to September 2012). This constituted a substantial transfer of value from Auden to Waymade;
>
> (c) In exchange, Waymade agreed that it would not enter the market independently with its own 10mg product;
>
> (d) On 31 October 2012, the Amdipharm group was sold to Cinven and Waymade's 10mg marketing authorisation, 10mg product development and relevant staff, including Brian McEwan, became part of the AMCo undertaking;
>
> (e) From 31 October until 24 June 2016, the agreement continued with AMCo replacing Waymade as Auden's counterparty;
>
> (f) AMCo continued to receive substantial monthly payments from Auden/Actavis; initially through transfer of the profits on 2,000 packs/month at £1/pack; later 6,000 packs at £1; and finally 12,000 packs at £1.78/pack;

[121] CMA's Written Closing Submissions at paragraphs 16, in particular 16(b), (c) and (e).

(g) Auden and AMCo shared a common understanding during that period that, in exchange for the value transfers, AMCo would not enter the market with its own product.

17. That common understanding is referred to in the Decision as the "10mg Agreement".

18. The CMA found in the Decision that the 10mg Agreement had as its object the prevention, restriction or distortion of competition, thereby infringing the Chapter I prohibition. In particular, the 10mg Agreement was a market exclusion agreement. It aimed to prevent or delay the arrival of competition and the consequent likely price falls and to preserve Auden/Actavis's monopoly position and associated ability profitably to charge very high (and increasing) prices. A portion of the resulting profits was shared with Waymade and AMCo.

19. The CMA relies on the entirety of its Decision in defending the appeals against this finding of infringement. The CMA does not need to prove its case all over again. As the Court of Appeal held in *Phenytoin*, "the appeal is not a de novo hearing but takes the decision as its starting, middle and end point. Under section 46 CA 1998 the appeal is 'against, or with respect to' the decision and included 'whether' there has been an infringement. That focus on the impugned decision is reflected in the procedural rules of the Tribunal. The appellant must identify the decision under appeal and set out why it is in error".

20. Accordingly, in defending these appeals, the CMA relies on the evidence and findings set out in the Decision and also on fresh evidence that the Tribunal has heard during the trial. The types of evidence relied on by the CMA can be broken down as follows:

(a) The (uncontested) evidence relating to the value transfers from Auden/Actavis to Waymade/AMCo and the inference to be drawn from those value transfers, in the absence of any other plausible explanation, that they were in exchange for Waymade/AMCo foregoing independent market entry;

(b) The contemporaneous documents referred to in the Decision, the most important of which were put to the witnesses of fact in the course of cross-examination;

(c) Non-contemporaneous documents referred to in the Decision, e.g. section 26 responses;

(d) Evidence obtained by the CMA in compulsory interviews which is relied on in the Decision;

(e) Evidence from the witnesses of fact who were called by Advanz in the trial."

127. This is a good articulation of the essence of the Hydrocortisone Decision, the relevant material and the process that took place before the Tribunal on the hearing of the appeals. It correctly stresses the fundamental importance of the collateral understanding ("Auden and AMCo shared a common understanding during that period that, in exchange for the value transfers, AMCo would not enter the market with its own product").

128. The CMA's failure to cross-examine in this regard is, therefore, all the more critical to a fair process. Paragraph 20(a) – quoted above – refers to the "(uncontested) evidence relating to the value transfers from Auden/Actavis to Waymade/AMCo and the inference to be drawn from those value transfers". Whilst the monetary benefit derived by AMCo was uncontested (although the label "value transfer" was not accepted), the inference to be drawn from that "value transfer" was not merely in dispute, but denied in the most fundamental way.

129. The consequences of the failure to cross-examine became apparent during the course of oral closings.

(2) Oral submissions

130. As is clear from the CMA's written closing submissions, the CMA was defending the findings of the Hydrocortisone Decision, and specifically the collateral understanding found in the Hydrocortisone Decision:

(1) Auden would supply AMCo with 10mg hydrocortisone tablets "on terms that amounted to monthly payments (or "value transfers")" to AMCo. As we have noted, according to the express terms of the First and Second Written Agreements, AMCo (as the recipient of the tablets) was in fact contractually obliged to pay Auden (as supplier) – and did so. The "value transfer" arose because the price paid by AMCo to Auden was so low, compared to the price AMCo could obtain by selling the tablets into the market, that although AMCo was nominally the payor and Auden the payee, the mismatch between price paid by AMCo and value received by AMCo amounted to a "value transfer" from Auden to AMCo.

(2) The Hydrocortisone Decision rightly described this arrangement as a "sham". Thus – by way of example – Hydrocortisone Decision/6.884 states:[122]

> "The CMA **finds** that the 20mg and **10mg supply agreements** were a **sham**: their **true purpose** was for Auden/Actavis to make substantial monthly payments to Waymade and AMCo."

It may be that this finding falls short of an express finding of dishonesty: but it is a close-run thing, for the substance of the finding is that (contrary to the express terms of the First and Second Written Agreements) AMCo was not paying Auden for hydrocortisone tablets, but Auden was in undercharging for the hydrocortisone tablets paying AMCo for something nowhere expressed in the agreements. Although Mr Beighton accepted that AMCo got an inexplicably good deal, he (as did the Appellants) denied all other aspects of the so-called "value transfer". As we have described, this case was not put in cross-examination.

[122] Emphasis added.

(3) Naturally, the benefit found to have been received by Auden in return for this "value transfer" was also denied. The Hydrocortisone Decision found that in exchange for these payments (from Auden to AMCo) AMCo would not enter the market independently with its own 10mg hydrocortisone tablets. In short, the value transfer was a payment by Auden to AMCo to induce AMCo to stay out of the market. Again, as we have described, this case was not put in cross-examination.

131. We consider that had the CMA put its case to Mr Beighton, it would – inevitably – have had to allege dishonesty on the part of Mr Beighton. That much is clear from the following passages in Mr Beighton's evidence (both written and oral):

(1) Mr Beighton denied the existence of the collateral understanding in terms in his written evidence: "…there was not a 10mg Agreement"[123] and orally: paragraph 78 [59], [69] and paragraph 79 [9], [49]ff.

(2) Mr Beighton repeatedly asserted that AMCo would enter the market as soon as it could. See the exchanges at paragraph 78 [52] (an answer which was not engaged with) and paragraph 79 [11], [19]ff, [43], [55], [59].

(3) Mr Beighton denied the existence of a value transfer in the sense of a sham payment from Auden to AMCo. See the exchanges at paragraph 78 [55], [57], [65].

132. The CMA's case as to why these answers were incorrect was never put. The assertions were simply allowed to stand, unchallenged, during the course of a lengthy examination. How they might have been challenged was a matter for the CMA. The essential point was that Mr Beighton, in particular, was saying in terms that the inference of a collateral understanding, found in the Hydrocortisone Decision, was wrong. The CMA had to go beyond merely noting a difference of view: it had to provide the Tribunal with evidence that the inference found in the Hydrocortisone Decision was to be preferred over Mr Beighton's version of events. That is the absolute minimum that the Tribunal was entitled to if it was fairly to uphold the Hydrocortisone Decision in the face of the positive contrary case advanced by the Appellants.

133. Had such a challenge been made, then we have some difficulty in understanding how the CMA could have said anything other than that Mr Beighton's stated intention that AMCo would enter the market as soon as it had a deliverable product was anything other than a lie. Mr Beighton was positively asserting his belief in a state of affairs fundamentally inconsistent with the Hydrocortisone Decision. The only reason, we find, that an allegation of dishonesty was not made, was because the topic was not cross-examined upon. Mr Beighton never had any chance to refute the implicit allegation of dishonesty.

134. In short, the CMA never put its case against the positive case advanced by the Appellants. The sort of "frontal" attack that ought to have been made is well-illustrated

[123] See paragraph 24(2)(i) above.

– albeit with one major qualification - in parts of the Advanz Appellants' written submissions for this hearing, which we set out below.[124] The major qualification is this. Establishing dishonesty on the part of Mr Beighton was not a necessary or essential part of the defence of the Hydrocortisone Decision. What needed to be defended was the finding that the collateral understanding existed. That defence needed to deal with Mr Beighton's evidence that the collateral understanding, to his knowledge, did not exist, not least because AMCo intended (in complete contradiction to the collateral understanding) to enter the market as soon as it could. That evidence had to be challenged. In particular:

(1) It had to be put to Mr Beighton that his assertion that AMCo would enter the market as soon as it could was untrue.

(2) It had to be put to Mr Beighton that his assertion of no collateral understanding at all was untrue.

That could only be done by a detailed parsing in cross-examination of Mr Beighton's evidence. We find it difficult to envisage how such a cross-examination could have been conduct without making very serious allegations against Mr Beighton; but if such a course were possible consistent with putting the defence fairly then we absolutely accept that dishonesty did not have to be put. On this basis, we turn to what was written by Advanz:

"28. In the cross-examination of Mr Beighton (and Mr Sully) it was neither suggested that the written supply agreements were a sham nor that they were negotiated with a dishonest intent to deceive others into believing that they were genuine and *bona fide* agreements. Indeed, during the trial the CMA expressly disavowed the notion that the two written agreements were a sham, fictitious and dishonestly put together. The CMA expressly submitted that neither Mr Sully nor anybody else at Advanz set up the written supply agreements "*deliberately to deceive anyone*". The CMA at various stages submitted as follows:

> "Our case, just to be clear, is that we are not alleging a separate dishonest rider or a separate dishonest side agreement."
>
> "We are not saying that these agreements were deceptively entered into."
>
> "... the CMA is not inviting the Tribunal […] to find that Mr Sully, or anybody else, set up the written supply agreements deliberately to deceive anyone."
>
> "No, sir, it is not dishonesty. It does not have to be dishonesty and the CMA has not found dishonesty."
>
> "We say we can take dishonesty off the table." "Again, I reiterate we are not asking you to find dishonesty."

[124] The references were supported by footnotes, which we have omitted.

> "… in this appeal we are not alleging any dishonesty."
>
> "… the CMA did not allege dishonesty at the time that the agreement was formed."
>
> "… the way that the appellants have sought to characterise the CMA's case is […] it is a sham agreement, there is a side agreement that was covered up, and that simply is not the CMA's case."
>
> "Our case is that the premise on which the parties entered into the written agreement was the premise that AMCo would not enter the market, which is a bit different to saying that they approached the written agreement in a conspiratorial manner so as to hide the true state of affairs."

29. The Tribunal rightly considers in the Closed Judgment at [153(1)] that the CMA's position is "*troubling*".

30. First, it is troubling because the CMA has deliberately decided not to defend a key factual basis of the Hydrocortisone Decision, that the supply agreements were "*sham*" agreements that hid the true purpose of the arrangement which, so the CMA found, was for "*Auden/Actavis to pay AMCo, rather than simply to give it product to sell as in a genuine bone fide distribution deal*." (Closed Judgment at 24(4)]). As the President observed at the trial, instead of the CMA defending key parts of their existing case "yes, *they have run away from it*."

31. As Green LJ stated in *Flynn & Pfizer v. CMA* an appeal under section 46 CA 1998 is "*against or with respect to*" the Decision and any appeal "*takes the Decision as its starting, middle and end point.*" Advanz agrees with the Tribunal's conclusion in the Closed Judgment at [15(5)] that the express finding of a sham "*cannot be disavowed on appeal by the CMA, because it represents the conclusion reached (in this regard) by the Hydrocortisone Decision.*" In principle, a failure to defend such an important and serious factual foundation should lead to a successful appeal. Any claimant pleading a claim for deceit should expect to lose if the plea is then disavowed at trial. The CMA should not be in any more favourable position.

32. Second, it is troubling because the CMA's deliberate decision to disavow "sham" means that the CMA did not put its existing case on "sham" and the intertwined issues of honesty and dishonesty to the factual witnesses called by Advanz. This is important because, as the Tribunal says in the Closed Judgment at [24(5)], "*issues of honesty and dishonesty are so inextricably linked to the findings that <u>were</u> made in the Hydrocortisone Decision that the CMA's case on infringement would need to be put with some clarity to any witness called by the Appellants who could assist on the point*." The troubling issue is not that "sham" and "dishonesty" were not put with some clarity, but that they were not put at all. They were not put (indeed they were disavowed) in circumstances where the serious allegation of a dishonest sham involved serious consequences. For example:

- At [76] of Mr Beighton's witness statement (his evidence in chief) he stated: "*The unequivocal advice from Pinsent Masons was that we could put a further supply agreement in place and we instructed Pinsent Masons to assist AMCo in the negotiations and approval, from a competition law compliance perspective, of that agreement*." Yet, it was never suggested to Mr Beighton under cross-examination

that all this was a sham from his perspective designed dishonestly to hide an agreement that was not competition law compliant. Indeed, any notion of a sham was ultimately disavowed by the CMA and the clear implication is that the CMA accepted his evidence that the agreements were not a sham.

- On 6 June 2014, Mr Beighton had a telephone call with the company's external solicitors, Pinsent Masons, who were advising on the terms of the second agreement. Also on the call were Mr Sully, Auden's external solicitors who were advising Auden on the terms of the second supply agreement and Mr Patel. The concern had been that Auden were trying to prevent AMCo from launching its own product. The presence of Advanz's external solicitor on the call with Auden was to act as a "*safeguard*" to ensure that the company was competition law compliant. Yet, any finding that Mr Beighton was negotiating a dishonest sham agreement means that he was deceiving his General Counsel, the company's own external solicitors and Auden's solicitors. The meeting would have been a charade because he would have already agreed with Mr Patel that AMCo would not launch an independent product which agreement would not be competition law compliant. Despite being taken to the email evidencing the nature of the call it was never suggested to Mr Beighton under cross-examination that he was discussing a sham agreement or otherwise deceiving his General Counsel or the external legal advisers.

- On 18 June 2014, Mr Sully emailed Mr Beighton stating that he was concerned that Auden was being "*very cute*" about tying up AMCo's ability to launch its own product. Mr Sully stated that he did not trust them and asked Mr Beighton to agree a form of wording to prevent Auden from restricting AMCo in this way. Mr Sully was clearly of the view (as found by the Tribunal) that the proposed second supply agreement recorded the whole bargain. On 19 June 2014, Mr Beighton told Mr Sully that he was "*fine*" with Mr Sully's proposed wording. Yet any finding that Mr Beighton was negotiating a dishonest sham agreement behind Mr Sully's back means that he was deceiving his own General Counsel since on the CMA's case he would already have agreed with Mr Patel of Auden that AMCo would not launch its own product. However, under cross-examination Mr Beighton was never challenged on the lack of *bona fides* in his response to AMCo's General Counsel.

- On 28 June 2014, following discussions with AMCo's senior management, Mr Beighton sent an email to his staff and managers explaining that the reason for not launching AMCo's own product was the inferiority of the product due to the child's indication. Mr Beighton referred to this email at [93] of his witness statement but the CMA did not challenge him on the *bona fides* of it. It was not suggested to Mr Beighton that the agreement he referred to was a dishonest sham. Yet any finding that Mr Beighton had negotiated a dishonest sham agreement means that he was deceiving his staff as he would have known that this was not the real reason for AMCo not launching its own product.

- On 31 July 2014, at a meeting of the AMCo Board of Directors (with Mr Beighton present) Mr Sully advised the Board that a second written supply agreement had been entered into "*in order to stay in the market*" and that Pinsent Masons had advised on the second agreement. He thus gave the impression that the agreement was *bona fide* and lawful. In his witness statement at [94] – [95] Mr Beighton says that this was the position he also relayed to the Board at that meeting. Yet any finding that Mr Beighton had negotiated a dishonest sham agreement means that he was wilfully deceiving his own Board of Directors since on the CMA's case Mr

> Beighton would have known that this was not the real purpose of the written supply agreement that had been concluded with Auden.
>
> 33. In summary, the allegation of a sham agreement deliberately and dishonestly engaged in by Mr Beighton was not put to him. On the contrary, as the Tribunal says in the Closed Judgment at [153(1)], during the trial the CMA expressly disavowed the findings of a dishonest sham. The CMA expressly averred that it was not asking the Tribunal to make any finding of a dishonest sham agreement. The clear implication of this is that the CMA was inviting the Tribunal to accept Mr Beighton's evidence that the agreements were not a sham."

135. Given the rules regarding cross-examination set out in Section E above, there was a failure, on the part of the CMA, to observe the most basic principles of due process. Fairness and a need for an appeal process with evidential integrity required that the essential findings of the Hydrocortisone Decision be put to Mr Beighton (and, but less importantly, to Mr Sully) and they were not.

K. THE JUDGMENT (CARTEL INFRINGEMENTS)

136. The CMA has never accepted any failure of due process. It has steadfastly maintained that its case was put and that the Hydrocortisone Decision was appropriately defended on appeal. In particular, that was the CMA's position when the appeals were closed, and the Tribunal left to write its (necessarily reserved) Judgment (Cartel Infringements).

137. The Tribunal was thus effectively forced to write a judgment on the basis of an evidential record that was incomplete and (as we have now found) unfair. Whilst the Tribunal could have elected simply to allow the appeals and make no findings on the basis that the CMA had chosen not to defend the Hydrocortisone Decision, that would have been an error. Given the CMA's stance – namely that the case had been fully and appropriate heard – and given that the issue of due process had not been argued at this time, but only raised as a concern, the Tribunal had to render a substantive judgment ruling on the evidence before it. That is what the Tribunal did in the form of the Judgment (Cartel Infringements).

L. NO JURISDICTION TO CHANGE THE OUTCOME

138. Although the Judgment (Cartel Infringements) is expressly provisional, because of the Due Process Question, the CMA contended that – notwithstanding the terms of the Judgment (Cartel Infringements) – the Tribunal has, in handing down that very decision, decided the appeals in favour of the CMA and affirmed the Hydrocortisone Decision. The CMA's position is that the Tribunal is functus and that the Tribunal has no jurisdiction other than to confirm the Hydrocortisone Decision.[125] Despite the express conditionality and provisional nature of the Judgment (Cartel Infringements) the CMA contends that the Tribunal's hands are now tied and that it is impossible for the Tribunal to anything other than affirm the Hydrocortisone Decision.

[125] See paragraphs 58ff of the CMA's written submissions on the Due Process Question.

139. The Judgment (Cartel Infringements) is in the following terms (all emphasis added):

(1) Paragraph 25 notes that "[w]e are concerned that **the CMA's case was not fully put to Mr Sully or Mr Beighton**. We express no concluded view, not least because the parties have not had the opportunity to address us on this point – **nor on the implications of it, if it is well-founded**."

(2) Paragraph 26 states:

> "We propose to decide the issues arising out of the appeals in relation to the Cartel Infringements **on the basis of the evidence before us**. This is – self-evidently – a question of carefully reviewing the factual material before us and of making findings in relation to that material. **That exercise is carried out in Section B below**. In Section C, we set out our conclusions in relation to the various grounds of appeal, **based on the findings made in Section B**. In Section D, we return to the concern just articulated: the question of whether (in light of our consideration of the evidence, and the findings we have made) the CMA put its case and (if they did not) what the implications of this are."

The Tribunal was thus making findings of fact provisionally and on the basis of an evidential record that was incomplete because of the Due Process Question. The only reason the Tribunal was doing so was because the outcome of the Due Process Question had not been debated (and could not be debated until the Judgment (Cartel Infringements) was handed down). Until the Due Process Question was resolved, it would not be possible to say what its effect on the appeals might be. The point was expressly left open.

(3) Sections B and C address the matters described in paragraph 26, and the issue of due process is considered again in Section D. The CMA placed a great deal of reliance on paragraph 156, the last paragraph in Section C:

> "All of the grounds of appeal fail. The 10mg Agreement – as we have described it at [155] is a by object infringement of the Chapter I prohibition. The object was flagrantly anti-competitive and the anti-competitive effects significant, in that an abused monopoly position was maintained and supported. The 20mg Agreement is part of a pattern of fact that supports the findings we have made. But we should be clear that the significant product in the market was 10mg immediate release hydrocortisone tablets, and that even without the 20mg Agreement and the findings in the Hydrocortisone Decision regarding the 20mg Agreement, our findings in relation to the 10mg Agreement would have been the same. Furthermore, although there is a link between the dominance of Auden in the market and the subject matter of this judgment, we regard the conclusions of this judgment as standing independently of the findings and conclusions in the Judgment (Abuse of Dominance Infringements)."

This is certainly a ringing endorsement of the Hydrocortisone Decision, but subject to the express qualification in paragraph 26 (quoted above) that the evidential record was incomplete and the integrity of the appeals process expressly under future review of the Tribunal.

(4) That point is made good in Section D. Paragraph 157(2) states:

> "Had no witnesses been called to rebut the findings of Cartel Infringement, then the concerns that we have would not arise. However, Mr Beighton and Mr Sully were called, and it would have been appropriate for the relevant findings in the Hydrocortisone Decision to be put to them specifically. Without stating a final position, because we have not heard submissions, we are concerned that the CMA's case in defending the Hydrocortisone Decision was not fully put. We want to hear from all interested parties on this point."

(5) The judgment then concludes as follows:

> "159 **Given that we are, for these reasons, in no position finally to determine the appeals in relation to the Cartel Infringements, and that there will be a further substantive hearing in order to do so**, it would be inappropriate to consider the appeals in relation to the penalties imposed by the CMA in respect of the Cartel Infringements (including to be clear, in relation to the 20mg Agreement). For this reason, we consider the question of penalty no further.
>
> 160. **Although we are not finally disposing of the appeals in relation to the Cartel Infringements**, we confirm that this judgment is unanimous."

140. The Judgment (Cartel Infringements) is expressly provisional and not final. The suggestion that the appeals have finally been determined in the CMA's favour is unarguable, as is the proposition that the Tribunal is functus. We have jurisdiction to determine a question expressly left open in the Judgment (Cartel Infringements) – namely the Due Process Question.

M. SETTING THE SUBSTANTIVE OUTCOME OF THE JUDGMENT (CARTEL INFRINGEMENTS) AGAINST THE PROCEDURAL OUTCOME OF THIS JUDGMENT (DUE PROCESS)

141. The Judgment (Cartel Infringements) reaches a clear albeit provisional conclusion that the Cartel Infringements were properly found by the Hydrocortisone Decision, and that the appeals ought therefore, subject to the Due Process Question, to be dismissed. This Judgment (Due Process) concludes that this substantive outcome was reached in a procedurally flawed manner.

142. It might be said that the question is whether apparently substantive soundness trumps the procedural flaws or whether the procedural flaws undermine substantive soundness. That would be to suggest, wrongly, that substantive merits and procedural flaws need to be weighed in the balance, and the proper outcome determined as a result of some "balancing" exercise. That is not the correct approach. For this is not a question of balance at all. In the first place, these are incomparable values, and seeking to compare them is an "apples and oranges" comparison, not an "apples and apples" comparison. The two values cannot be equated. Secondly, the values are closely related and symbiotic. Procedural soundness leads to good substantive outcomes, whilst bad process endangers a proper and fair substantive outcome.

143. The case law that we have described makes clear that technical points are to be eschewed. A sound substantive outcome will not be defeated by a technical failure to "put" a case. Where there has been a serious and material failure of due process, as here,

then the court should seek to cure it by facilitating the recall of the relevant witness. We have explained why that was not possible here.

144. What is not permissible is simply to view the substantive outcome in the abstract and to say that it should stand because it "looks" right. That is impermissible because it assumes that which cannot be known: namely the answers that the witness would have given. That is an arbitrary approach, and undermines the very processes that inform our justice. If substantive regularity can be purchased so easily, then cross-examination is not as important as the case-law tells us it is.

145. The failure of due process that we have identified in the present case fatally undermines the substantive decision in the Judgment (Cartel Infringements):

(1) The central aspect underpinning the findings of Cartel Infringement in the Hydrocortisone Decision – namely the existence of the collateral understanding – was soundly based on inference. Had the appeals only been in relation to the soundness of that inference, then we would have upheld the Hydrocortisone Decision for the reasons given in the Judgment (Cartel Infringements).

(2) But the appeals did not (just) put the inference of the existence of an unlawful collateral understanding in issue. The appeals put forward a positive case from witnesses who had relevant evidence to give who said that, no matter how apparently plausible the inference of collateral understanding, it was an inference wrongly drawn. The witnesses called positively asserted that there was no such collateral understanding.

(3) Those assertions were not so inherently implausible so as to be dismissed without examination. To the contrary, Mr Beighton's version of events (namely, that it would have been in AMCo's interests to enter the market the moment it could; and that the Second Written Agreement was no more than a stop-gap enabling AMCo to supply the market whilst they secured their own, independent, supply) is a coherent explanation of AMCo's conduct which is inconsistent with the existence of the collateral understanding on which the Hydrocortisone Decision rests.

(4) Without cross-examination of this version of events, neither the CMA nor this Tribunal can properly disbelieve them and hold against the Appellants. The Judgment (Cartel Infringements) is, for this reason, fatally undermined. Descending to the detail for a moment, this flaw manifests itself in the following way:

(i) The Judgment (Cartel Infringements)/[139]*ff* considers Waymade's and AMCo's state of mind. Waymade did not appear before us and did not appeal the Hydrocortisone Decision,[126] but AMCo did, and the Judgment (Cartel Infringements) notes that "the conclusion reached by the CMA

[126] Judgment (Cartel Infringements)/[140].

that AMCo had been party to the Cartel Infringements" was resisted by AMCo in "very firm terms".[127]

(ii) For this reason, the Judgment (Cartel Infringements) looked to matters as they stood at the time of the Second Written Agreement,[128] and sought to ascertain AMCo's state of mind – as well as Auden's – at this time.

(iii) Auden adduced no positive case in this regard: the findings of the Hydrocortisone Decision were not accepted, but the challenge was that the findings were not borne out by the facts before the CMA at the time of the Hydrocortisone Decision, not by the adduction of witnesses, present at the time, who denied those facts. We have no procedural issue with the conclusions reached in the Judgment (Cartel Infringements) as regards Auden (or Waymade) for that reason.

(iv) But the Judgment (Cartel Infringements) makes a series of findings – based on the material that was before the Tribunal – concerning AMCo's state of mind, from which a conversation[129] crossing the line between Mr Beighton and someone at Auden (probably Mr Patel) is inferred, during which the collateral understanding was made or affirmed.[130] The critical paragraph of the Judgment (Cartel Infringements) is [144], which concludes that there was a collateral understanding between Auden and AMCo. At [144(9)], the following question is asked:

> "The correctness of this conclusion – which we reach conscious that we must be satisfied to a very high standard – can be tested in this way. The one, big, difference between the First and the Second Written Agreement was the increase in supply. What could Mr Beighton have said to induce Auden to agree to such an increase? We consider that there is only one plausible answer, which is the one given above."

(v) The question is framed as a rhetorical one, yet it is no such thing. Had Mr Beighton not attended to give evidence, the question would have been rhetorical, and we would have answered it as we have in the Judgment (Cartel Infringements). But the question was not rhetorical. It was one of many central questions that could and should have been put to Mr Beighton, and his answers would have been of the highest importance to our consideration.

(vi) Mr Beighton never gave those answers, not because he was unwilling or unable to do so, but because he was never asked. The CMA failed to

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[127] Judgment (Cartel Infringements)/[140].

[128] Judgment (Cartel Infringements)/[141] to [142].

[129] The Judgment (Cartel Infringements) is explicit about this: see [144(8)].

[130] See Judgment (Cartel Infringements)/[144(2) to (9)].

put its case and so failed to defend the central aspect underpinning the findings of Cartel Infringement in the Hydrocortisone Decision.

146. In short, the substantive (provisional) outcome in the Judgment (Cartel Infringements) must give way to the outcome of this Judgment (Due Process), and it cannot be cured. We have indicated why the recall of Mr Beighton is not (in this case) practicable; and we have indicated why it has unfortunately been necessary to set out a provisional substantive outcome at all in the Judgment (Cartel Infringements). But this does not alter our conclusion.

N. DISPOSITION AND FINAL POINTS

(1) Disposition

147. The appeals in respect of the findings of Cartel Infringement succeed and to this extent the Hydrocortisone Decision must be set aside. The question of penalty becomes irrelevant, subject to the extant appeal in relation to the penalty imposed on the Auden/Actavis Appellants for the 20mg Agreement, which will be considered in a separate, later judgment. To the extent any penalties have been paid, they must be repaid. We trust that any questions of interest can be resolved between the parties.

148. This is our unanimous conclusion.

(2) The "closed" status of the Judgment (Cartel Infringements)

149. As we have described, we have ordered that the Judgment (Cartel Infringements) stand as a "closed judgment". That order was itself provisional, to be reviewed once the Due Process Question has been resolved.

150. We consider that the Judgment (Cartel Infringements) should now be made an open judgment. That is for the following reasons:

(1) A judgment – particularly one of significance – ought to be open, not closed. It should only be closed permanently where there is very good reason. In this case – because of the appeal of the Due Process Question that we will permit – the Judgment (Cartel Infringements) is (albeit contingently) of the greatest importance.

(2) In this case, the Judgment (Cartel Infringements) was provisionally closed because it makes a series of damaging, provisional findings in relation to Mr Beighton and (to a lesser extent) Mr Sully. However, if this (present) judgment is published as an open judgment – and we consider that it should be – then the essence of the Judgment (Cartel Infringements) will be revealed to the world. It will be known that (i) Mr Beighton and Mr Sully were witnesses for the Appellants, (ii) that they were involved in the Cartel Infringements, (iii) that those Cartel Infringements were provisionally upheld and (iv) that dishonesty is likely to have been involved.

(3) The essentially fragile basis of the findings in the Judgment (Cartel Infringements) will now be exposed to the world. As we have stated, had Mr Beighton and Mr Sully not given evidence in the witness box, then the conclusions of the Judgment (Cartel Infringements) are sound. Mr Beighton and Mr Sully did give evidence in form, but in substance they did not: they were deprived of that opportunity because the CMA did not use the powerful process of cross-examination to enable the full story to be assessed. The Judgment (Cartel Infringements) is only sound if it is assumed that Mr Beighton and Mr Sully could not have answered the points that the CMA should have put.

(4) We have, in this judgment, sought to explain what Mr Beighton and Mr Sully's general answer to the inference of collusion in the Hydrocortisone Decision was in general terms. They denied the collateral understanding because (they said) AMCo had issues with its own supply of hydrocortisone tablets, which it was resolving, and that the moment it did, it would enter the market in its own right. In the meantime, AMCo took advantage of the very favourable terms being offered by Auden, as set out in the First and Second Written Agreements which were carefully reviewed within AMCo and by AMCo's external lawyers.

(5) We cannot descend into the particulars of that answer, because the CMA deprived us of that opportunity. In the circumstances, the best we can do is to make that point clear and to stress that the Judgment (Cartel Infringements) is necessarily an unsafe one, made in the face of a fundamental (albeit disputed by the CMA) procedural deficiency.

(6) We do not consider that Mr Beighton or Mr Sully's position is protected by maintaining the "closed" status of the Judgment (Cartel Infringements) unless this judgment is also closed. We consider that this judgment – which rejects as unsound the inferences drawn in the Hydrocortisone Decision - needs to be an open one. In these circumstances, the Judgment (Cartel Infringements) should now be handed down openly as well.

151. However, the following rider should be inserted prominently at the beginning of the Judgment (Cartel Infringements) and at the head of each page:

> **This judgment must be read in light of the Tribunal's later judgment at [2024] CAT 17. That is because the provisional findings made against witnesses called are unsafe and are repudiated by the Tribunal. They were made because of a failure, on the part of the CMA, to observe fundamental principles of due process, and for that reason they cannot stand.**

Sir Marcus Smith
President

Professor Simon Holmes

Professor Robin Mason

Charles Dhanowa OBE, KC (Hon)
Registrar

Date: 8 March 2024