IN THE SUPREME COURT OF NEW ZEALAND SC 91/2008

BETWEEN **ASTRAZENECA LIMITED**
Appellant

AND **COMMERCE COMMISSION**
First Respondent

AND **PHARMACEUTICAL MANAGEMENT AGENCY**
Second Respondent

Hearing:	8 July 2009
Court:	Elias CJ Blanchard J Tipping J McGrath J Wilson J
Appearances:	M N Dunning with T P Mullins and I T F Hikaka for the Appellant D Goddard QC with K L Clark QC and B Hamlin for the First Respondent M G Colson with R E Brown for the Second Respondent

---

CIVIL APPEAL

MR DUNNING:

May it please the Court, Dunning and I appear with Mr Mullins and Mr Hikaka for the appellant.

ELIAS CJ:

Thank you Mr Dunning.

MR GODDARD QC:

May it please the Court, I appear with Ms Clark and Mr Hamlin for the Commerce Commission.

ELIAS CJ:

Thank you Mr Goddard.

MR COLSON:

May it please the Court, Colson with Ms Brown for the second respondent Pharmac.

ELIAS CJ:

Thank you Mr Colson. Yes, Mr Dunning.

MR DUNNING:

Thank you Ma'am. I've prepared just the one page outline of the notes of the points that I wish to make this morning which my learned junior is handing to the registrar, may it please the Court.

May it please the Court, I refer you firstly just to the ground for appeal and what we say at paragraph 1.2 of our written submissions, are the two threshold questions which we say are the key questions in this case and they are addressed in sections 4 and 5 of our written submissions. I'll come back to that. Firstly, I just wish to summarise overall what the Commission's submissions appear to be. I'll mention them briefly and then come back to those as well because firstly I wish to dispel two planks of what the submissions made by the Commission as to what this case is about.

So, the Commission's submissions in my view, suggest (a) that AstraZeneca seeks a broad interpretation of section 53. They refer to AstraZeneca seeking a blanket immunity, seeking carte blanche and so on which would open, in the view of their submissions, some sort of floodgates approach to the protection that section 53 is designed to offer. AstraZeneca says well, that's not correct,

that mischaracterises its submission. It is only seeking to challenge this notice, in respect of this conduct, of the investigation against it.

The second point is that they refer to a "reasonable commission, properly directing itself as to law as unchangeable". As AstraZeneca says well, the issue here is what the law is and therefore whether it has properly directed itself, or properly applied the law.

Thirdly, is a suggestion that the Commission should be entitled to investigate, use its powers for that purpose and determine itself whether section 53 applies in any event. In our submission, that puts the cart before the horse, there can be no implied power to check whether there is a power. If, as a matter of law, this notice is properly invalid, then the investigation is also invalid and this Court should so declare.

Fourthly, getting these last two really to, what we say are the key questions in the case, section 53 does not apply to the conduct the Commission alleges here because firstly, there might be other conduct to which section 53 does not apply and in our submission, that's based upon arguing a case which isn't before the Court, with contrived hypotheticals, they're not withstanding the clear basis for the Commission's investigation, being the specific conduct alleged here. Secondly, there is a very strong suggestion that section 53 effectively operates asymmetrically because the focus, apparently, is on the purpose of being to benefit Pharmac and there's the introduction of concepts of whether conduct is a reasonably necessary concomitant to entering into an agreement with Pharmac, or in some way for public benefit, protecting only Pharmac generated proposals. AstraZeneca submits that that is in fact rewriting the legislation, it's unworkable and it's inconsistent with the objectives of the New Zealand Public Health and Disability Act.

May it please the Court, those are the four points. I'm going to deal with (a) and (b) first, just to try and dispel those two suggestions as being relevant here. Then I will move on to what we submit are the key questions are about, the lawfulness or otherwise of the investigation.

Dealing first with the ambit of claim. May it please the Court, the submissions by the Commission as to the breadth of the claim here are overstated. It is only this alleged conduct and this notice which is at issue under section 53. AstraZeneca is not arguing for and I quote from the Commission's submissions, "any conduct connected, however indirectly, with potential entry into an agreement with Pharmac". They're not arguing for some bright line rule. This is not, although it seeks to become, by the Commission's submissions, it's not the federal case that they seek to turn it in to. You don't see the Researched Medicines Industry Association sitting in the Court intervening, as did Pharmac. It's not viewed as that broad reaching. It's about particular notice here and the investigation here.

AstraZeneca has only ever argued that section 53 operates to prevent conduct coming within its ambit, being investigated by the Commission and (2), the notice and the investigation on which it's based, make it clear that the Commission is seeking to investigate conduct, that is on the plain words of section 53 within the ambit of section 53. So, all AstraZeneca is asking the Court to do, is find whether the decision to commence this investigation and issue this notice was lawful. I submit that that's a position which is also clear from the form of the question on which leave to appeal was granted.

I wish to take the Court, this is under 1(a) and (b) of my outline, I'm now on to (a) and I wish to take the Court to what we say is genesis of the issue. May it please the Court, if you turn to the case on appeal, volume C which are the exhibits, at page 157, that's the heliotrope coloured volume.

TIPPING J:

Volume B?

MR DUNNING:

Volume C, Your Honour.

TIPPING J:

Volume C, beg your pardon.

MR DUNNING:

Page 157. That's the notice issued by the Commission, with the covering letter at page 157. Paragraph 4 says, "The Commission is conducting an investigation into allegations that during negotiations with Pharmac, AstraZeneca Limited may have illegally tied the proposed provision of Betaloc CR tablet pharmaceuticals to the continued supply of Betaloc IV intravenous injection pharmaceuticals in breach of section 36 of the Commerce Act. Attached to that, at page 159, is the notice itself. In that, it lists the documents which the Commission seeks under the notice.

TIPPING J:

There's a key expression in that paragraph, "for during negotiations"?

MR DUNNING:

There is, exactly. May I say Sir, since you raised that point, much is made of that being the only plank of our case and it is not. There are two parts to what is going on here. It's the alleged conduct during negotiations with Pharmac and the alleged conduct is this alleged tying.

TIPPING J:

Yes, oh yes, quite.

MR DUNNING:

Yes well, my friends really try to say that we're looking for a bright line interpretation, that any conduct during negotiations by any pharmaceutical company, would be protected by section 53 and we did not argue for that.

ELIAS CJ:

What's the link that you contend for?

MR DUNNING:

Well, the link –

ELIAS CJ:

Because you don't say that all, or do you, say that anything antecedent to agreement is within the exemption?

MR DUNNING:

I would not go so far as to say everything antecedent to an agreement, or all conduct by any pharmaceutical company would be caught by section 53. What we do say though, is that what is alleged here as the behaviour is tying. It's tying in respect of two pharmaceuticals which are pharmaceuticals defined as being those within the ambit of section 53, namely –

TIPPING J:

Are you saying that it's anything during negotiations is protected?

MR DUNNING:

If it's negotiations yes, yes, that's right.

TIPPING J:

That's what I thought you were saying. It's not everything antecedent but it's everything which can be fairly be said to be part of the negotiations?

MR DUNNING:

Your Honour, I'd agree with that except for of course, when we say –

TIPPING J:

Well, I'm just trying to identify what you're saying. I'm not expressing any view at all.

MR DUNNING:

When we say fairly part of negotiations, that's where some of the difficulty may arise and antecedent, necessarily by the words of section 53, it does

include conduct which are plainly antecedent to the contract, i.e. plain entry into the agreement and are therefore antecedent to the agreement and are part of the negotiations but when does a negotiation start? From my learned friends approach, it would be when Pharmac says it starts and that Pharmac would generate a proposal and when Pharmac says that it wants to enter into a contract, then we have a negotiation. The problem with that is that what if, as commonly happens, if a pharmaceutical company comes along with a proposal? Pharmac says, I'm not entertaining that and you just tried to breach the Commerce Act by putting up a bundle of proposition to me. If Pharmac says, actually I do want to discuss that with you, then it's a negotiation, then it's a contract. That's the problem with an asymmetrical approach to the interpretation of section 53.

Coming back to your proposition Sir, I can agree with you, in the sense – and I can also agree with Mr Colson without this case, without AstraZeneca not being entitled to the protection of section 53 in this case because Mr Colson says in his submission, it should be for the purpose of entering into an agreement. Now, he reads down which Justice Fogarty rejected in the minority, he reads down the word purposes in section 53 which can encompass a range of purposes, to be simply "the purpose" of entering into an agreement with Pharmac. Now, on the facts of this case, we could even accept that because plainly what is alleged here, on any view of what was alleged, was done for the purpose of entering into an agreement with Pharmac.

TIPPING J:

Presumably, such an agreement means an agreement which would otherwise breach the Commerce Act?

MR DUNNING:

Which might otherwise breach the Commerce Act –

TIPPING J:

Either might or would.

MR DUNNING:

It would only bite of course and only be needed –

TIPPING J:

If it did.

MR DUNNING:

– if it did, absolutely and it's there for that purpose, we can't ignore the words, it's designed to provide an exemption from the Commerce Act. That's exactly right.

McGRATH J:

Mr Dunning, you've gone straight to the letter of 31st of October. Do you place any weight on the memorandum of the same date, 31st of October, page 150?

MR DUNNING:

Yes, I do Sir. I do Sir and that was one of my further points I was going to come to, to support, as I get down to 1(b) of my outline, as to what exactly is the Commission investigated here. May I come back to that?

McGRATH J:

The other point I was going to ask is that you've highlighted the words "illegally tied". Are you making anything of the point that we're talking about trade ties here, we're not talking about collective activity?

MR DUNNING:

Yes, I certainly do and as I was going to develop, that's why I say there are two parts here. It's not just during negotiations, it's the conduct alleged here which is tying of two pharmaceuticals. That conduct, by definition, in inherently means an agreement would eventuate if the tie is successful. Tying, by very nature, leads to an agreement. I will continue supplying X, if you will continue subsidising Y and I agree to continue supplying X, if you agree to subsidise Y. Or, put it from the other perspective, I will agree to

continue subsidising Y, if you agree to continue supplying X. It inevitably must lead to an agreement. There is no point to making this so-called, or the alleged threat, if the intent of it is not to bring about an agreement.

So yes, Your Honour, I do, as the two parts of the conduct here which the Court can assess without the need for further investigation, is tying during negotiations with Pharmac. In relation of course, just to gild the lily, two pharmaceuticals which are defined in section 53 as being of the kind that section 53 is designed to cover.

We were just looking at page 157, that's the notice and then just in terms of how the issue developed, page 165 is the letter, that's in the same volume. When AstraZeneca's solicitors wrote to the Commission pointing out that well, actually on page 2 of that which is page 166 of the volume, section 53 would appear to apply, so inviting the Commission to withdraw the notice. Noting that, if in fact the Commission doesn't then may need to take steps to apply for interim relief. Page 167 is the Commission's reply, paragraph 2, "The Commission has not reached a view..." Paragraph 3 –

ELIAS CJ:

What are you taking us to this for? The case really just comes down to statutory interpretation and application, doesn't it?

MR DUNNING:

Absolutely, I couldn't agree more and I'm only taking –

ELIAS CJ:

I'm not trying to deter you from taking us to it, I just want to know why you are?

MR DUNNING:

Yes, it's a fair question Your Honour and I'm sorry that – I'm only taking you to this because of the suggestion that we are trying to seek a blanket immunity, a carte blanche for pharmaceutical companies, some bright line rule. In

respect of really what is before the Court, is a very narrow issue which is this notice, this investigation, this pharmaceutical company –

ELIAS CJ:

This conduct.

MR DUNNING:

This conduct. So, I was just really taking you to this simply to demonstrate that this is plainly the only conduct that's ever been challenged.

TIPPING J:

So, you have to put it as high as saying, this alleged conduct must necessarily fall within the exemption.

MR DUNNING:

Absolutely.

TIPPING J:

On its face –

MR DUNNING:

Yes.

TIPPING J:

Beyond argument.

MR DUNNING:

Yes.

TIPPING J:

You have to put it that high, don't you?

MR DUNNING:

Yes.

TIPPING J:

And you did?

MR DUNNING:

We've always accepted that. Just to complete that Your Honour, at 167, the Commission said well, consider section 53 does exclude the application of Part 2 of the Act in respect of a limited range of conduct, what it doesn't exclude is the application to conduct in the pharmaceutical industry generally which is a sentence which did perplex us somewhat but nonetheless, acknowledged, it does apply sometimes but I'm not saying it did here and then suggesting that the information should still be provided pending the outcome of the challenge which the solicitors for AstraZeneca have very promptly filed.

Page 168 on the next page is an email from the Commission's investigator to the solicitor for AstraZeneca just adding, by the way it says as an addendum in paragraph 2 of that email at page 168, "We wish to make it clear the Commission declines to offer an undertaking which was sought namely while the proceedings are being put together don't pursue the notice because we're going to bring a legitimate challenge to that notice." So the Commission refused to provide that undertaking, that it would not take steps to enforce the section 98 notice and went on to say that a failure to comply would lead to a breach of section 103 and may accordingly result in prosecution.

Just as a footnote to that, because of that proposition and the uncertainty in obtaining interim relief and that was there no undertaking and time of course is ticking away, one never knows with the Damocles Sword of an expiring notice, and the threat of section 103, AstraZeneca properly did at least do the exercise of compiling the documents from its files that were requested and then tendered them to the Commission on the Tranz Rail search warrant basis which was under seal. It said well look, they're done, they're here, but you

shouldn't look at them until we've resolved this issue before the Court. That wasn't acceptable to the Commission. We had to seek interim relief and Justice Ronald Young in a minute, which is in volume A that I won't take you to, basically indicated that they should back off of that position. We eventually resolved it through interim arrangements.

So that was how the issue developed and that was the genesis of the issue and if you look at the statement of claim plainly all that the statement of claim does, which is in volume A of the case, page 60. It simply recites the sequence that a notice was issue section 53 would appear to apply, a very narrow issue, always thought it was a narrow issue of statutory interpretation. First ground to review, this is on page 63, paragraph 15 of the statement of claim, notice purports to be necessary in relation to an investigation into (a) conduct, which is a potential breach of section 36 and that's the tying allegation and (b) which was allegedly engaged in during negotiations, the two parts, the essential two parts. And then 16, this first sentence, even assuming the alleged conduct to have occurred we say well look it was alleged to have occurred during negotiations and would therefore be exempt, and so on and so forth.

So it's apparent, in my submission, and it was certainly understood this way by at least the Court of Appeal, that the challenge by AstraZeneca was in respect of the conduct alleged to have occurred during negotiations with Pharmac. It's not a challenge which says all conduct during negotiations is caused by section 53. Just for the sake of completeness that's evident from paragraph 42 of the Court of Appeal's judgment.

I just wish to move on to what is noted as 1(b) of my outline which is the basis and the only basis for the investigation and for the notice is the alleged conduct and that's coming back to a point that Justice McGrath made before. If one looks at the memorandum which is the internal memorandum leading to the issue of that notice which can be found in volume C as well, just prior to the notice itself, page 150 of volume C, at the bottom of the page it talks about the background and paragraph 4 talks about what the allegations are and

says, “Negotiations for the contract to supply these tablets were allegedly tied by AstraZeneca to its continued supply.”

So that, and of course the letter itself, which plainly says what the basis of the investigation is, in my view make it abundantly clear that there is only one investigation here and only one thing which is being investigated and that is this alleged tying and which occurred during negotiations for Pharmac.

TIPPING J:

So is this point simply that the idea that you could go in and have a general look is not the point. They are confined to what they say they’re investigating?

MR DUNNING:

There are two points Your Honour. That point as a general proposition is certainly correct and there are a number of Australian cases which establish that certainly if you are a –

ELIAS CJ:

But it’s not an issue here?

MR DUNNING:

It’s not an issue here. It’s not an issue here as such so certainly one – but one can't justify notice, even a valid notice, and we of course say this isn't a valid notice, by saying yes but there might be other stuff we find. Now –

TIPPING J:

Outside the range of the asserted breach?

MR DUNNING:

Absolutely.

TIPPING J:

I thought you had to assert the breach in the notice but apparently you can do it in some collateral letter is that –

MR DUNNING:

That's the practice.

TIPPING J:

That's not an issue?

MR DUNNING:

That's not an issue.

TIPPING J:

That's the practice?

MR DUNNING:

That's not an issue here. The Commission in the letter says this letter does not form part of a notice. That's normal, that's a litany that they use, and their reason for that, I believe, is basically so that one can't get into nit-picking arguments about exactly what the investigation is. That they might have perhaps misdescribed it or not quite described it accurately enough in the notice so as my learned friend rightly says in his submissions, these things are not a pleading, they shouldn't be taken as a pleading and I accept that. But it's evident here that there is only one investigation. No matter how you look at it the letter accurately sets it out.

Justice Fogarty himself said it accurately sets it out and he said that because he said well let's look at the documents they seek in the notice itself, not the letter, and those documents that they seek were all directed plainly to an allegation of tying two products to get Pharmac to secure a deal. There is nothing in there which suggests, for instance, to take some of my learned friend's hypotheticals, that anybody was concerned that there might be two pharmaceutical companies entering some cozy arrangement outside a contract with Pharmac but possibly with a view to securing some advantage from Pharmac. That's not what's before the Court and that's not what the Commission was investigating.

WILSON J:

Mr Dunning referring to Mr Goddard's hypotheticals, would you accept that those hypotheticals would all be outside the section 53 protection?

MR DUNNING:

I would accept that the first three might be. The fourth is probably close to it and that's – I'd be within section 53 and the fifth, the fifth is this case and the fifth is within section 53. The fourth is borderline. It's moving from the first three to the fifth and in my view that one, one could be perhaps a bit querulous about what's going on there but the robust real world answer there is Pharmac would say, no.

WILSON J:

What would you say was the material distinction between the first three hypotheticals in the present case?

MR DUNNING:

Well they were all involved, initially at least, arrangements between people who aren't just directly negotiating with Pharmac.

McGRATH J:

Or potential collective activity?

MR DUNNING:

Potential collective activity. Your Honour, I think we could all agree what the purpose of section 53 is about and we would certainly acknowledge it is about achieving the aims and objectives of the Public Health and Disabilities Act. It's about giving Pharmac buyer power against pharmaceutical companies and it's about enabling worthwhile contracts for the supply of pharmaceuticals to take place. You don't do that by creating an asymmetrical playing field and you don't do that by allowing regulatory or even Court intervention in a negotiating process if it's a valid negotiating process. Negotiation by its very definition is the use of competing power by one party against another.

A pharmaceutical company says, I have a drug that's under patent you would probably want to have it. Pharmac says, well I've got funding and I'm the one you need to come to because I'm the only one that's going to subsidise it and they both use that negotiating power against the other. It would be a capitulation not a negotiation if one party simply says, whatever you want, you get. And of course this happens all the time in this context and I'll come back to that in terms of how the operating policies and procedures operate in this industry. That there are bundles, Pharmac is encouraged to bring about arrangements. We may de-list some pharmaceuticals, subsidise others. All of them have impact on competitors and so we can't determine this particular case by saying, but that's going to have an incidental impact on competition or competitors. Of course it is. That's how the system operates and that's what section 53 is designed to prevent and it's designed also to prevent tactical litigation which the Court saw for a period there while people were testing the boundaries of well, maybe we can get something.

We can review Pharmac, we can sue a competitor, you know, those sort of challenges. Coming back to Your Honour's point Justice Tipping that fairly relates to the negotiation, it's an umbrella. Once you've entered the arena and you're negotiating with Pharmac, you should have the same protections as Pharmac. Justice Fogarty said there's nothing in the provision that reads it as being asymmetrical. My learned friend refers to it as requiring to be coextensive because it must be. It must enable those who deal with Pharmac to be as equally protected as Pharmac. Otherwise, there would necessarily be a chilling effect on entering into the arena.

TIPPING J:

So, your very apt metaphor is the test. Have you entered the arena?

MR DUNNING:

Yes.

TIPPING J:

If you have, you're protected, if you haven't, you're not.

MR DUNNING:

Absolutely.

McGRATH J:

Mr Dunning, this memorandum you've taken us to, considers section 36 of the Commerce Act. Does it alert the Commission to section 53?

MR DUNNING:

There's a problem with that, it may do but it's been deleted because the legally privileged material in that memorandum, page 154, if it pleases Your Honour and this led to a bit of a skirmish in the High Court I have to say because we ran a point which elevated itself to a fully fledged argument, that really the privilege should be waived on that because either it was considered well, it was plainly considered but what their views on it were we couldn't tell. Now, maybe they misinformed themselves, is another ground for judicial review. Who knows what was said in there. So, we sought, we made an application for possibly privileges waived on that, where in the sense that it really went to the heart of voirs which we lost –

McGRATH J:

Section 53 is there. What you're saying is that the comment has been taken out?

MR DUNNING:

Yes, paragraph 22.

TIPPING J:

Does it matter what they thought, or how they advised themselves, surely it's ultimately a question of law?

MR DUNNING:

Yes, that's right. We just put it that –

TIPPING J:

It would have been nice to have a look.

MR DUNNING:

It's always nice to have a look Your Honour.

ELIAS CJ:

They might have asked themselves the wrong question.

MR DUNNING:

Exactly, exactly. For instance, what if they had said, not trying to impute any nasty intentions at them at all but what if they had said, we're not sure about section 53, we think we should issue this notice and get it tested by the Courts. Now, that would be an improper exercise of their power, just to float it out there –

TIPPING J:

As long as they honestly thought that it was –

MR DUNNING:

That may be, that's why we should have a look –

TIPPING J:

Surely they're entitled to have it tested?

MR DUNNING:

As long as they did, we don't know, do we?

TIPPING J:

I think this is a sideshow frankly.

MR DUNNING:

Well it was, I agree with that Sir, in this respect –

ELIAS CJ:

And it's not before us.

MR DUNNING:

No, it's not. We just raised that and said look, we should have a look and then because we'd raised that in a telephone conference, we said, to be fair we should probably do it properly on notice and argument and so we did have some submissions and dealt with that as a preliminary point at the High Court. It's not before you.

ELIAS CJ:

Mr Dunning, the note that I've taken, I just want to ask you whether really this is what you are arguing, is that all the conduct was directed to tying through an agreement with Pharmac?

MR DUNNING:

Yes, effectively. Well, tying by its very nature, will only lead to an agreement.

ELIAS CJ:

You could tie your willingness to negotiate I suppose but it was done with a view to an agreement?

MR DUNNING:

Yes, the alleged threat here was that, we can't supply IV anymore if we're not getting a subsidy in CR. Turn that around, if we do get the subsidy in CR, we will supply IV. What would be the outcome of that being accepted? It would be an agreement that we will continue supplying IV if you continue subsidising CR. Or, from AstraZeneca's, the terms of the agreement, AstraZeneca, it will continue to be subsidised if you agree to continue to supply IV. It is an agreement. Bear in mind, under section 53, if you've had a look at that and I'll come back to this but the definition of agreement is incredibly broad.

TIPPING J:

It doesn't seem to me to have been any point in the tying proposition, unless they were trying to get an agreement in those terms.

MR DUNNING:

Absolutely.

TIPPING J:

Otherwise, it would have been sort of gratuitous, beating the air.

MR DUNNING:

Gratuitous. Well, that does raise an interesting point Your Honour which Justice Fogarty analysed and dismissed which is, if the Commission says ah, well okay, it wasn't for entering into an agreement, it was some unilateral act of AstraZeneca's to just withdraw supply for commercial reasons of IV, then he said well, that's not an anti-competitive purpose, that's not a tie, they decided, for their own good reasons, to do something. In which case the notice would be invalid as well because there's no anti-competitive conduct. So, plainly, it either is not an anti-competitive purpose, they decided for their own good reasons they were no longer able to supply, or it is part of a tie which was to secure this agreement.

ELIAS CJ:

The tying could only take effect through an agreement with Pharmac?

MR DUNNING:

Well it depends. If by agreement you mean a formal written agreement, likely to but tying –

ELIAS CJ:

An understanding, or whatever –

MR DUNNING:

Absolutely. Tying, by its very concept, as alleged here, really involves a seller making product of A available, only on the condition that the customer also purchases product B. To put it another way, a purchaser might insist that it would purchase product A only on the condition that it can also purchase product B and that's what Pharmac does routinely. It's the reverse, it's the flipside, bundling and tying, it's the same thing and necessarily, the concept of agreement arises, on any view of it.

McGRATH J:

To be realistic in that scene, both Pharmac and the party entering into an agreement with a tie, are agreeing to cut out another suppler who could otherwise compete for the tied product, to supply the tied product?

MR DUNNING:

That's correct but then any successful contract cuts out the unsuccessful contract –

McGRATH J:

I'm not being pejorative here but that's presumably why you have section 53, to cover those sort of situations?

MR DUNNING:

Well, at this or others because any agreement, for instances we'll see when we come to the OPPs, effectively when a pharmaceutical company –

ELIAS CJ:

OPPs?

MR DUNNING:

Sorry, the operating policies and procedures of Pharmac, I beg your pardon.

ELIAS CJ:

Thank you.

MR DUNNING:

I'll come back to them, I'm sorry, I'll elaborate –

ELIAS CJ:

Sorry, I never understand those things.

MR DUNNING:

Yes, I can't stand TLAs and other three letter acronyms.

TIPPING J:

It would be odd, wouldn't it, if you were protected by reference to giving a fact to a tying agreement because that's paragraph (c) but you weren't protected in trying to achieve one?

MR DUNNING:

Absolutely, it would be odd. Really, just to finish off this point because I think it's well travelled now. The Commission is not investigating any other kind, it's reflected in its, sort of floodgates approach here about what is sought to be achieved is going to open up this enormous raft of possibilities of protection under section 53. If the Commission was investigating other conduct, it could quite easily have issued another notice. There's nothing wrong with it, if it suspected that there was other conduct of the kind that my friend is hypothesising, issue another notice but it didn't.

TIPPING J:

Then it would have to identify, wouldn't it, in some means –

MR DUNNING:

Well exactly and it never has, despite being asked through the entire course of this proceeding, (a) it was asked in a letter I showed you at the start, what do you say is the other conduct, if it's not this conduct? It has never provided any explanation for anything else and, plainly, nor would it because its own documents show consistently it's only investigating that conduct.

My learned friend, I think, has one fair point in this area of his submissions, where he points out that, there are one or two points I agree with him on.

TIPPING J:
Not the important ones?

MR DUNNING:
Not the important ones, no, I'm afraid he's far too misguided there. That was, that he criticises the statement of claim and the relief sought at the first declaration, if Your Honours please, we'll go to the statement of claim again which is volume A, at page 63. He uses this to suggest that we are looking for some blanket immunity for any conduct carried out "during negotiations", as if anything done during negotiations would be covered by section 53 which is not what we seek.

He refers to declaration A(1), where we recite if you like, that by virtue of section 53(2)(b) nothing applies to conduct**,** during negotiations with Pharmac. Now, look, I'm quite content for that relief to be amended if that would satisfy the point because it's just really meant to be a recitation. I just suspect that it may have been overtaken by the way in which the question for appeal has been framed but, if Your Honours please, I have drafted if you like, a different version of (1), just to make the point that we're certainly not seeking anything that's going to be as broad as is suggested in the bright line approach my friends suggest we take.

Anyway, that's just to make it abundantly clear because, in my view, it was clear because our case is not beyond this notice and this alleged conduct but if that would satisfy the point, then the declaration in respect of A(1) can be as suggested by that draft.

I'd like to move on, may it please the Court, to the second point, a notion I'd also like to dispel as being particularly relevant here which is the idea that a reasonable Commission properly directing itself as to law is unchallengeable

and we say well that's all well and good. The first time in my view it's a good reason. It's the first time it's been put this way in this proceeding because the issue really is a question of law here. A reasonable Commission must still direct itself properly according to the law. It cannot act –

ELIAS CJ:

I find that personalised formulation not particularly helpful. I would have thought the question is whether the decision of the Commission was reasonable. Anyway it's just a personal dislike of that because it does tend to push you straight away into recoiling from the idea that the Commerce Commission is anything other than a reasonable Commission whereas it's perfectly possible it's made a decision that's unreasonable in a particular case.

MR DUNNING:

Absolutely and no doubt my friend can discuss that with you because in my view that's absolutely right and we of course aren't saying that they're not a reasonable Commission in the general sense in personalising it but there is a suggestion here, in this submission, which is, you know, so long as it believed it was acting in good faith and doing the right thing, then it was okay. Now plainly that's not right, that's not the point. It's a question of whether in this particular exercise of public power that was a decision which it could make and –

TIPPING J:

And it turns on law not reasonableness, doesn't it?

MR DUNNING:

It turns on law, exactly Your Honour, and my learned friend –

McGRATH J:

You'll come to the Act shortly and no doubt point to a provision of the Act which you think backs that. It's the key position you rely on. Is it the necessary or desirable for the purposes element.

MR DUNNING:

Yes well I'll come, I'm shortly about to come to the key decisions, which is the *Telecom* decision the Court of Appeal adds to the Commission's functions and powers.

ELIAS CJ:

Don't you have to first come to the key provision which is in fact section 98?

MR DUNNING:

Yes, well –

ELIAS CJ:

Which is not found in Part 2 of the Act?

MR DUNNING:

No they're certainly not but section 98 in terms of whether a notice is necessary or desirable in the Commission's view –

ELIAS CJ:

Yes.

MR DUNNING:

It must be necessary or desirable says section 98 for the exercise of its functions or powers and the exercise of its functions or powers are as defined by the Court of Appeal in the *Telecom* decision upon a full analysis of the Act because this is not an Act like the Securities Commission Act which sets out clearly what its functions and powers are and that's why President Cooke had to divine what they were by a full reading of the whole Commerce Act in that case and say well it has three and they're quite specific.

TIPPING J:

Is it not really simply put that whether it's necessary or desirable must be informed by a correct appreciation of the law?

MR DUNNING:

Absolutely.

TIPPING J:

It's no more subtle than that, is it?

BLANCHARD J:

But it's all going to turn on the exemption isn't it?

MR DUNNING:

Yes it is.

BLANCHARD J:

I don't understand there to be any argument that if the exemption didn't exist, *Telecom* was exceeding its – the Commerce Commission was exceeding its powers in issuing a section 98 notice.

MR DUNNING:

That's correct.

BLANCHARD J:

It was doing it for the genuine purpose of an investigation. Your point is that it couldn't do it for this investigation because of the exemption.

MR DUNNING:

That's correct. That's why I say the key questions are as I put them at the start and I'm hopefully getting there, I was just spelling these other arguments if you like –

TIPPING J:

Why don't you wait and see how Mr Goddard gets on –

MR DUNNING:

I'm content with that.

TIPPING J:

– and have a reply.

TIPPING J:

That was all I needed to say on reasonable Commission.

McGRATH J:

Mr Dunning can I just – you're accepting, are you, that it was the Commission's opinion it was necessary and desirable but you're not accepting if that's the test it was a reasonable decision?

MR DUNNING:

That was certainly their opinion. I mean it's whether they consider it necessary and desirable but the case law that was referred to in our written submissions suggests that plainly it has to be what it says. It has to be necessary and desirable before the exercise of their functions and powers and that's where the legal position comes in which is, well was this a legitimate exercise of its functions and powers given section 53 says that this conduct is exempt from part 2 and which means no proceedings can be taken for a contravention in respect of this conduct, if we're right on the interpretation of section 53.

Well then moving into that. I mean the two step analysis we say, the two threshold questions, there's no doubt that section 53 does apply to exempt certain conduct. That is its purpose, it's there to do that. There's no point saying we don't like that, that's what it's about. The first question though is if it does apply, what exactly is the impact at law of an exemption of this kind on the Commission's jurisdiction. If the conduct is evidently within section 53, what impact does that have on the Commission's powers? Plainly when section 53 applies, which it must do in some circumstances otherwise it would

be ineffective, then nothing in Part 2 is to apply and if there's nothing in part 2 is to apply then there's no contravention of the Act. That's what it says.

Now coming to *Telecom* now, if it please the Court, the authorities which the appellant's have in their bundle, which is the pink bundle, under tab 5 is the Court of Appeal decision in *Commerce Commission v Telecom*. Now in this part of my submission what we're saying is that by virtue of the application section 53 in appropriate circumstances it should mean from the basis of *Telecom*, which we'll just go through shortly, that the Commission has no jurisdiction and that should mean it's got no power to investigate and no power to issue a section 98 notice. It's an immunity for all that that means. It's not a part-immunity. It's not –

BLANCHARD J:

Well the argument is that there's no power to investigate something that must be lawful.

MR DUNNING:

That is definitely not unlawful if I can put it that way. I'm sorry about the double negative but it's not unlawful.

TIPPING J:

But you can only investigate a contravention and if it's clearly not a contravention then –

WILSON J:

Or a possible contravention.

TIPPING J:

Or a, yes. You've got to demonstrate quite – that's where we were a few minutes –

MR DUNNING:

Yes, quite right, and that's why we referred to those Australian authorities which although the wording of their section 155 is slightly different, Justice Gallen in the next *Telecom* case I'll take you to said there's still worthwhile propositions to be taken from those authorities which show that can all the possible facts that were being established, may make a contravention. So yes I mean, could there possibly be a contravention on the alleged conduct on the facts here and the answer is no.

WILSON J:

Doesn't it all come back to Justice Tipping's proposition earlier that the issue is whether the alleged conduct was necessarily within section 53 or not?

MR DUNNING:

Yes it does. So in *Telecom* as Your Honours may recall that that was an investigation promulgated by the Commission into the development of competition in the telecommunications industry. Telecom challenged that and say well look you don't have a general jurisdiction to commence investigations. President Cooke reviewed the Act and made the point that I mentioned before that there is no section describing the functions and powers of the Commerce Commission like for instance the Securities Commission –

BLANCHARD J:

Do we need to go into all this?

MR DUNNING:

No.

BLANCHARD J:

This is all a given isn't it?

MR DUNNING:

Look I'm content with that but it is worthwhile, if it pleases the Court, just to remind oneself about the touchstones that the President did –

BLANCHARD J:

Well we're thoroughly reminded.

MR DUNNING:

Yes all right. There is, if I may though, it is worth reminding myself about this, that at page 429 of the case, this is before 28 under the heading "The True Role of the Commission." "One needs to bear in mind that we're not just dealing here with some arid question of law involving a company and it's not important because 429 President Cooke quite rightly said that published findings by a public body such as the Commerce Commission could damage reputations or business relationships. All determinations by the Commission under the Commerce Act is subject to rights of appeal. It's improbable that Parliament meant to give by mere implication or authority to make them publish unappealable findings." And that's what happens effectively here where there's a termination report of investigation. Various things are found out, they're subject to the Official information Act and there's no right of appeal against what the Commission has found here. It's an unappealable finding.

ELIAS CJ:

But why is that relevant in this case where we're at the investigation stage?

MR DUNNING:

Well the investigation is completed as the Court knows from the memoranda filed –

BLANCHARD J:

Well again we've been thoroughly reminded about this in the exchanges that have occurred before the hearing.

MR DUNNING:

Yes. Yes, my point is simply this. These are important to – this is important to AstraZeneca in terms of what's going on here –

BLANCHARD J:

Yes, clearly.

MR DUNNING:

– it's not just an arid point.

BLANCHARD J:

Clearly.

MR DUNNING:

Yes. And that was all that I wished to take you too there. The *Telecom* decision following, and I'm very conscious of Justice Blanchard's comment before, I won't go through that either, but that is just worthwhile to mention in the sense of, there Justice Gallen to emphasise the point did refer to the Australian authorities as providing some assistance. In that case he also just stated, and we only put this case up again for making the obvious point which maybe you don't need to be reminded of, is that one can only really have the functions and powers. Notice must relate to functions and powers that the Commission has –

McGRATH J:

Could you just give us a page and line reference to the Gallen J decision?

MR DUNNING:

That one's under tab 6. And pages 160 through to 162 are the relevant passages.

McGRATH J:

Thank you.

ELIAS CJ:

And it's 162 –

MR DUNNING:

162 in particular where it concludes, "This leads to the conclusion that the defendant has power to seek information only where it is relevant to the investigation which itself must be unauthorised by the Act." It very succinctly puts it. So really the point of all that is simply to say that if that's correct, which we say it is, and is still good law, then it means that if section 53 applies in appropriate circumstances there is no power. It means there can be no investigation and there can be no notice issued on the basis of it. If that's not correct the contrary view seems to be that there's this sort of ex post facto immunity. The Commission can investigate and determine that in fact section 53 might apply and that's okay.

ELIAS CJ:

These, Gallen J is summarising there what he takes from the Australian authorities. Is there anything more recent in Australia that you –

MR DUNNING:

Yes there is. We've put up the *Seven Network* case in our bundle.

ELIAS CJ:

Yes.

MR DUNNING:

We put that in there because – sorry.

ELIAS CJ:

Part of it.

MR DUNNING:

We put in the *South Australia Brewing Holdings* case because that carries a neat summary if you like of the way in which the Australian Courts have approached the section 155 notices and my learned friends have referred to the *Seven Network* case which also contains some summary of principles applicable to notices. Not all of them are relevant here because the number

of challenges to the notices in that jurisdiction on all sorts of areas but certainly when it comes down to the point, this is dealt with in section – paragraphs 4.9 and following of our written submission. We refer in 4.16 to the *Emirates* decision last year I think that was, just recently, end of last year, reported this year. Paragraph 4.16 where the Judge said there, well as a matter of logic and without the necessity to have all the facts, it maybe concluded in any given case that particular conduct is not capable of constituting a contravention of the Act.

WILSON J:

Quite, the necessity point again.

MR DUNNING:

Yes. And capable of constituting a contravention reflects their wording. They have that specific wording in section 155.

McGRATH J:

Where are you reading from?

MR DUNNING:

This is from our written submissions at paragraph 4.16 and the *Baxt* decision referred to in that paragraph is in our bundle of authorities?

McGRATH J:

Yes. Thank you.

MR DUNNING:

And so just finally on this point about the impact of section 53 applying where it is evidently applying, must be to prevent the Commission having functions or powers we say that well even on the Commission's approach section 53 would apply in certain circumstances to exclude its jurisdiction and even to investigate. Their letter of 15 November which I took you to at the start we've said well, we agree that it excludes the application of the Act in respect of a limited range of conduct, it just didn't say what that was, but conceptually

there was a limited range of conduct with which we agree, there must be. The question is therefore what conduct. The Commission's arguments themselves seem to suggest that if there was a complaint against Pharmac, which is asymmetrically protected, the Commission would not investigate. And it must be correct as a matter of principle that a regulatory agency or public body with these sort of powers must, as a matter of law, must be correct that they have no jurisdiction if the matter of law and interpretation has established that something they've issued is wrong. I mean think of a police search warrant. It's not the case that one allows the search warrant to be executed if there's a challenge to it. In the matter of law it's pointed out there's something deficient about it, the Court doesn't say complete your search warrant, we'll deal with it afterwards.

TIPPING J:

Mr Dunning, is it the necessary corollary of the proposition that it must necessarily fall within the exemption before you can concede that the Commerce Commission must show that there are reasonable grounds to suspect a non-exempt contravention? In other words, that is one way in which you can test whether your conduct, your client's conduct necessarily falls within the exemption?

MR DUNNING:

I'm not sure I'm sorry Your Honour. There is certainly the Australian authorities, and the *Seven Network* case sets this out, it says that first off in a challenge to a notice like this the Courts would consider whether all the facts, just quite separate from the exemption, may constitute a contravention, are they capable of constituting a contravention sufficient to justify the investigation and if the answer to that is no then the notice is invalid anyway. If the answer to that is yes, your point I think, then does the exemption mean that the notice is invalid.

TIPPING J:

I would have thought at the very least to issue a notice based on a proposed or on an asserted contravention, or a suspected contravention, you would have to show reasonable grounds for that suspicion?

MR DUNNING:

Well yes –

TIPPING J:

I'm putting it –

MR DUNNING:

I think –

TIPPING J:

– from the other side so to speak.

MR DUNNING:

Yes no I mean I've, the Commission, if it considered in its consideration, considered that it was necessary or desirable for the purposes of investigating a contravention, to issue a notice, the limited challenge of the other issues that were not before the Court, but it's for the Commission to consider if necessary and desirable for the exercise of its function to issue a notice.

TIPPING J:

What I'm leading to is if they choose, and probably they ought, to define, at least in broad terms, what the contravention alleged is, if on the terms of the allegation it cannot be the contravention?

MR DUNNING:

Yes.

TIPPING J:

Then it necessarily falls within the exemption or if you like there are no reasonable grounds –

MR DUNNING:

That's right, yes.

TIPPING J:

– to suspect that there is a contravention.

MR DUNNING:

Both of those, both of those and I think I might have been putting it slightly differently but that's right. They have to allege a contravention which they're investigating. If that may not reasonably constitute a contravention at all under any circumstances the notice is invalid. If it may do then the question is would the exemption take it out though nonetheless of its power to investigate.

TIPPING J:

Quite.

McGRATH J:

Isn't it the idea that the conduct must give rise to Commission reasonably suspecting contravention a little different to the circumstances being capable of constituting a contravention?

MR DUNNING:

Yes I looked – and I've certainly and in our submissions we said one can't wholesale adopt the Australian wording reasonably capable of constituting. That specific wording in their section 155 but nonetheless Justice Gallen and one could reasonably say there are still some principles in there that one can derive from it. There's no wording in our Act which says reasonably capable of constituting a contravention or reasonably suspect or whatever. It is simply the question of does the Commission consider it necessary or desirable for the exercise of its functions or powers and the functions or

powers are as articulated by the Court of Appeal in *Telecom*. The only one we're concerned with there is the function or power to take proceedings for a contravention of the Act. Does the Commission consider it necessary or desirable for the purpose of investigating whether there has been a contravention of the Act. Now if it wasn't for section 53 we wouldn't be here but section 53 we say takes that out of their functions or powers because there can be no contravention.

TIPPING J:

Well I'm sorry if I put a distraction in your path Mr Dunning.

MR DUNNING:

That's quite all right Sir.

TIPPING J:

I'm just trying to feel a broader perspective of this before honing it to this case.

MR DUNNING:

So moving on really now to the second question of what we would say is the key question insofar as does section 53 apply. Now in that respect it's in tab 1 of our authorities. I'll ask the Court just to open up to tab 1, section 53 and what it says. Firstly defines agreement includes any agreement arrangement, contract, covenant, deed or understanding whether oral or written, whether expressed or implied and whether or not enforceable at law. Very broad. Then pharmaceuticals, substances or things, medicines, therapeutic medical devices or products or things related to pharmaceuticals.

No issue here, both Betaloc IV and Betaloc CR are within that definition and then 53(2), nothing in Part 2 applies to (a) any agreement to which Pharmac is a party and that relates to pharmaceuticals for which full or part payments maybe made for money appropriated under the Public Finance Act. Both of the pharmaceuticals at issue here fall within that category. And (b), nothing applies to any Act matter or thing done by any person for the purposes of entering into such an agreement. And then (c) of course giving effect to it.

The RMI cases which Justice Fogarty referred to in his decision, and the Court of Appeal judgment there she refers to both the High Court and the Court of Appeal, said in respect of what was the former provision, which was not expressed as broadly as this, that one shouldn't read in qualifications to the plain wording. Shouldn't read down the scope of the exemption that would narrow it to impracticality. Now the alleged conduct here, as you've heard me already submit, is plainly within section 53. In paragraph 5.12 of our written submissions, we draw to the conclusion, what we say are, unarguable conclusions which both Courts below could not avoid. They couldn't avoid the obviousness of this conduct being within section 53 but then went on and said, yes but, there might be something else. So plainly, we say in 5.12 of our written submissions, section 53 applies to exempt otherwise potentially anti-competitive conduct from the application of Part 2 of the Act. That's its point. It applies to negotiations as well as to any concluded agreement –

ELIAS CJ:

I'm sorry, where are you now?

MR DUNNING:

Sorry, paragraph 5.12 of the written submissions.

ELIAS CJ:

Thank you.

MR DUNNING:

It plainly applies to negotiations and that seems to be accepted now, notwithstanding arguments to the contrary below and (c), there in 5.12(c), set out quotes from various other judgments which it found against us, where and particularly the Court of Appeal, there's no doubt that they have to accept and acknowledge that this conduct was within the wording of section 53. Justice Glazebrook at (c)(2), "That it took place in the context of contractual negotiations as was for the purpose of securing an agreement" and (3), Justice MacKenzie, "Any conduct of AstraZeneca which the Commission

might properly investigate, would fall within the plain meaning of the words any act, matter or thing done by AstraZeneca for the purposes of entering an agreement with Pharmac."

So, that's where it should have ended in our submission, plainly, that was enough. They were compelled to accept that. Then we have this introduction unfortunately of, yes but there might be a public benefit context here, or there might be a public benefit context, or there might be other facts. We say well, there are no other facts, we're prepared to assume –

BLANCHARD J:

That's certainly not an argument that would appeal to a Court in criminal law context and it's not an argument that would have much support from the Bill of Rights.

MR DUNNING:

Absolutely.

TIPPING J:

This public benefit thesis, or are you going to go on and address that directly?

MR DUNNING:

I think we should address it now, if it pleases Your Honour.

TIPPING J:

All right then, no, no, please proceed.

MR DUNNING:

I'm happy to address it now if you'd like?

TIPPING J:

No, no, only in your own sequence.

MR DUNNING:

Really, all I was going to say is the Commission's case that we're hearing, or will hear and have read, exists almost solely on hypotheticals and we're talking about this particular alleged conduct and this particular notice. We say that section 53 says what it says and the purpose, if one wants to cross-check as one should the purpose, is consistent with that because it facilitates achievement of those outcomes I mentioned earlier which I think we can all agree on. The outcomes desired by the NZPHDA, who would not facilitate those if those required to work within that fall foul of the Commerce Act.

Section 53 quite clearly carries within it, all of the terms of its operation required to achieve its purpose. There is nothing in there which of itself suggests that it isn't aware, if you like, of the impact and ambit and, if I may, just refer you to paragraph 5.11 of our written submissions, where we say look, it's in relation to subject matter which is subsidised pharmaceuticals and in relation to parties which is Pharmac and whomever Pharmac is dealing with, the exemptions properly narrow. There are two eyes of the needle you go through. It's not wholesale, it's properly narrow in terms of subject matter and parties but the range of conduct by those parties in respect of that subject matter is necessarily wide, any act, matter or thing and so is the scope of the agreement which includes those things I mentioned before.

It must cut both ways, there's no point protecting just one party because then the other party would be deterred, there would be a chilling effect. My learned friend, in paragraph 7.8 of his submissions, was probably about the only other point we agree with which says, "The scope of protection for those dealing with Pharmac needs to be co-extensive with the protection for Pharmac, to enable negotiations to take place." I can agree with that. Then unfortunately, my learned friend's submissions go on to say subsequently that, "Only Pharmac is the one that can initiate a proposal", that it's an asymmetric sort of negotiation. It's not a negotiation if a supplier comes along and says, I'm prepared to offer you this and that, if you take this I'll give you a deal on that, or I'm not prepared to provide this if you won't take that. Pharmac says no, that was an attempted tie and was unlawful.

TIPPING J:

That would be a really difficult line in some cases as to who first mentioned –

MR DUNNING:

Absolutely. It would be unworkable. How do the pharmaceutical companies and their advisors work out when have they overstepped the mark. Is this something which Pharmac's going to go for or not, do we wait –

TIPPING J:

Well, we thought you were hinting –

MR DUNNING:

Yes.

TIPPING J:

– so it was on the table.

MR DUNNING:

Well exactly and I think at that point, it would be appropriate, if I may, to take you to the Operating Policies and Procedures because that makes it abundantly clear as to how this industry really operates in that regard. They are found in volume C at page 171. You'll see it's what they say they are, the 3rd edition thereof. The evidence is pretty clear from all parties, it's not contested that this is Pharmac performing its functions under sections 48 and 49 I think it is, of its own Act. In pursuant to that Act it has promulgated these, 47 and 48 of the NZPHDA Act requires it to maintain and manage a pharmaceutical schedule and to meet those objectives and performance functions that develops these expenditure management strategies.

If Your Honours please, you'll see just at page 183 which is the end of those procedures, there's a flow chart, talks about the procedure for listing a pharmaceutical on the schedule. At the top, there's a reference in the first box to an application. The important point about this which we'll see from the

terms of the policies and procedures, that's by a supplier as much as it is by Pharmac. It's not just Pharmac generated proposals or applications and if one looks back on page 175, you'll see in section 2.1, it refers to amendments to the pharmaceutical schedule. It says PTAC which is a therapeutic committee, part of Pharmac, pharmaceutical suppliers, DHBs et cetera, may approach Pharmac to suggest possible amendments to the schedule. Possible amendments are listed, A through to H. You'll note for instance C, changing the subsidy levels of pharmaceuticals, E, de-listing pharmaceuticals, or de-listing part or all of the therapeutic group or sub-group.

Now, coming back to a point that was made to me before about the impact on competitors, one can think of no greater impact on a competitor than de-listing its product, it's got no market anymore, it's been de-listed as a result of a strategy implemented by Pharmac, through an approach by possibly a supplier, another supplier. If one looks also, bear in mind these are everybody's strategies not the preserve of Pharmac. Anybody who is in this industry, primarily it would be the suppliers but it could be DHBs, can enter the arena that we talked about before. Page 177, 3.2, there lists out Pharmac's strategies which we had referred to in the evidence that was filed in the High Court and our submissions includes reference pricing and so on but at D, you'll see cross-deal or bundling arrangements, these are routine. In fact, in this particular case, one mustn't lose sight of the fact that it was –

ELIAS CJ:

Is this a bundling arrangement, is a tying arrangement a bundling arrangement?

MR DUNNING:

It's effectively the same, it's effectively the same. The net result is the same, you bundle two things together. The question is, that's there's a commercial threat by one side presumably which they hope will be effective, if that's what's going on which says, if you want this you've got to take that but the end result is a bundle. It's not different from Pharmac going to a supplier and saying look, I really want that and I'll give you this if you give me that.

BLANCHARD J:

It falls within the next words, “whereby a composite decision may be made entailing amendments to the schedule” which of course, could be in or out, “in respect of more than one pharmaceutical”.

MR DUNNING:

That’s right. Then 178, if one refers to 3.2.3, “Pharmac may enter into an express contractual agreement with a supplier not to apply one or any of the strategies set out previously to a particular pharmaceutical supplier.” So, they can favour one over another, can exclude or restrict. I mean, all of these strategies are designed ultimately to achieve the outcomes of the NZPHDA but the strategies are all, you know, have issues about them under the Commerce Act and they’re not just Pharmac generated strategies, as we see.

Then 3.4.1, on page 179, refers to the majority of pharmaceuticals listed, “Listing contracts may also include special terms relating to particular pharmaceuticals, including rebates and risk sharing arrangements, restrictions on access and protection against de-listing or price reduction. The special terms of any contract will depend on the commercial arrangement negotiated between the supplier and Pharmac.” Page 180, 4.1.1, “Before seeking to initiate an amendment to the schedule, the party seeking the amendment should contact Pharmac to discuss the nature of its proposed amendment."

The risk here apparently is that, if for instance, a supplier went along and said look, I tell you what I’ll give you a really good deal on X but you’ve got to take Y and I’m not going to give you the good deal on X unless you take Y. Pharmac says I don’t like that, well that party just attempted to breach the Commerce Act apparently and is not protected by section 53 but if Pharmac says, that’s not bad let’s talk about that, I tell you what, I’ll give you something else on X and Y and then it’s a negotiation and it’s okay and it is protected by section 53. Now that’s just not workable.

BLANCHARD J:

So you're saying negotiation must extend to an attempt to negotiate?

MR DUNNING:

It must. If the party is entering the arena legitimately to that – the pharmaceuticals as defined in section 53 and in agreement in respect of those with Pharmac it's in the arena.

TIPPING J:

Otherwise you'd be frightened of starting.

MR DUNNING:

You would be frightened of starting, exactly. And that really can lead it seems on this view to a sort of perverse outcome which is that if for instance section 53 does not apply to this alleged threat of tying here, well presumably and certainly in our submission, the intent of the threat was that Pharmac would succumb one would imagine. The idea was we would like to get this if you do this. That was the intent of it so at the end of the day is that if Pharmac had succumbed and entered into an agreement, apparently the agreement would be protected.

TIPPING J:

And performance would be protected.

MR DUNNING:

Well there's an issue about that, isn't there, on the asymmetrical approach.

TIPPING J:

Well that's what I'm saying, yes.

MR DUNNING:

Well I think it should be and that's what our position is.

TIPPING J:

Well that's what paragraph (c) says.

MR DUNNING:

That's what it says. But what it really says is that if it isn't, if the approach asymmetrically says that your attempt to do so isn't unless Pharmac buys into it and we enter into agreement, you have this situation where there's a reward for successful anti-competitive conduct. You better make sure that your attempt –

BLANCHARD J:

How can a character of an attempt change depending upon whether it's successful or not?

MR DUNNING:

It shouldn't but if there's asymmetry, if for instance there is this asymmetry which says, you can't approach Pharmac with this cross deal, this bumbling arrangement because you run the risk of breaching the Commerce Act unless Pharmac wants to parley, then only if Pharmac wants to parley and an agreement is entered into that the agreement apparently is protected. So that says you better make sure. There's a reward for making sure that your attempt to get this agreement is successful.

WILSON J:

It's difficult to see how there can be any asymmetry in performance given that 2(b) refers to any person rather than Pharmac.

MR DUNNING:

Absolutely Your Honour and I'm just simply trying to illustrate the, if you like, the straw men that are being put up against us in trying to deal with those and show how really they don't work. It's unworkable.

TIPPING J:

This proposition that it makes all the difference who fires the first shot, is that something that has emerged only in this Court?

MR DUNNING:

No. Asymmetry has been lurking in this proceeding for some time.

TIPPING J:

But that particular articulation of it because I don't recall any of the Judges below –

MR DUNNING:

No it hasn't been –

TIPPING J:

– addressing that particular –

MR DUNNING:

Not quite in those terms. Justice MacKenzie said that it may be, that's why he said maybe you should let this investigation proceed. There maybe that it's only Pharmac which can exercise market power in the situation, not a pharmaceutical company.

TIPPING J:

Yes. in other words he wasn't committing himself to a view. Apparently the facts of this case were going to illuminate them all?

MR DUNNING:

Apparently and that's been our concern which is that we get this position where it seems to be accepted, begrudgingly by the Courts below, that the facts are covered by section 53 but there might be something else. There might be more.

TIPPING J:

But there's also, it seemed to me with respect subject to correction, to be a slightly unusual approach that we need to have all the facts before we can decide what the law is?

MR DUNNING:

That's exactly what is being said below and we're saying, but we're prepared to assume all the facts.

TIPPING J:

Yes.

MR DUNNING:

We're saying that if you get all the facts in the world in terms of the alleged conduct, because we're prepared to assume the alleged conduct, that means all facts are overtaken by that assumption. They're subsumed within it. Let's assume that alleged conduct is made out. May it please the Court, I think that's probably an appropriate moment for me to stop, unless there's any further questions?

ELIAS CJ:

Thank you Mr Dunning. Yes Mr Goddard.

MR GODDARD QC:

I think it's probably helpful to begin with the broader question raised by Justice Tipping in a question to my learned friend, what requirements must the Commission meet in order to issue a valid section 98 notice and Your Honour suggested the Commission needs reasonable grounds to suspect that a contravention has occurred. I think I'd put that slightly differently, with respect. Bearing in mind that often the Commission is investigating covert cartel conduct, of which it may receive hints or indications but no more which are the trigger for it to exercise its enforcement powers.

It would be extremely unfortunate if a formulation were to be adopted which prevented the Commission from exercising its powers to try to uncover conduct of that kind, seriously damaging to the long-term interests of consumers of which it acquires only the most limited hint. In my submission, it would be better –

ELIAS CJ:

That's not an argument for a roving investigation?

MR GODDARD QC:

No, it's not Your Honour.

ELIAS CJ:

No.

MR GODDARD QC:

What I was going to suggest as perhaps a more helpful formulation, is that the Commission must have a rational basis for suspecting that conduct may have occurred which would be capable of amounting to a contravention of the Act.

TIPPING J:

You're really substituting rational for reasonable?

MR GODDARD QC:

Rational basis for reasonable grounds. It was the grounds word I was a little bit worried about Your Honour because that sounded a little concrete, a little like evidence or something like that. Rational basis may be something –

TIPPING J:

I don't think you and I would be far apart on this, Mr Goddard.

MR GODDARD QC:

I'm relieved to hear that Your Honour, I didn't –

ELIAS CJ:

It's a very old fashioned formula.

WILSON J:

Mr Goddard, does it follow from that proposition, that if the alleged conduct is necessarily within section 53, there's no jurisdiction for the notice?

MR GODDARD QC:

Yes, if there is nothing one could learn about the conduct which necessarily is understood only imperfectly and incompletely at that stage which might result in that conduct being a contravention, then the power could not be exercised. There are other much more precise exemptions from the Commerce Act, for example in section 44 of that Act which could perhaps more plausibly than section 53 of the Public Health and Disability Act, give rise to circumstances that were so plainly not capable of constituting a contravention of the Act, that there would be nothing to investigate. There are two key points on which I want to take issue with my friend –

McGRATH J:

Just before you go to those, is this test you are articulating different to the Australian test, in that *Emirates* case?

MR GODDARD QC:

The language at section 155 of the Trade Practices Act is quite different from our section 98, so yes it is. It's tied to our Act which focuses on whether the Commission considers that it's necessary or desirable for the purpose of exercising its functions or powers.

McGRATH J:

You say that equates to rational grounds to suspect?

MR GODDARD QC:

A rational basis for suspecting.

McGRATH J:

Though you're really imposing on the Commission on that test, a higher level of requirement than the Australians are imposing but you say you're doing that because of the different language.

MR GODDARD QC:

Yes.

ELIAS CJ:

What's the language in Australia?

MR GODDARD QC:

The language focuses on what one suspects the person has – perhaps the easiest place to go is the Commission's authorities, tab 3. The section is actually in my friend's authorities, I'm grateful to him, under tab 4 is section 155 of the Australian Act –

ELIAS CJ:

Tab 4 of what?

MR GODDARD QC:

Of my friend's authorities. That focuses on whether the chair or deputy chair has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes or may constitute a contravention. I don't think it's dramatically different from the formulation –

TIPPING J:

No, it's not.

MR GODDARD QC:

– I'm suggesting actually.

TIPPING J:

Not hugely different.

MR GODDARD QC:

No, I think I was probably wrong Your Honour, to suggest that I was, suggesting a different.

TIPPING J:

To knock out an attempt to inquire, you've really go to demonstrate that on no rational hypothesis is there anything more that could shed light on this alleged affair.

ELIAS CJ:

Or even on no reasonable basis.

MR GODDARD QC:

The word reasonable is used with so many shades –

ELIAS CJ:

Ubiquitous in administrative law?

MR GODDARD QC:

Yes and tends to then produce immediately an inquiry about what we mean by it and the particular context –

ELIAS CJ:

Yes and so does the word rational.

MR GODDARD QC:

I was hoping, though obviously wrongly, that the word rational indicated where I was suggesting the test sat on that spectrum which is at the less demanding end of the spectrum.

ELIAS CJ:

This is a peculiar notion in terms of mainstream administrative law, as these concepts are used in the United Kingdom at any rate. This is a New Zealand perversion of recent years.

MR GODDARD QC:

To use rational as –

ELIAS CJ:

Well yes, to use it in contra-distinction to reasonable.

MR GODDARD QC:

I'm dismayed, in my first 10 minutes, to have engaged in a New Zealand perversion.

ELIAS CJ:

Anyway, you are contending for rationality being a higher test than reasonableness and you say it applies?

MR GODDARD QC:

A lower test Your Honour.

TIPPING J:

Less demanding.

MR GODDARD QC:

Less demanding.

BLANCHARD J:

Is that appropriate in circumstances which will require the handing over compulsorily of material and therefore, I would have thought, would amount to a search and is that consistent with the prohibition on unreasonable search and seizure in the Bill of Rights?

MR GODDARD QC:

What the Courts have consistently said about that prohibition in section 21 of the Bill of Rights Act is that what is reasonable turns, in respect of a particular search, it turns on the privacy expectations of the party in the particular context and on the degree of intrusiveness of the particular form of search or seizure. This is a context in which, as the Court of Appeal said in *Trans Rail*, expectations of privacy on the part of commercial entities are very low.

TIPPING J:

We didn't say very low. We said comparatively lower than – because I wrote it and my brother Blanchard was party to it.

ELIAS CJ:

And I wasn't and I question whether – I'd better flag with you. I question whether the privacy rationale is the adequate rationale for section 21?

MR GODDARD QC:

I wonder whether what this illustrates Your Honour is that in a case where this hasn't been squarely argued and the authorities haven't been included –

ELIAS CJ:

We shouldn't get into it.

MR GODDARD QC:

– however alluring it might be, it's better to stay away from this because I think, my friend was kind enough to find one or two small things on which he agreed with me. What I think I can agree with him on is that, at the end of the day, this about legality.

ELIAS CJ:

Yes.

MR GODDARD QC:

It's not actually about where the Commission sat on the reasonableness spectrum because there is no challenge to the decision of the Commission to issue this notice –

BLANCHARD J:

But we're being asked to formulate a test, aren't we?

MR GODDARD QC:

Well, I'm not asking Your Honour to formulate a test.

BLANCHARD J:

All I was really trying to flag, by introducing the Bill of Rights, is that I'm a bit queasy about the idea of rationality being sufficient. I would have thought reasonableness but not necessarily at the rationality end.

MR GODDARD QC:

What perhaps again this illustrates is that the safest thing to do in this case is to stay with the language of reasonableness which is familiar, both in the judicial review context and is the language used in section 21.

BLANCHARD J:

Well, I'm certainly comfortable with that approach.

MR GODDARD QC:

To refrain from exploring where, in the reasonableness spectrum, or what it might –

BLANCHARD J:

It was you that introduced the word rational.

MR GODDARD QC:

Yes, I know and I'm regretting it already Sir.

TIPPING J:

I provoked you Mr Goddard.

COURT ADJOURNS: 11.26 AM

COURT RESUMES: 11.49 AM

ELIAS CJ:

Yes Mr Goddard.

MR GODDARD QC:

Your Honour, let me see if I can recapitulate what I was trying to say in terms that avoid the various pitfalls into which I fell earlier –

ELIAS CJ:

I think you have, by saying that it's really a question of legality.

MR GODDARD QC:

Yes and the Commission must get the law right. Just in terms of, if this is a problem then I'll abandon any attempt at formulations at all but I was going to suggest that what I should have said earlier, was that the Commission must have a reasonable basis for suspecting that conduct has occurred, or may have occurred, that may constitute a contravention of the Act. The corollary of that and I think I'm accepting what Your Honour Justice Tipping said earlier, is that the Commission cannot properly issue a section 98 notice if it is so clear that an exemption applies, in the circumstances known to the Commission, that nothing it could learn through further investigation could effect that conclusion.

That's, I think, the context in which these issues need to be considered. It's an important part of that context that we are talking about a situation where there's no challenge to the Commission's belief that the conduct could, apart from the exemption, constitute a breach of Part 2 of the Act. AstraZeneca

hasn't sought to raise that in these proceedings, without conceding of course that it had breached the Act in any way –

TIPPING J:

Well, they're proceeding on an assumption?

MR GODDARD QC:

That's right Sir, yes.

TIPPING J:

Yes.

MR GODDARD QC:

They've said, assume that's the case, nonetheless the exemption is so clear, it's so clear that it applies in the circumstances known to the Commission that nothing the Commission could learn through this section 98 notice could effect that conclusion. That's where, I think, there are two important points of departure between the Commission and AstraZeneca. The first is that the Commission emphasises how little it knew about the conduct at the point at which it was issuing the notice. My learned friend repeatedly referred to "this conduct" but the whole point was that the Commission didn't know –

McGRATH J:

Well, it knew that there was a negotiation –

MR GODDARD QC:

It knew that there was –

McGRATH J:

– and it knew that there was either a trade tie or an attempt at a trade tie?

MR GODDARD QC:

It suspected that there might have been and that's one of the first points I want to make, is that tying is a very general term and it's much broader than

AstraZeneca suggests, that my friend suggests. It is not the case that every type of tying necessarily involves entry into an agreement. That's a key fallacy that underpins the whole of my friend's argument. Let me provide an example at once –

BLANCHARD J:
You're using the word agreement in its widest sense as defined.

MR GODDARD QC:
Yes.

BLANCHARD J:
Including understandings and nods and winks and that kind of thing.

MR GODDARD QC:
Yes but, in my submission, falling short of capitulating to a unilateral threat and that's important. If someone makes a unilateral threat and you surrender to it and refrain from taking some action, there's no understanding or agreement, even in that broader sense. Let me give an example. This is very important, I think, in understanding the sort of issue that could arise. As is explained in the affidavits, the agreements with Pharmac are continuing agreements. The agreement in respect of Betaloc CR was not one that had a particular termination date, it was just certain aspects of the agreement that were to come to an end.

Suppose a similarly situated person, with an evergreen agreement with Pharmac for the supply of a particular pharmaceutical which is the only pharmaceutical on the list of that kind and which also supplies another pharmaceutical, pharmaceutical Y. So, you've got X which is on the list, the only one of the kind and the other pharmaceutical Y and the supplier learns that Pharmac is considering listing substitutes for X and the company says to Pharmac, if you list substitutes for X we'll stop supplying Y. Now, that's not conduct for the purpose of entering into an agreement. No agreement is sought, it's simply a threat that if agreements are entered into with other

people, or indeed even if certain substances are listed without agreements because there's not a perfect – it's not the case that everything that's listed must be the subject of an agreement.

BLANCHARD J:

There would be no negotiation in that scenario, would there?

MR GODDARD QC:

The statute doesn't use the term negotiation of course Your Honour. What it says is, "for the purposes of entering into an agreement".

BLANCHARD J:

What about the notice?

WILSON J:

With the letter, in paragraph 4 of the letter?

MR GODDARD QC:

I think Sir, it's important and my friend, I think this was one of the two things we agreed on, that a letter accompanying a notice is not to be construed as if it were a pleading.

BLANCHARD J:

But it's indicating what was being investigated.

MR GODDARD QC:

In very broad non-technical terms –

BLANCHARD J:

Well, it talked about negotiations.

MR GODDARD QC:

It referred to negotiations but if one looks at –

BLANCHARD J:

You're putting up a hypothetical scenario that appears to not be the sort of thing that the Commerce Commission thought it was looking at.

MR GODDARD QC:

I'm happy to take the Court through the facts and to show that the Commission didn't know what exactly it was looking at and that there were a range of possible scenarios –

BLANCHARD J:

It thought there were negotiations.

MR GODDARD QC:

Yes and at that point one needs to inquire into what the negotiations related to and whether they were for the purpose of entering into an agreement, or for other purposes. My starting point Sir, is that one can't leap from tying or from a threat of exercise of unilateral market power, to the assumption that the conduct was for the purposes of entering into an agreement with Pharmac.

ELIAS CJ:

I just wonder whether it is right to say that that isn't for the purposes of entering into an agreement, in the context of the exemption and the place occupied by Pharmac. I just flag that I'm not sure that you don't need to develop that a bit more. It may be unilateral in form as action initiated but the outcome is still agreements to purchase.

MR GODDARD QC:

No Your Honour, it's not to enter into any new agreement. Remember that the backdrop is that there's a continuing agreement –

ELIAS CJ:

Well, or to continue an agreement, agreement is very wide.

MR GODDARD QC:

Or a listing, or a listing which is a statutory power that can be exercised without any agreement. I think it's common ground, that in this case Betaloc IV was listed on the schedule but was not the subject of any agreement between Pharmac and AstraZeneca.

BLANCHARD J:

There'd be an agreement –

ELIAS CJ:

To list.

MR GODDARD QC:

No, there doesn't have to be an agreement to list something Your Honour. It can simply be listed in the exercise of a statutory power and a decision can be made. That has certain consequences in terms of the prescription of the relevant pharmaceutical in New Zealand.

TIPPING J:

You may be right in the abstract Mr Goddard and I think I would accept that you're right in the abstract but I don't see what it's got to do with this case.

MR GODDARD QC:

That's where I think we come to the second significant point of departure which is the interpretation of section 53 and the purposes –

WILSON J:

Just before we get there Mr Goddard, do you accept that in order to justify the legality of its notice, the Commission can't go outside what it said in paragraph 4 of its accompanying letter?

MR GODDARD QC:

No, I don't Your Honour because it seems to me that what we're doing is assessing the legality of a decision made by the Commissioner and that what

one has to ask is whether, on the material before her, the decision was a lawful one. So, I think a letter that's written to go out with the notice is not in fact especially relevant or helpful, rather –

TIPPING J:

But it's the very decision maker who writes this letter explaining what it is that she wants to investigate. It seems a bit abstract to say that you can't divorce the two. I know you cunningly say that this shouldn't be part of the notice. Now cunning I don't mean that in pejorative terms but –

BLANCHARD J:

Or not very.

TIPPING J:

Not very pejorative but I mean in the real world someone getting this notice in letter will say oh they're after us for this.

MR GODDARD QC:

But what must, in my submission, be basis for assessing the legality of the Commission's decision is the totality of the material that was before the Commission, Commissioner making the decision, so it's –

TIPPING J:

Well how can the decision maker go behind her own explanation of the purpose of the investigation?

MR GODDARD QC:

Because it's a very short form summary which is not intended to be comprehensive and indeed I must say that I have been on the receiving end for clients of letters that were deliberately extremely vague because the Commission for example was acting on tip-offs that it didn't want to disclose. Practice in relation to disclosure of the issue and the basis for the investigation is variable depending on the circumstances and rightly so.

TIPPING J:

I agree with that but when you choose, and it's the honest way to go that you say what you're after, surely you can't come along and say, well as a matter of fact we might pick up something else in the process.

MR GODDARD QC:

We can't come along and say we might pick up something else in the process. What you can do is go back to the decision paper and the other material before the decision maker and ask whether looking at all of that material, rather than a one sentence summary, there's a proper basis for making a decision. That must be right, with respect.

McGRATH J:

But the basis must include the fact that the Commission considers it necessary or desirable which is that the Commissioner had an opinion that it was necessary or desirable.

MR GODDARD QC:

Yes on the basis of the material before the Commissioner.

McGRATH J:

Yes.

ELIAS CJ:

But not one that we might find ex post facto.

MR GODDARD QC:

No.

ELIAS CJ:

And contrary to the reason identified by the Commission.

MR GODDARD QC:

Not one contrary to the grounds on which the Commission acted at the time which is not necessarily the same thing as judging the Commission's decision on the basis of a one sentence summary of it in a letter.

McGRATH J:

I'd agree with that Mr Goddard but it is a subjective enquiry in part isn't it?

MR GODDARD QC:

Yes.

McGRATH J:

That we're looking for, one of the questions is whether the Commissioner truly held that opinion –

MR GODDARD QC:

Although that's not challenged in this case.

McGRATH J:

– quite apart from everything else. That's not challenged.

MR GODDARD QC:

There's no challenge for that in this case.

ELIAS CJ:

Well that's a challenge to honesty but it's not determinative. Then you need to look at whether, as we've discussed, it was reasonably available.

MR GODDARD QC:

I've been on a proper understanding of the law to form that view, yes.

McGRATH J:

It could well be cases though where if you're saying well it's not just ties, we're looking beyond that, and the Commission tried to write a broad letter, I think

as you put it, and put it in, that those issues might arise, might they not? I mean this was always a trade tie case.

MR GODDARD QC:

At the most general level of that concept, yes.

TIPPING J:

I personally think it maybe, I don't think we're going to have to go here unless you push us here, that it maybe implicit in section 98 that you've got to identify in the notice, with as much specificity as the circumstances allow, what it is you're after.

MR GODDARD QC:

And the Commission did that by describing with considerable specificity the particular documents it wanted.

TIPPING J:

Yes but I mean more than that, I mean what particular alleged contravention your enquiry is focused on.

MR GODDARD QC:

And I don't want to spend time on that issue because again that hasn't been challenged in this case. It hasn't been a subject of argument.

BLANCHARD J:

And you wouldn't want it. It would be disastrous for you if we went that way, wouldn't it?

MR GODDARD QC:

Disaster is strong but it's certainly something on which I can't give proper assistance to the Court because it hasn't been the focus of argument.

BLANCHARD J:

But I mean your argument is tending to push us in that direction.

MR GODDARD QC:

Well I – not really Your Honour.

BLANCHARD J:

Yes it is.

MR GODDARD QC:

Let me focus on, for a moment, because I think it does shed light on what I'm trying to say here. The second broad area of departure between the two cases, and that is the interpretation of section 53, and here I take issue both with my friend's suggestion that on the language of section 53, on the words, there is only one interpretation available, only one meaning available that's clear that negotiations are for the purposes of entering into an agreement or it's clear that tying is for the purposes of entering into an agreement. And the second and very important limb of this argument is that my friend's approach would produce absurd results that are inconsistent with the policy of both the Commerce Act and the Public Health and Disability Act and it would be rather odd if a result that's contrary to the purposes of both were to be reached given, as I explained in my written submissions, that the policies of the two Acts are in fact entirely congruent. Commerce Act, long term interests of consumers, Public Health and Disability Act, public health outcomes for New Zealanders, those are congruent policies and –

McGRATH J:

I wonder if they are totally congruent. I mean it seems to me that in providing for the exemption, what Parliament may have had in its mind was a need to sweep away any suggestion that a pharmaceutical company would feel impeded by the contravention or by the provisions of the Commerce Act and so that, to be cynical about it, they couldn't say to Pharmac, oh we still think there's a risk we'll be caught by them.

MR GODDARD QC:

I think the important point to bear in mind there Your Honour is that the policy objectives of the Commerce Act are the long term interests of consumers and that the Commerce Act itself recognises there would be circumstances where the long term interests of consumers are best served by not applying the provisions of Part 2 and there are a range of mechanisms for dis-applying those within the Commerce Act by reference to the long term interests of consumers. This is effectively a hard wired authorisation of certain types of conduct so it avoids the need to trail off to the Commission and apply under Part 5 for an authorisation in respect of these agreements. And there's all sorts of good reasons to do that but the authorisation regime is governed by that purpose statement of the Commerce Act just like the sections.

So when I say it's consistent with the policy of the Act, what I'm saying is it's consistent with the policy of pursuing the long term interests of consumers through either the application of those provisions or, in circumstances where they don't serve the long term interests of consumers, an appropriate exemption. And there are both hard wired exemptions in the Commerce Act, sections 43 and 44 and section 43 is the reference to statutory authorisation of conduct which is what links into section 53 of the PHD Act. Then in section 44 there's a host of others. For example, agreements between natural person partnerships are exempted so the partners of Chapman Tripp can't be accused of price fixing when they agree on their hourly rates that they'll charge.

TIPPING J:

Not of price fixing.

MR GODDARD QC:

Or anything else governed by the Commerce Act. I shouldn't have picked my old firm should I Your Honour. So the policies are absolutely congruent. This is a hard wired exemption designed to serve that broader objective and I think what one sees very quickly is that my friend's approach doesn't serve those. But let me deal first with the language and I think it's worth pausing for a moment to notice that the concept of doing something for the purposes of a

particular outcome often naturally, in the way English is used, means that it must be done genuinely for that purpose and it must be reasonably necessary for that purpose.

Let me give you an example. Suppose that a company in New Zealand makes a job offer to someone in Australia and sends an email saying we will meet the cost of travel for the purposes of attending the job interview. So we'll meet the cost of travel for the purposes of attending the job interview. Now if the Australian candidate charters a jet to fly them over then in my submission plainly you would say that's not travel costs for the purposes of attending the interview because it goes far beyond what's reasonably necessary for that purpose. If they were to purchase a round the world ticket and travel from Sydney to Wellington via Paris, always alluring, then the New Zealand company could reasonably say that's not travel for the purposes of attending the interview. That's a bolt on, that's something for your own purposes.

BLANCHARD J:

Well that's a nice example but it's got not relevance here and to demand that what he's done must be reasonably necessary for the purpose of entering into an agreement, is to create a very opaque test.

MR GODDARD QC:

It's not –

BLANCHARD J:

What is reasonably necessary in a negotiation?

MR GODDARD QC:

Well in practice what one can say I think with some confidence is that there are a range of forms of anti-competitive conduct exercised against Pharmac, exercised against contrary to the purposes of the Public Health and Disability Act that are not reasonably necessary. Now –

TIPPING J:

It's almost –

BLANCHARD J:

How do you know what's necessary because you don't know what the other side's posture really is.

MR GODDARD QC:

But –

BLANCHARD J:

There's a lot of game playing going on. Is that reasonably necessary?

MR GODDARD QC:

There are certain games that will never be reasonably necessary. I think if one goes to my examples in the submissions it's a helpful way of focusing attention. If we, on this issue which I think lies at the heart of the interpretation issue, beginning on page 15 of my submissions. So Pharmac writes to companies A and B, says we're going to conduct a tender for the supplier of drug X. There are just two potential suppliers A and B and A and B agree that B will bid but in a very high, artificially high price, so that A will be able to win the contract at what is itself an inflated price –

ELIAS CJ:

But apart from that being a mile away from this position, that's not dealing with Pharmac. Isn't section 53 concerned with dealings between any person and Pharmac?

WILSON J:

Mr Dunning, I think the first three examples were put outside section 53.

TIPPING J:

Yes and were clearly not on.

MR GODDARD QC:

And similarly here what the Commission sought to investigation was the unilateral decision made by AstraZeneca about what its approach would be to the supply of Betaloc IV.

TIPPING J:

You can't say it was unilateral when you assert it was during negotiation.

MR GODDARD QC:

It's the difference – in neither – in both that example and both this case and example 1 what you have are strategic decisions made by someone which then issue in communications with Pharmac about the basis on which the person wants to deal with Pharmac.

BLANCHARD J:

Are you saying that's not a negotiation?

MR GODDARD QC:

I'm saying that example 1 is an example of a negotiation.

BLANCHARD J:

But hang on. Forget about examples 1 to 3, they're nothing to do with it.

MR GODDARD QC:

But how does – the important thing is to read section 53 in a way which excludes examples 1 to 3 and so immediately –

ELIAS CJ:

Well I've read –

BLANCHARD J:

I don't have any problem with that and nor does Mr Dunning.

MR GODDARD QC:

But Mr Dunning has carefully avoided explaining how he understands the language for the purposes of entering into an agreement in a way that excludes this. A and B put in their bids for the purposes of entering into an agreement with Pharmac. In particular when A puts in its bid at an inflated price –

BLANCHARD J:

But it's not part of the negotiations.

TIPPING J:

It's prior to engaging with Pharmac. It necessarily is prior to engaging with Pharmac because that's the whole point.

BLANCHARD J:

And even if it was done at a time when negotiations with Pharmac were going on, it wouldn't be part of the negotiations, it's clearly quite collateral.

MR GODDARD QC:

And it's that point about conduct being collateral to entry into agreement that's critical. Let's turn to example 4 –

ELIAS CJ:

Isn't section 53 really about dealings between Pharmac and other persons and anything that is part of those dealings is subject to the exemption and for good policy reasons if you think what Pharmac's set up to do.

MR GODDARD QC:

I'll come back to those policy reasons but on Your Honour's approach A is submitting the bid in example 1 would be protected and in my submission that's not the case. In my submission, that's breach of the Commerce Act because it's giving effect which is one of the things proscribed by the Commerce Act to an unlawful agreement.

ELIAS CJ:

But if that was all there was to it, it might be protected by the side arrangement it has with B is not and that's the breach.

MR GODDARD QC:

Well I think that's a helpful starting point at least because it suggests that the degree of connection with a negotiation is a critical factor in deciding whether something is for the purposes of entering into an agreement. Now if we turn to example 4 I think my friend said here, and this I think is critical, well maybe, maybe not. What we have here is a situation where company A if the only supplier of X is due to come off patent in three years and A says, you won't get any of this drug for three years unless you enter into a 10 year contract to purchase all requirements for X now. Now that meets Your Honours test of being –

ELIAS CJ:

It probably does, yes.

MR GODDARD QC:

And yet that is –

ELIAS CJ:

Although we wouldn't want to decide it.

MR GODDARD QC:

Well I think that would be effectively what Your Honour was deciding by going with my friend's approach and that's really what I'm trying to emphasise by drawing these examples to the Court's attention. Your Honour cannot accept my friend's approach without accepting that example 4 is protected by 53.

McGRATH J:

Yes.

ELIAS CJ:

Mmm.

MR GODDARD QC:

And in my submission that would be an extraordinary result to reach.

BLANCHARD J:

Be extraordinary if Pharmac agreed to it too.

MR GODDARD QC:

Well –

BLANCHARD J:

It's not a particularly realistic example.

MR GODDARD QC:

With respect it is Your Honour. In fact it's not a million miles from this case where what was sought –

McGRATH J:

I can accept that it is a realistic example but what I put to you is I think you have to, at the end, meet and – that Parliament may have been prepared to allow pharmaceutical companies to negotiate in a robust way with Pharmac as the price for making sure that there could be no, that they couldn't use as an excuse, the Commerce Act provision.

MR GODDARD QC:

I think Your Honour is exactly right. It's really the approach adopted by Justice Fogarty who says well I accept that permitting this sort of conduct doesn't serve the purposes of the Act but His Honour considered that the language of section 53 was so clear that it admitted of no other choice.

ELIAS CJ:

Well except what's been put to you is it may serve the purposes of the, what is it, the Public Health –

MR GODDARD QC:

– and Disability Act.

ELIAS CJ:

Yes.

MR GODDARD QC:

PHD Act.

TIPPING J:

At a higher level of generality if you like. There are levels of –

MR GODDARD QC:

Right, so –

McGRATH J:

We're in the business of how far can you read it down because of the purpose context I suppose or purpose provisions in the Act.

MR GODDARD QC:

Yes. How whether for the purposes of such an agreement has to be read as a result of purpose in a way which excludes conduct such as example 4 which, as I say, is linguistically I think plainly open. I gave the example of, you know, travel costs that are incurred for the purposes of attending an interview and it's implicit in that reasonably necessary for the purposes. The language is often used in that way so the question for the Court is, is that the sense in which it's been used here, given that that's a perfectly ordinary –

TIPPING J:

It's not really a question of reasonable necessity, it's a question of what is regarded as acceptable and I think you're rather eliding that in the concept of reasonable necessity. Like my brother Blanchard I regard that as a very slippery concept in this, in the field it's almost as bad as good faith in the field of negotiations.

MR GODDARD QC:

I'm not necessarily wedded to that precise formulation of the concept. The idea is though that –

TIPPING J:

The bottom line of your argument seems to me to be some things are on within negotiations, and some aren't.

MR GODDARD QC:

Yes and –

TIPPING J:

Now you have to be able to articulate to get off the ground some clear and principled line between what are on and what are not on.

MR GODDARD QC:

Well the first point must be that the negotiations must be negotiations towards entry into an agreement and I just want to come back to that point because tying for example doesn't necessarily involve entering into any sort of agreement where there is simply a threat directed at preventing Pharmac from taking steps vis ã vis others. So that's the first point. Secondly –

ELIAS CJ:

Mr Goddard –

BLANCHARD J:

It's still a form of agreement.

MR GODDARD QC:

With respect Your Honour I think if someone says, give me your wallet –

BLANCHARD J:

It's an arrangement or an understanding.

MR GODDARD QC:

Give me your wallet or I'll shoot you and you hand over the wallet, I'm not sure there's any sort of agreement.

ELIAS CJ:

Well I'd agree pretty quick.

TIPPING J:

It's duress Mr Goddard but anyway I think we're getting a mile away from our present case.

ELIAS CJ:

Mr Goddard, if the legislature had wanted to exempt Pharmac and anyone which concludes an agreement with Pharmac, it could have said so.

MR GODDARD QC:

I'm not arguing that the exemption only applies where an agreement has been concluded. That doesn't work and that's accepted in my submissions. It has to also apply to steps taken for the purposes of entering into an agreement, even though it transpires that no agreement ultimately is entered into. I also accept absolutely that the lawful or unlawful character of the conduct must be able to be ascertain at the time it takes place. It can't be the case you have to wait to see whether an agreement is arrived at –

TIPPING J:

It can't be retrospectively –

MR GODDARD QC:

No, it can't. The Commerce Act does actually do that for some conduct but that's not what's contemplated here. I accept that absolutely. So, we come back to looking at examples, like example four and I think that it's important to pause and notice that it is plainly contrary to the policy of the Commerce Act. I don't think that's a startling proposition.

ELIAS CJ:

That's why there's an exemption.

MR GODDARD QC:

No but it's also contrary to the policy which informs the grant of exemptions under the Act which is the long term interests of consumers.

ELIAS CJ:

Well, that's the issue, yes.

MR GODDARD QC:

Then looking also at the Public Health and Disability Act. I don't think that the purpose provision is included in the materials that have been provided but in 4.9 of my submissions I note, "That the purpose is set out in section 3 and the focus is on pursuing improved health outcomes for New Zealanders, so far as reasonably achievable within the funding providing to the public health sector." Then section 47 which I set out in my 4.10, "The objectives of Pharmac, secure eligible people, best health outcomes, reasonably achievable from the pharmaceutical treatment and from within the amount of funding provided." That's the key limb of that.

So, there's a clear focus on achieving best achievable health outcomes within constrained funding. It flows, as night follows day, that that objective will be secured by Pharmac exercising its monopsony power to secure lower prices and better deals for pharmaceuticals. There is absolutely nothing in that purpose statement that is served by permitting pharmaceutical companies to

exercise either collective or unilateral market power against Pharmac in a way that drives up those prices beyond the competitive price.

ELIAS CJ:

Well, collective is off the table because we're not looking at that situation. One has to take the broader view and the longer term view. The very existence of Pharmac surely, is so that it can take that longer view and it can decide where the swings and roundabouts will end up.

MR GODDARD QC:

That's right and that it can exercise its significant market power –

ELIAS CJ:

Yes.

MR GODDARD QC:

– to procure better health outcomes at low cost.

ELIAS CJ:

But not in individual cases necessarily.

MR GODDARD QC:

No, no, it can be across –

ELIAS CJ:

Yes, yes.

MR GODDARD QC:

– pharmaceuticals, it can be over time but that's still about Pharmac using its market power to achieve those outcomes, that's what delivers the purpose statement.

ELIAS CJ:

But you have to have pharmaceuticals willing to deal with them and what Justice McGrath puts to you is that the pharmaceutical companies might say, we can't deal with you because if we make some proposals to you, we may be at risk of anti-competitive activity and what's put to you is section 53, discourages that.

MR GODDARD QC:

I think that it's important to begin by noting that there is the world of difference, both in terms of factual circumstances and in terms of policy context, between Pharmac exercising its market power and a negotiation taking place in the context of an exercise by Pharmac of its market power and the exercise by a pharmaceutical company of its market power. It seems to me that there are really only two routes for AstraZeneca to arrive at the conclusion that the latter was intended to be protected by this exemption.

The first is to suggest that there needs to be some sort of fairness, some sort of equality of arms in the negotiations and at times I think my friend's argument slid in that direction. The other is to say that it's impossible to serve the first goal without also serving the second because it will deter people from dealing with Pharmac, in context where it exercises its market power, if they can't also exercise their market power. Both of those arguments are flawed. Let me deal with each.

First of all, it's no part of the purpose of the Public Health and Disability Act to create any sort of equality of arms between –

ELIAS CJ:

This isn't about equality of arms, it's about a safe haven, it's about an alsatia. That's not the same as an equality of arms argument.

MR GODDARD QC:

The safe haven, the entering the arena argument, is the second of the two I suggested.

ELIAS CJ:

Yes but I'm just wondering whether you're just not introducing a man of straw in this equality of arms issue?

MR GODDARD QC:

I'm delighted to treat it as a person of straw and abandon it. I was merely –

ELIAS CJ:

I like my straw people to be men.

MR GODDARD QC:

I was in a mediation recently where it was suggested that something would take a certain number of man hours and the suggestion that it could be done in far fewer women hours was immediately made by the other side and I think we settled on that basis in fact. I digress. This straw "creature", it is one that I detected elements of in my friend's argument but if it's not seen as a serious issue, I'm happy to just abandon that, to move on from it. It's clearly not what the Act is trying to do.

The question then becomes one of whether, in order to achieve the policy objectives of the Public Health and Disability Act generally and section 53 in particular, it's necessary that there be an umbrella of protection over both the exercise by Pharmac of its market power and the exercise by pharmaceutical companies of their market power. My submission is that those are factually distinguishable, that participants in negotiations will know in practice which of those is happening and that it is not necessary, in order to make section 53 work, that pharmaceutical companies be protected in circumstances where they are seeking to exercise unilateral market power against Pharmac.

TIPPING J:

Does it all turn on this concept of unilateral and bilateral because otherwise, when are they not allowed because they are clearly allowed to do it in some circumstances, aren't they, as a result of paragraph (b)? I mean, you can't

write it out altogether and you seem to me to be suggesting that it's all right if it's in a genuine bilateral context but not all right if it's done unilaterally, vis-à-vis Pharmac.

MR GODDARD QC:

There's no circumstance in which the exercise – yes, I think that's a way of capturing it. There's no circumstance in which the exercise of unilateral market power, against Pharmac, is authorised by this. Pharmac can exercise its market power and it's possible for –

TIPPING J:

Can I just interrupt you. Do you mean by unilateral, not for the purpose of achieving an agreement?

MR GODDARD QC:

No Your Honour, I mean in the sense that section 36 applies to unilateral market power as opposed to collective market power. So, I'm just using –

TIPPING J:

No, no, well we're talking at cross purposes then.

WILSON J:

I think that that's very much the point Justice Tipping was putting to you, that on the argument you're now putting to the Court, wouldn't you expect 53(2)(b) to refer only to Pharmac rather than any person?

MR GODDARD QC:

No because one of the things that Pharmac can do is enter into an agreement with a pharmaceutical company that has adverse consequences for the ability of another pharmaceutical company to compete to supply a product so it's important that both Pharmac and the pharmaceutical company be protected in that situation –

ELIAS CJ:

But that's (c) isn't it, that's (c)?

MR GODDARD QC:

But one has to be able to negotiate towards that as well as arrive at it.

ELIAS CJ:

Well that's (b), yes.

McGRATH J:

Isn't that protecting the company, the pharmaceutical company, from the unilateral exercise of market power?

MR GODDARD QC:

No Your Honour it's protecting it from the exercise of shared market power. It's the consequence of Pharmac's market power in particular as – in fact it's really protecting an agreement which has the effect of lessening competition against the backdrop of Pharmac's market power because it's Pharmac's market power that enables it to say we'll buy from just you and from no one else. So those agreements are all about Pharmac's market power. The reason it was a competition concern is because Pharmac's a monopsonist.

TIPPING J:

But you seem to be saying that Pharmac can exercise market power, fair enough.

MR GODDARD QC:

Yes.

TIPPING J:

No question about that.

MR GODDARD QC:

Yes.

TIPPING J:

But a pharmaceutical company, or anyone else for that matter, cannot, in any circumstances, exercise market power in a way that would otherwise be a –

MR GODDARD QC:

Breach of the Commerce Act.

TIPPING J:

Commerce Act. Now are you actually putting it as high as that?

MR GODDARD QC:

That they can't exercise it against Pharmac, yes.

TIPPING J:

I think you are.

MR GODDARD QC:

Yes I am. I'm saying –

TIPPING J:

They can't use their market power in any circumstances against –

MR GODDARD QC:

Pharmac.

TIPPING J:

– if you like, Pharmac.

MR GODDARD QC:

So –

TIPPING J:

Well that's very hard to reconcile with (b).

MR GODDARD QC:

No. In my submission it is not Sir and that's because exercising your market power against Pharmac is not for the purposes of entering into an agreement with them any more than chartering the jet was for the purposes of attending the interview. It's going over and above what is reasonably implicit in the concept of acting for the purposes of an agreement and it's saying this isn't about facilitating agreements that benefit New Zealanders, this is about facilitating agreements that benefit pharmaceutical companies.

WILSON J:

It's still using or attempting to use the market power for the purpose of reaching the agreement with Pharmac, isn't it?

MR GODDARD QC:

And that's where one has to pause and say so in what sense is the language used here. Let's cross-check it against purpose of the Act in the language of this court in *Fonterra* and let's see whether that makes sense. For the purposes of is actually a very open and malleable phrase rather like cost of capital and one has to look at, one has to pause –

TIPPING J:

You're on a good wicket that time round Mr Goddard.

MR GODDARD QC:

And I'm also on a good wicket but one that just takes a little longer to explain this time Sir. It's a phrase which takes its colour, which takes its context from the purpose of the Act and it is immediately apparent, I think, that there is just no sense in which the purpose of this Act is served by permitting pharmaceutical companies to exercise unilateral market power against –

TIPPING J:

But what if I'm a pharmaceutical company and I come up with a proposal that is exercising my market power but which is perfectly acceptable to Pharmac? Your approach would outlaw that.

MR GODDARD QC:

It would – I cannot conceive of a situation in which it was being exercised against Pharmac and would be acceptable to Pharmac so I think there's an inherent contradiction in Your Honour's suggestion.

WILSON J:

Can I put a hypothetical to you slightly viewing what actually occurred here but I emphasise hypothetically. Just assume that AstraZeneca had proposed, using its market power, a tie of these two pharmaceuticals and Pharmac had accepted that tie and entered an agreement in those terms. On your argument AstraZeneca had been outside section 53 in putting up the proposal but got the benefit of section 53 once Pharmac accepted it.

MR GODDARD QC:

I think there's an important distinction about the types of proposal that can be put to Pharmac that needs to be understood here because I think I'm not sure that I've been precise enough about it. There are two ways one can put a proposal to Pharmac. One is to say, here is another approach for you to consider. In addition to all the options you have now, here is another option. That can never be an exercise of unilateral market power against Pharmac.

ELIAS CJ:

Why not, on your argument?

MR GODDARD QC:

As a matter of – because you're not withholding any option that was otherwise available. To say, would you like to do this deal as well as the others that are on foot now, is not. But to come along and say these are, this is the only

basis on which we will supply X or supply X and Y, that is capable, as a matter of competition law, of being an exercise of unilateral market power.

ELIAS CJ:

Well suppose they come along and say, we are prepared to sell these two drugs if you enter into a 10 year agreement but we'll also drop the price and it's quite a good deal for you and Pharmac says yes. Well the –

MR GODDARD QC:

But there's no competition issue, there's no exercise of unilateral market power against Pharmac there so that's not the case I'm talking about. To make an –

ELIAS CJ:

Well I don't see that that's right. I don't see that it's –

TIPPING J:

It's putting an awful lot of weight on the concept of against.

ELIAS CJ:

Yes.

TIPPING J:

And we're going to have really tricky issues in that area. I mean is it against when Pharmac doesn't like it and not against when Pharmac does like it?

MR GODDARD QC:

It's against when it prevents Pharmac from pursuing its objective and effectively results in Pharmac paying supra competitive prices as a result of the exercise of market power. This is not a distinction that in practice is going to be difficult to draw. You can usually tell in a negotiation who it is who's exercising unilateral market power. You don't usually, I've never come across a case where one didn't know which of two parties was breaching section 36 or might have breached section 36. You have an enquiry about who has

market power. You look at the form of the particular action taken and you apply the limbs of section 36. I think there's a real risk of making assumptions about how the Commerce Act works which are not well founded and which feed into an overall broad –

BLANCHARD J:

That gets fairly blurred when you have one party which is free to exercise market power and the other is said not to be free to do so.

MR GODDARD QC:

I think so Sir.

BLANCHARD J:

I accept what you say about a normal negotiation but negotiations with Pharmac are not normal negotiations.

MR GODDARD QC:

And they're not meant to be. Pharmac is meant to have all the weapons.

BLANCHARD J:

I didn't intend any criticism of Pharmac in saying that.

MR GODDARD QC:

The whole purpose of this Act is to, if one might give Pharmac the ability to engage in conduct which might otherwise breach the Commerce Act and to ensure that people can participate in the negotiations that result from that without themselves being exposed to breach of the Commerce Act, given that, for example, section 27 applies to both parties, to an anti-competitive agreement not just the person with market power in circumstances where one has and one hasn't got market power. In circumstances where there are all the usual attempt at prohibitions in section 80 in particular of the Act –

TIPPING J:

You build all this Mr Goddard out of the expression "for the purposes of entering into such an agreement." You have to don't you?

MR GODDARD QC:

Yes because when you understand what the Act is trying to do, it's all about facilitating negotiations in which Pharmac exercises its market power.

TIPPING J:

Pharmac has a big stick.

MR GODDARD QC:

Yes.

TIPPING J:

And the other people are not allowed a similar big stick.

MR GODDARD QC:

The other people have all lawful sticks but don't have the ability to exercise sticks that in any other context would be unlawful, yes, because there is no objective of fairness or equality of arms here. The idea is to tilt the playing field. It's to say to Pharmac, you can deploy weapons that people are not normally permitted to deploy and those who deal with you don't breach the law as a result of you deploying those weapons. So that's the umbrella. The umbrella is an umbrella to protect Pharmac from the Commerce Act and to protect those who deal with Pharmac when Pharmac is exercising its market power. It would be –

ELIAS CJ:

At Pharmac's option.

MR GODDARD QC:

Yes.

ELIAS CJ:

Your argument means that if Pharmac is happy to play along with what a monopoly producer suggests then it's fine. If it doesn't then that person has breached the Commerce Act and is not protected by the exemption?

MR GODDARD QC:

I think that's one way of looking at it and in terms of Justice Tipping's comment about an arena earlier today what that effectively means is that Pharmac is the gatekeeper for the arena and Pharmac decides whether people come in to the arena or not. But I think another way –

TIPPING J:

But you can't make a proposal under the matter for unless you're in the arena.

ELIAS CJ:

Well unless you're lucky and it's accepted.

MR GODDARD QC:

You can –

ELIAS CJ:

You're at risk as soon as you make a proposal.

MR GODDARD QC:

I think one can't make a proposal which breaches the Commerce Act. Most proposals that are put to Pharmac will not breach the Commerce Act. I can't emphasise that strongly enough. Simply saying we offer to do this or we offer this package of products, will not normally breach the Commerce Act and –

ELIAS CJ:

But hang on a moment. If you put up a package and you say, this is our package. You may not say we're not going to sell you some if you don't take the whole package, but that is what you're proposing, why is that not exactly what's happened here?

MR GODDARD QC:

Because that's not what happened here. What happened here or what the Commission thought might have happened here –

ELIAS CJ:

Oh it was sequential here.

MR GODDARD QC:

– was to say we will not supply this at all unless you do whatever it is that was sought and there was some uncertainty around exactly what was sought as well which again I can't emphasise too strongly. So this was not a here are two things. This is a you're not going to get Y unless you fall in line on X. Now that's exactly – there's an extensive, although not always completely accessible, jurisprudence around section 36 and what does and does not breach it and one ends up getting into the types of different proposals that can be made and what the contract scholars talk about as, you know, offers, threats and hybrids, throffers and things like that.

TIPPING J:

Throffers?

MR GODDARD QC:

Throffers, it's a wonderful word. Michael Trebilcock discusses it in his book The Limits of Freedom of Contract but a new offer that creates new opportunities for Pharmac is never going to amount to a unilateral exercise of market power against Pharmac but a threat that says, if you don't do this, this is off the table may and that's something that has to be investigated because there are some circumstances in which you can make that threat and you're not using a substantial degree of market power and bear in mind also that that is the conclusion reached in this case. This was a commercial bargaining position that was put forward but the Commission has concluded that AstraZeneca did not have the substantial degree of market power that meant that section 36 applied. So they're not saying you can't make proposals,

they're saying if you don't have a substantial degree of market power you can put any proposal you want. If you do have a substantial degree of market power what you can't do while claming that it's for the purposes of entering into an agreement with Pharmac, is exercise that market power against Pharmac because that does not serve the purposes of this Act and it's not within the concept "for the purposes of" entering into an agreement properly understood.

ELIAS CJ:

It's going to put a huge premium on how you pitch it, isn't it?

MR GODDARD QC:

No Your Honour. It's going to put a premium on what the substance of the proposal is, what its effect is and it's going to mean that the usual enquiries that you have to make in any section 36 case have to be made in respect of anything that's initiated by a pharmaceutical company. All it means is that you can't arrogate to yourself this umbrella, whatever conduct you might engage in, simply because you're writing to Pharmac and there's no reason why the purposes of the Act would be served by extending the umbrella to that sort of unprompted initiative in circumstances where it involves the exercise of market power directed against Pharmac.

McGRATH J:

It seems to me it's going to put a lot of incentives for a form of negotiations rather than substance in a manner that will just simply impede the parties getting at what the agreement they want to and if the pharmaceutical companies know the certain lines they're not allowed overtly to undertake then they'll be doing them in subtle ways through the selection of form.

MR GODDARD QC:

I don't think it will be as easy to dress up misuse of market power by form as Your Honour's question might suggest and in each case what will be required is an enquiry into what was really happening as in any section 36 case they're not easy cases. They require difficult distinctions to be drawn. My point is

simply that the distinction that would be required here is no more difficult than the normal section 36 distinction. That it will be easy to tell whose market power is being deployed and for what purpose and that to say, oh no example 4 that's fine, pharmaceutical companies can do that, would really be an astonishing result to reach on both, on the language but especially the policy of this legislation.

TIPPING J:

I think it's not astonishing at all on the language. I think you're really trying to persuade us that the language should be very creatively interpreted in order to meet the policy, to be quite blunt about it Mr Goddard.

BLANCHARD J:

It would have been easy enough just to import some of the language from section 36 into the exemption directed at the pharmaceutical company but that wasn't done.

MR GODDARD QC:

And – I think Your Honour's right to say that I went to far in suggesting that it was an astonishing use of the language. It is one of a number of ways in which the language can be read and I'm suggesting that it should be read in a particular way to achieve the policy of the Act.

TIPPING J:

My worry is that this is all so troublesome with cross-conflicting policies and desiderata here that we should interpret it as it is written and leave it to Parliament to sort it out if something more subtle and nuanced is required.

MR GODDARD QC:

I think that it's not quite as difficult as Your Honour suggests and that Parliament has provided sufficient signposts in terms of the purpose statement of the Public Health and Disability Act and the context within which this legislation was enacted that it is both possible and necessary for this

Court to interpret the provision in a way which serves those ends and that it would be – yes, that the Court can do that and it's not the case that –

TIPPING J:

The concept of "for the purposes of" still contains within it some degree of control over the activities of counter-parties for Pharmac. I mean you've got to genuinely have that purpose.

MR GODDARD QC:

And as soon as one accepts that then it seems to me that this section 98 notice must be valid because one of the things the Commission could enquiry into is whether AstraZeneca genuinely had that purpose. That's one of the things I was trying to say earlier, is that one, the Commission was aware that exchanges were taking place, Your Honour put to me the word "negotiations" but it didn't know whether AstraZeneca genuinely desired a new agreement or whether its principal objective was to simply discourage the listing of generic alternatives. That's exactly the sort of thing that the Commission can properly investigate and to be cutting an investigation off at the knees before the Commission knows what the purposes for which AstraZeneca operated actually were is, in my submission and this is really Justice Panckhurst's point I think, premature.

BLANCHARD J:

Had there been no agreement at this stage, that it started the investigation?

MR GODDARD QC:

There had been no agreement and there has been no agreement. So, this is not a case where an agreement issued. It's not a case where the Commission could know that that was genuinely what was sought. It was perfectly reasonable for the Commission to say, here is conduct which apart from section 3, may constitute a breach of section 36. We don't know enough yet to ascertain whether this conduct is properly described as being for the purposes of entering into an agreement. It could be that there was no

genuine objective for that, the main purpose, the sole purpose was to put Pharmac off taking steps with others, it may be.

TIPPING J:

You're saying that the expression "during negotiations" does not of itself rule out an inquiry into purpose?

MR GODDARD QC:

Absolutely.

TIPPING J:

That's really the kernel of your argument I would have thought.

MR GODDARD QC:

It is and up until about 45 minutes ago, AstraZeneca has consistently sought to equate negotiations with Pharmac with conduct for the purposes of entering into an agreement. What I've explained I think, is that there are a whole range of things that could take place within negotiations, or in the context of threats made to Pharmac which would not genuinely be directed at entering into an agreement. It might be to discourage Pharmac from terminating an agreement, I don't think that's entry into an agreement.

Suppose that you were making a threat to discourage Pharmac from terminating an agreement, that's not for the purposes of entering into an agreement. Suppose that it was engaged in to discourage Pharmac from listing other substances that would compete with yours, that wouldn't be for the purposes of entering into an agreement. There are a whole range of threats that could be made to Pharmac, in the exercise of unilateral market power, that would not properly described as for the purposes of entering into an agreement, even though loosely, you might describe them as being in the course of negotiations, in the sense that there had been a communication by one party to the other.

TIPPING J:

I think that's your best point frankly.

MR GODDARD QC:

It is and I've been muddling my way towards it for the last wee while but I think that is what I've been trying to say, that there are a whole range of things that can be done which can't properly be described as for the purposes of entering into an agreement because an agreement –

BLANCHARD J:

Your best point is, you've told us for the first time there was no agreement in this case.

MR GODDARD QC:

Yes.

BLANCHARD J:

Then you've said there are some plausible hypotheticals that might have been going on which might have meant that there was no genuine purpose of entering into an agreement. That sums it up, doesn't it?

MR GODDARD QC:

That of itself sufficient –

BLANCHARD J:

Then we don't have to get into this business about reasonably necessary which I agree with my brother Tipping on, is very muddy indeed and it seems to me, something that could have been put in there quite simply by Parliament, if that is what it had intended.

MR GODDARD QC:

Certainly it could have been put in and with the benefit of hindsight, it would have been helpful if it had been put in but that doesn't get over the question of

what Parliament could reasonably have thought was implicit in the language it used. These personifications –

ELIAS CJ:

Do we have anything in the legislative history of section 53 that sheds any light on this?

MR GODDARD QC:

There are some extracts from Hansard which are quoted in the first instance decision and which are accepted by both parties as helpful and illuminating but they really –

ELIAS CJ:

They don't address this?

MR GODDARD QC:

They don't squarely address this. It would be fair to say that – and I think all the Judges below agreed, that what they suggest is that the idea was to facilitate the exercise of market power against pharmaceutical companies. One needs to bear in mind, not only that Pharmac has significant monopsony power now but that at the origins of this legislation, what you also had was Pharmac owned jointly by all the district health boards and so you had the district health boards also engaged in what would otherwise have been collusive conduct as purchasers.

TIPPING J:

With Pharmac?

MR GODDARD QC:

With Pharmac against pharmaceutical companies.

TIPPING J:

Yes, yes.

MR GODDARD QC:

There is still the potential for that today, so it's wrong to think of this as just about – it was intended as a broad protection by purchasers Pharmac and, Court will see in the division of history, DHBs and ministers and others.

TIPPING J:

Could I attempt to summarise what I think is your best point is this, that the nature and genuineness of the purpose is still open to inquiry?

MR GODDARD QC:

Yes, that's certainly one of my arguments and I'm glad that Your Honour thinks that it has more appeal than –

TIPPING J:

It's a relative assessment Mr Goddard.

MR GODDARD QC:

Yes, I was also worried about that. It really illustrates the way in which language takes it colour from context Your Honour. Best can mean best and very good, or it can mean best and so, so. I really do want to also emphasise that the risk of adopting my friend's approach to section 53 and of not focusing on –

TIPPING J:

In other words, you're saying you don't want us to confine ourselves to the point that's just been identified. You would like us to go on because that on it's own would be capable, if it's sound, of resolving the issue.

MR GODDARD QC:

Yes and I'm certainly not saying that the Court shouldn't simply resolve the case on that basis but what I am urging is that the Court not – Your Honour said that was relative assessment. If Your Honour were to conclude that it didn't get me there, then Your Honour would have to go on and consider the

other issue and that's what I'm now moving too. So yes, that's by itself sufficient but suppose –

TIPPING J:

It's not enough.

MR GODDARD QC:

– it's not enough because Your Honour says –

TIPPING J:

We go to your other points, yes, I appreciate that.

MR GODDARD QC:

So, going to the other point –

ELIAS CJ:

Do you want to take the lunch adjournment now?

MR GODDARD QC:

That's a really good idea and I'll formulate it as best I can.

TIPPING J:

If you can formulate your other point in equally succinct terms, it would be very nice.

MR GODDARD QC:

I'm never as succinct as Your Honour but I'll do my best.

ELIAS CJ:

I would also like you to return to the question of genuineness and whether it's helpful in this context. Whether "for the purposes" really means "in order to" which probably does import a concept of genuineness. I just want to be careful about language like that and maybe there's some authority on that.

MR GODDARD QC:

On the extent which?

ELIAS CJ:

Whether genuineness is the enquiry, or whether it's, I hesitate to use the word rational but whether its rational connection?

MR GODDARD QC:

Or conceivably principal purpose.

ELIAS CJ:

Well, is it motive that one gets into here, or is it an objective connection?

MR GODDARD QC:

I think I understand the question, thank you Your Honour.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.20 PM

MR GODDARD QC:

Your Honour, I want to do three things for the purposes of advancing my argument, genuinely believing that they maybe relevant to it.

BLANCHARD J:

And reasonably necessary?

MR GODDARD QC:

That's the test I always apply Sir and then I'm going to stop which may also help. The three things I want to do, I want to look briefly at the facts relevant to the argument that the Commission could investigate this case in order to ascertain whether AstraZeneca was acting in fact acting for the purposes of entering into an agreement with Pharmac. I think there are just a couple of things that will help to take the Court to, to show that was a live issue.

Second, I want to address Your Honour the Chief Justice's question about genuineness and purpose and whether that's the right way to ask the question. Third, I want to offer a reasonably concise formulation of my other argument and explain very briefly why I think it works in terms of the language of the Act, the policy of the Act and the practical workability of the test.

So, first thing, the argument that Justice Tipping was kind enough to describe as my best one so far but on a relative scale, that it was open to the Commission to issue a section 98 notice in this case in order to ascertain whether in fact AstraZeneca was acting for the purposes of entering into an agreement with Pharmac, or whether it was acting for some other end. In particular, I drew a distinction this morning between conduct directed towards entering into an agreement, conduct for the purposes of entering into an agreement with Pharmac and conduct directed to discouraging certain action by Pharmac vis-à-vis third parties, such as listing their products. So, no goal on the part of the act of securing an agreement with Pharmac, just an objective of discouraging Pharmac from doing things with other people, listing other substances.

If I could ask the Court to turn to volume C of the case on appeal which my learned friend –

McGRATH J:

Is that doing things with other people that might preclude an agreement with Pharmac?

MR GODDARD QC:

It's someone making threats to Pharmac to discourage Pharmac from taking action with those other people, or in respect of those other people's substances. So for example, to discourage Pharmac from listing a competing substance.

McGRATH J:

A competing substance though?

MR GODDARD QC:

Yes.

McGRATH J:

Yes.

MR GODDARD QC:

If we can turn to volume C which my learned friend described somewhat startlingly as "heliotrope" this morning, I think purple is a more prosaic prescription, volume C.

TIPPING J:

Yes, yes.

MR GODDARD QC:

Yes and page 112, this is a communication from AstraZeneca to Pharmac, it's in February 2007 and this is leading up to the July 2007 action which is what the Commission was investigating. What we have here, this is just by way of background, is a reference to the agreement of 22 December 2003, so there was an agreement in force in respect of Betaloc CR, entered into in December 2003. It notes that, "That agreement provides the price for Betaloc CR may not be increased above annex 2 prior to 1 July 2007, however after 1 July 2007 AstraZeneca may increase the price following not less than six months' written notice and Pharmac can review listing." It notes, "Pharmac view generic are likely in the medium term and thus a long term listing agreement for Betaloc CR is unlikely to be acceptable without very significant upfront decreases." It says, "The current prices reflect commercial certainty afforded by a three year fixed subsidy period which is expiring in July. After 1 July they remain listed but the subsidies fixed by Pharmac on a month-to-month basis. AstraZeneca consistently made it clear to Pharmac that without long term commercial certainty pricing for pharmaceuticals will necessarily reflect spot market levels." It says that, "While they remain

committed to renegotiating long long fixed subsidy agreement, meanwhile here is a six month written notice of a price increase."

So, there's notice of a price increase under an existing agreement. Then, if we turn over to page 119, there's a communication from Pharmac to health professionals. There's a helpful summary, under the heading Summary of Current Situation, "Pharmac and the supplier AstraZeneca have been in discussions regarding these products for six months but have not been able to reach agreement." So that's Pharmac saying we haven't reached an agreement. The supplier has notified prices increases, next bullet point, "An alternative supplier of the tablets has been identified, currently consulting on an agreement regarding its potential future listing." So they're exploring an agreement with the alternative supplier about its listing and until that product is available, proposing to match AstraZeneca's price increase and provide a full subsidy for certain groups of patients.

So, negotiations have failed, no agreement, "We're looking at an alternative and consulting on an agreement with that other person and meanwhile we're going to match AstraZeneca's price increase, so there's a full subsidy for other groups of patients." Then, we come to the communication on 121, to which this case relates, it's the facts from AstraZeneca, dated 30 July 2007, referring to Pharmac's facts. It says, "AstraZeneca is concerned at the messages sent by Pharmac." Then, next paragraph, "Reinforced in this view by Pharmac's letter of 18 July to help professionals which states that Pharmac has been unable to reach agreement with AstraZeneca and does not signal any ongoing negotiations. Pharmac's facts of 20 July similarly makes no counter-proposal to our proposal and indicates that negotiations are unlikely to succeed."

So this is written in circumstances where negotiations have failed and there's no indication that they are to continue. Then we get the same theme coming through, "AstraZeneca, like Pharmac, must now take steps on the basis negotiations appear unlikely to succeed no matter what AstraZeneca proposes. Note that Pharmac proposes to list generic extended release

metoprolol succinate", I'm probably saying that wrong, "as soon as possible, subject to a priority assessment by Medsafe. This would of course have a very significant negative impact on our Betaloc business."

So it's the listing of the alternative that would have a negative impact. Then we get the heading Betaloc IV Discontinuation. "AstraZeneca repeatedly indicated to Pharmac, as long ago as December 2003, as recently as May 2007, that loss of the Betaloc CR tablet business to a generic competitive or through reference pricing, would risk the commercial viability of Betaloc IV as a low priced low volume service item. Must assume Pharmac is comfortable with this outcome, therefore not place any further forward orders for Betaloc IV. Estimate current stocks will be exhausted at the latest. Written to health professionals to advise them of this outcome. Also attached a formal notice of continuation for your records."

So, what AstraZeneca is saying to Pharmac here is, negotiations are dead. It looks like nothing we propose will produce an agreement. You're threatening to list a competing product to our Betaloc CR tablets and this is what we're going to do and it is at least open on that, to conclude that the threat is made for the purposes of deterring Pharmac from listing the alternative, not for the purposes of entering into any new agreement.

ELIAS CJ:

Sorry, what's the notice of discontinuance, what is it of?

TIPPING J:

It's of the Betaloc IV, isn't it?

MR GODDARD QC:

Of the Betaloc IV. It's saying, we're no longer going to supply Betaloc IV.

TIPPING J:

Yes, so we'll withdraw that product which, prima facie, would be anti-competitive.

MR GODDARD QC:

Well, AstraZeneca's accepted –

TIPPING J:

Or might be?

MR GODDARD QC:

– that it might be and that that would be something that could legitimately be investigated.

TIPPING J:

And the question is, why were they doing that?

MR GODDARD QC:

My submission is that based on this material, it's reasonably open to consider that it was for the purposes of discouraging Pharmac from listing an alternative, rather than for the purposes of securing any new agreement.

McGRATH J:

Surely it was for both?

MR GODDARD QC:

That's not what it says Your Honour. What it says is –

McGRATH J:

I know, I know.

MR GODDARD QC:

But isn't that exactly what should be investigated Your Honour? That's the point, isn't it, that it might one, it might be the other but it's perfectly coherent to suggest – remember, AstraZeneca, the 2003 agreement was continuing agreement, it hadn't terminated, it was just some aspects of it that had ceased to operate.

McGRATH J:

If they are successful in stopping Pharmac from listing the other product, it will only be because they've got an agreement with them to list Betaloc?

MR GODDARD QC:

No, no but Betaloc already is listed and no action has to be taken by Pharmac to continue that. The 2003 agreement was in place, the listing was in place. A viable option was for Pharmac to do nothing. Not enter into any agreement with AstraZeneca at all.

McGRATH J:

Pharmac was paying the higher price at this period, wasn't it?

MR GODDARD QC:

It was paying a higher subsidy.

TIPPING J:

Were they contractually entitled to give this formal notice of discontinuation, presumably they were?

MR GODDARD QC:

There was no contract in relation to Betaloc IV.

TIPPING J:

Ah, so there was nothing –

MR GODDARD QC:

There was nothing to stop them.

TIPPING J:

– preventing it.

MR GODDARD QC:

Yes Your Honour's exactly right. It was a listed substance but it was not the subject of any agreement. And with Betaloc CR also listed and also the subject of an agreement which was an evergreen agreement and one possibility was that the status quo would just continue. That was not –

BLANCHARD J:

Yes.

MR GODDARD QC:

And therefore that was something that the Commission could investigate because it was not necessarily the purpose of this threat to secure an agreement. Indeed unless AstraZeneca was being disingenuous in this communication, AstraZeneca didn't expect to enter into an agreement. Now one might wonder whether there was an element of disingenuity here but if this is taken at face value, the purpose wasn't to enter into an agreement because AstraZeneca didn't expect one.

BLANCHARD J:

What was the purpose then?

MR GODDARD QC:

To discourage Pharmac from listing the alternative. From taking the step described back on page 119 –

ELIAS CJ:

But with the consequence that the discontinuation would not take effect. Sorry, I may not be understanding this. Does that mean that it would in terms of the actions Pharmac would take, there are no actions it needed to take because this product still remained on the list, is that right?

MR GODDARD QC:

The CR product remained on the list.

ELIAS CJ:

Yes.

MR GODDARD QC:

Yes.

TIPPING J:

The tablet?

MR GODDARD QC:

The tablet.

ELIAS CJ:

Oh the tablet remained on the list?

MR GODDARD QC:

And remained subject to an agreement so there was no need to enter into an agreement relating to it.

ELIAS CJ:

No, no, I understand that.

McGRATH J:

But the status quo was at the higher price. Surely there had to be an agreement before Pharmac could get the price down to the level that the company was prepared to accept, if there was an agreement?

MR GODDARD QC:

No, the company had specified its higher price and what Pharmac was saying in its previous communication was –

McGRATH J:

It's a spot price as they call it. This is a month by month price?

MR GODDARD QC:

Month by month price and what Pharmac was saying was, okay, for some but not all patients we'll increase the amount of subsidy we pay. Pharmac doesn't itself bind the –

McGRATH J:

No but whoever, boards, hospital boards, whoever it is.

MR GODDARD QC:

Or pharmacists and Pharmac pays through them a subsidy so AstraZeneca increases the price. Pharmac says, we don't like that but we want to ensure it's fully subsidised for at least some patients so we'll increase our subsidy. Not for all patients as they explain in there and they say, but eventually there'll be another product which we list which will be at a lower price. We're going to enter an agreement with someone else, not with AstraZeneca, and what we will then – and there are a range of things that Pharmac might then do but it had a discretion at the least to subsidise both at the same level which would mean that if AstraZeneca continued to charge its higher price, then patients would have to pay –

McGRATH J:

The difference or go –

MR GODDARD QC:

– the difference.

McGRATH J:

– to the other product, yes.

MR GODDARD QC:

So it would put pressure on AstraZeneca to drop its pricing or it would face significantly reduced demand and what AstraZeneca says it's doing here is giving up on any new agreement in respect of the tablets but saying so we're going to drop Betaloc IV and at least one reasonable explanation of that is

that that was a threat designed to discourage Pharmac from listing the alternative and entering into an agreement with the supplier of the alternative with the result that for potentially a significant period of time AstraZeneca would continue to supply, at its new higher prices, with a benefit of a higher subsidy.

WILSON J:

Mr Goddard if a supplier has two purposes, one of which is within 2(b) and the other is not, does it get the benefit of the exemption?

MR GODDARD QC:

I'd prefer to say that as one of Your Honours suggested earlier, the question of whether conduct is done for the purposes of entering into an agreement with Pharmac is a question of degree and that what one needs to do is ascertain the facts and then ask, in the light of those facts, whether it can fairly be said that that conduct was for the purposes of entering into an agreement with Pharmac.

TIPPING J:

Despite the other purpose?

MR GODDARD QC:

Yes so I think that's an illustration of why what one needs to do is get the facts and then apply the language of the statute to the facts as ascertained.

TIPPING J:

They were worried about a generic competitor getting listed.

MR GODDARD QC:

Yes.

TIPPING J:

Their comment about the formal discontinuance is a matter of conceptual sequence seems to follow on quite closely from that worry.

MR GODDARD QC:

Yes.

TIPPING J:

Therefore unless they can demonstrate that for present purposes that is completely erroneous, it deserves investigation.

MR GODDARD QC:

Exactly Sir.

TIPPING J:

That's really what you're saying, isn't it?

MR GODDARD QC:

That's what I'm saying. That's my first point.

ELIAS CJ:

I'm not sure that it destroys that point because in fact it doesn't but a letter such as this does need to be seen in the context of the dealings and it refers to no response from Pharmac to our counter-proposal or no counter-proposal to our proposal of 28 June so it's made in the context of a negotiation which contains an offer presumably in that letter of 28 June, what's that offer? The documents that we have don't seem to extend to the 28 June letter.

MR GODDARD QC:

No and I think the short answer to Your Honour's question is that yes this correspondence needs to be understood in context. What that means is that one needs to investigate in order to obtain the full context because the Commission doesn't have everything. It doesn't have everything sitting before it, before it makes the decision on whether or not to issue a section 98 notice. It has snippets.

TIPPING J:

Well ex hypothesi doesn't have everything.

MR GODDARD QC:

Yes, exactly. So the very fact that Your Honour is saying quite rightly well what is actually being done here and the purpose for which it's being done is something we can only understand once we know the context, explains why a section 98 notice should be given. It's to discover –

TIPPING J:

In the same way as a matter of context the last paragraph in the letter to the doctors, which is 124, might go AstraZeneca's way. But the point is, one can't be sure.

MR GODDARD QC:

Yes. That's exactly right. That's what you investigate.

TIPPING J:

But the moment one can't be sure. Sooner or later the position will have to be, you're saying will need clarification for investigation.

MR GODDARD QC:

Yes and what one does is get all the relevant information and then once one understands the facts, ask the question, so on these facts can it fairly be said that the conduct, as we now understand it, is, in the light of all this material, for the purposes of entering into an agreement.

TIPPING J:

Must necessarily be for.

MR GODDARD QC:

Yes.

TIPPING J:

You wouldn't cavil with that formulation I presume?

MR GODDARD QC:

No.

TIPPING J:

No.

MR GODDARD QC:

So that's my first argument and it is as Your Honour put to me earlier a sufficient disposal of the case by itself because it means that it was proper to issue the section 98 notice.

Second, Your Honour Chief Justice's question about genuineness of purpose and whether that's the right way to frame the test and I may have answered that implicitly by not using that language in the argument I've just presented. I don't think that's a very helpful gloss.

ELIAS CJ:

Well it's for another stage anyway. I was really only asking you about that because I'm simply sensitive to use of language which might have unintended consequences but I think it can be avoided and it should be avoided because it's not necessary to get to that stage.

MR GODDARD QC:

That's exactly what I was going to say Your Honour. That one does the investigation and stands back and applies the statutory test, in that language, without losses and asks whether the conduct was for the purposes of entering into an agreement with Pharmac or not. Whether, to paraphrase, I think it was Justice Tipping asked whether it can fairly be described as falling within that and that's a question of fact and degree which can only be answered after investigation of context.

TIPPING J:

What's gone wrong below, is that seemingly there's been some suggestion that the horizon has winded. It's not the widening of the horizon, it's a more precise attention to the proposition that even on the allegation made, the position is unclear.

MR GODDARD QC:

Yes. I'm going to have a go at the horizon now but even on that, yes and I think that's enough to dispose of the case.

TIPPING J:

Quite.

MR GODDARD QC:

Now, let me come to my other point. My argument on this can be summarised as, that the exemption section 53(2), does not extend to conduct representing the exercise of a pharmaceutical company's market power in breach of the Commerce Act to the detriment of Pharmac's objectives. Put another way –

McGRATH J:

Do you mind, I'd just like to get that down, the exception does not extend to conduct?

MR GODDARD QC:

Absolutely. Representing the exercise of a pharmaceutical company's market power in breach of the Commerce Act to the detriment –

BLANCHARD J:

Sorry, you're going far to fast for me.

MR GODDARD QC:

I'm sorry Sir. The exemption does not extend to conduct representing –

ELIAS CJ:

He's not that slow.

MR GODDARD QC:

No, no, I'm just waiting for His Honour to look at me. I'm just being very passive now and waiting until I get some positive signal that I can go on. Representing the exercise of a pharmaceutical company's market power in breach of the Commerce Act to the detriment of Pharmac's objectives. Put another way, section 53 protects the exercise of demand-side market power, not the exercise of supply-side market power. The umbrella is over demand-side market power. It doesn't matter who initiates a conversation that involves the use of that, the question is, whose market power is in issue.

TIPPING J:

Is that a sort of jargonista, without meaning anything pejorative, competitive law type of expression? You mean Pharmac, Pharmac is the demand-side –

MR GODDARD QC:

And the purchasers –

TIPPING J:

– and the pharmaceuticals are the supply-side?

MR GODDARD QC:

Yes and it's an important, it is competitive jargon that I've slid into but it's important because those are very visibly tangibly different things. I'll come to the workability later but you can easily tell whether what's being done involves the exercise of demand-side market power or supply-side market power. The policy of the Act is all about facilitating demand-side market power and is inimical to the exercise of supply-side market power.

ELIAS CJ:

Well, it's about a buying agent, the Act.

MR GODDARD QC:

It's meant to protect a buying agent and it's meant to protect – if one goes back to the legislative history and it's dealt with in the High Court judgment, I'll just provide the reference, on pages 57 to 59 of the case on appeal set out very helpfully there. It's all about creating a buying agent to exercise demand-side market power to secure reductions in overall cost.

TIPPING J:

There are two levels of protection. There is protection from the demand-side itself being in breach but you also have to say that it's a protection from the exercise of the supply-side, it's not a protection.

MR GODDARD QC:

No. What I'm saying is that it's all about protection of participants in negotiations, on either side of the fence, where what is being exercised is demand-side market power. That's the key point.

TIPPING J:

Yes, yes.

McGRATH J:

But it's freeing up the supply-side market power at the same time, to achieve it.

MR GODDARD QC:

No, Your Honour and that's not a necessary consequence of that, that's the point, is that it's removing legal risk to people on the supply-side from entering into agreements which involve the exercise of demand-side market power because otherwise they breach the Act as well.

McGRATH J:

That's freeing them up, isn't it, freeing them from statutory constraints?

MR GODDARD QC:

It's freeing them from statutory constraints in terms of participating in negotiations involving exercise of demand-side market power but what AstraZeneca is doing is taking it a step further and saying, it also frees them up to exercise their own market power which is a completely different proposition. That's what I was failing to say coherently this morning.

McGRATH J:

I understand what you're saying. As it gets more intricate, I'm just trying to relate it to the language of the Act.

MR GODDARD QC:

Yes, so let's do that, let's do language policy workability, those three sub-items under this one. Language. First of all, I think it's common ground that when one asks whether something is for the purposes of entering into an agreement with Pharmac, there's a question of the degree of connection. That's why the Court was so quick to say no, we're not talking about collusion between two suppliers because that's not sufficiently closely connected.

Similarly, in my submission, exercising supply-side market power is an extra, a bolt-on, something outside the concept of agreements with Pharmac which comply participation by this entity with demand-side market power but wait, there's more. You haven't just got the inevitable subject matter of this Act which is agreements affected by demand-side market power because they're agreements with Pharmac which is being set up to have this power, it's a whole separate type of wrong doing, involving different market power exercised by someone else for a purpose antithetical to the vectors of the statute. It's like taking the corporate jet to attend the interview in Wellington, it's over and above what can fairly be considered as for the purposes of entering into an agreement with Pharmac, the demand-side monopsonist.

The more that exercise of supply-side market power is not fairly within that language, it's a whole extra wrong. Like the agreement between the two companies, is a whole separate extra wrong. It's exactly the same point.

TIPPING J:

So, you're saying that if it's a necessary reciprocal of Pharmac's ability to act anti-competitively, then you'll protect it?

MR GODDARD QC:

It's never a necessary reciprocal to use –

TIPPING J:

No, no, I don't mean the supply-side but if you're caught up in the exercise of demand-side market power, then you're exempt?

MR GODDARD QC:

Yes.

TIPPING J:

But that's quite a separate concept from exercising supply-side market power?

MR GODDARD QC:

Yes.

TIPPING J:

Yes.

MR GODDARD QC:

That's what I'm saying.

TIPPING J:

If you're necessarily caught in the exercise of the demand-side –

MR GODDARD QC:

Or even if you come along to Pharmac and say hey, would you like to exercise your demand-side market power in this way because you're still not

exercising your market power against them. You're saying to Pharmac, have you thought of exercising your market power in this way and we have a deal for you if you are minded to do so. That's perfectly proper, so that's get away from this form idea, or from the idea that it matters who takes the first shot, it doesn't. The inquiry is, whose market power is in play here because this Act is all about protecting Pharmac's market power, demand-side market power. It was never intended to facilitate the exercise of supply-side market power. And it just doesn't need to be read as doing that. So the language is to say, well, it's an extra, just like the agreement between the two companies in my examples 1 to 3, between A and B as an extra.

ELIAS CJ:

Well, of course you could get there very much more directly by simply saying it's not sufficiently connected with the agreement.

MR GODDARD QC:

Yes.

ELIAS CJ:

It's for a different purpose.

MR GODDARD QC:

The purpose of exploiting your unilateral market power, yes, that's another way of putting it, which I'm very comfortable with.

TIPPING J:

It's not as quite as simple as that, is it, because you might have the ultimate purpose of reaching an agreement through the exercise of your supply-side market power.

MR GODDARD QC:

And what I'm really saying there is that when you read the language in this context, it's not intended to embrace that.

TIPPING J:

No.

MR GODDARD QC:

So your text and purpose, it's paragraph 22 of Fonterra, it's reading it in its social and economic context, understanding what the legislation was intending to achieve.

ELIAS CJ:

Well, that's text and purpose of the legislation.

MR GODDARD QC:

Yes, and so we've got the purpose of the legislation, which is better health outcomes of New Zealanders within a limited budget, achieved through a creation of a monopsonist, and an umbrella over that monosopnist's exercise of its demand-side market power, protecting both it and the people who deal with it while it's exercising that market power. So that's language, and I've really, I think, covered the policy point, as well, on the way through. Workability, this is very workable, this is very easy, because all a company needs to ask itself is, is there an exercise of market power by anyone here? The answer is no, that's not a problem. If there is, whose market power is being exercised? Who has market power, whose market power is being deployed here? And if it's Pharmac's, it's okay.

You can suggest a deal, you can participate in a discussion, you're under the umbrella. But if, when you ask yourself, whose market power is being deployed here, you say, ho ho, it's mine, then it's not okay, it's not under the umbrella. So you say, do I have market power, am I using it? Now, these are questions that every company with market power has to ask itself, normally, under section 36. These are questions which the legislature considers companies with market power can reasonably be expected to ask, before deciding on whether or not to act in a particular way. And there's no reason to exempt people on the supply-side with market power in pharmaceutical

markets from asking themselves exactly the same question, and governing their conduct by the response.

McGRATH J:

Did you say that this was basically a point that Panckhurst J was making at page 57?

MR GODDARD QC:

No, sorry, that was the legislative history, was at 57 to 59.

ELIAS CJ:

No one makes this point.

MR GODDARD QC:

It's sort of implicit in the way it's put by some of the judges. But I'm putting it most clearly, I think, I hope, now.

ELIAS CJ:

It does require an awful lot to be read into. The straight exemption from part of the Act.

MR GODDARD QC:

It requires the phrase, "For the purpose of entering into an agreement with Pharmac" to be read in the light of what Pharmac is, and what it's for, and what the Act is doing, and to say, well, that sheds light on what is sufficiently connected with an agreement with Pharmac to be treated as for the purposes of it.

ELIAS CJ:

"For the purposes of" is language of connection, which is ubiquitous. It's in almost all –

MR GODDARD QC:

And what it means depends very much on context –

ELIAS CJ:

On context, well, I accept that.

MR GODDARD QC:

For example, my diligent junior came up with a range of interesting cases involving "for the purposes of" over lunch. One, *Pelenato v Fergusson [2003] NZAR 446 Young J*, on an appeal against suspension of an on-licence for breaching licence conditions on ANZAC Day. Sale of liquor was prohibited unless any person who was present was there for the purposes of dining, and the question was whether eating snack food was for the purposes of dining or not. And there was a strong emphasis on context.

TIPPING J:

I had a case in Timaru, where the issue was whether, I think it was fish and one veg was a meal, as opposed to fish and two veg. Same sort of point, really.

MR GODDARD QC:

Social and economic context, I think.

ELIAS CJ:

And historic.

MR GODDARD QC:

And Your Honour Blanchard J decision *Television New Zealand Ltd v Newsmonitor Services Ltd 1994 2 NZ 91 CL79/91 Blanchard J* where one of the questions was whether something had been copied for the purposes of proceedings, a copyright issue, and whether it fell within that protection, and Your Honour said when one looks at the policy, which is facilitating the conduct of legal proceedings, it has to stretch back to advising before proceedings are commenced, not just begin once a proceeding has been commenced. So it's all about context. These are just illustrations, and they are probably not reasonably necessary. But they are interesting.

WILSON J:

Mr Goddard, with many agreements reached between Pharmac and the supplier, couldn't it be said that the agreement represented a trade-off between the market power of Pharmac and that of the supplier, in the real world?

MR GODDARD QC:

There are some forms of exercise of market power that are perfectly lawful, Your Honour, and there will be trade-offs between them. For example, the most basic form of exercise of market power is to set a price above a competitive price. And, of course, suppliers to Pharmac are free to try to do that, and there'll then be a straight haggle based on the market power of the supplier and the market power of the seller. But that's not a misuse of market power prescribed by section 36. Section 36 doesn't prohibit charging monopoly prices. Rather, what suppliers can't do is use that market power for the prohibited purposes in section 36(2). To do that is not for the purposes of entering into an agreement with Pharmac. It's a bolt-on, an extra, that's not within the scope of the umbrella.

WILSON J:

How does your proposed test work in the context of a trade-off between the market power of the contracting parties?

MR GODDARD QC:

Well, if it's a straight haggle about price –

WILSON J:

Yes.

MR GODDARD QC:

My test isn't engaged, because there's nothing that the supplier is doing that could be a breach of section 36. There's no misuse of market power. Some

uses of market power are perfectly lawful. My test is all about misuse of market power.

ELIAS CJ:

But a monopoly supplier who says we're not going to deal with you, except at a particular price?

MR GODDARD QC:

That's not a breach of section 36.

TIPPING J:

Not per se, not without other circumstances.

MR GODDARD QC:

Yes, Your Honour is quite right to add that. But by itself, it's perfectly lawful.

WILSON J:

Is your test, which I noted down as being based on the exercise of market power, in fact based on the misuse of market power?

MR GODDARD QC:

What I said was, the exercise of market power, in breach of the Commerce Act. So it was the same thing.

WILSON J:

Yes.

MR GODDARD QC:

Of course, suppliers can lawfully use their market power, and Pharmac will lawfully use its market power, and they'll haggle to try and reach a price both can live with. What is prohibited by the Commerce Act and not protected by 53 is misuse by the supplier of the supplier's market power. It will be bizarre if it was. There's no policy reason why Parliament would do that. it would be loopy, and so the only question is whether the Court is compelled to that

absurd, crazy result by the language of the section. It's just not. So it works on the language, admittedly with a heavy overlay of purpose. It absolutely delivers in terms of the policy of the legislation, and other readings do not. They produce absurd results, directly at odds with the policy, not incidental to it, but just conflicting head-on and it's completely workable and practical because it's this very simple inquiry. Whose market power? Theirs, mine? What's being exercised here? So, if we go back to my example 4, to which my friend said well, maybe, maybe not. My test provides a very simple answer because you look at what company A is doing, saying we won't supply it to you unless you enter into a 10 year contract. Whose market power is being exercised? company A's. So, that's not behaviour which is for the purposes of entering into an agreement with Pharmac. It's for the purposes of misusing company A's market power in breach of the Commerce Act and is therefore not protected. So, there is an answer and it's that it's a breach and that's a much better answer, in terms of the policy objective of the Public Heath and Disability Act. It would be alarming if the Court, in my respectful submission, were to say no, no, that's fine, it's lawful and that's what my friend is inviting you to do. So, those are my two arguments.

TIPPING J:

Is the line that you must, you're exempt if you are a participant in the exercise of demand-side market power but not if you are yourself exercising supply-side market power?

MR GODDARD QC:

Exactly and that's a simple workable line. It is always going to be clear which is happening.

TIPPING J:

Well, it's conceptually certain. It may have awkwardnesses in individual – this sort of thing always has awkwardnesses around the margins in these sort of cases.

MR GODDARD QC:

Section 36 brings awkwardnesses with it.

TIPPING J:

Yes.

MR GODDARD QC:

But it's only the awkwardnesses inherent in section 36 which the legislature expects companies to grapple with. Unless the Court has any more questions?

ELIAS CJ:

No, thank you Mr Goddard. Yes Mr Colson.

MR COLSON:

I have nothing to add to those submissions.

ELIAS CJ:

Thank you Mr Colson. Yes Mr Dunning.

MR DUNNING:

If I may, I'd just like to backtrack on that last discussion because effectively what my friend is asking you to do is to rewrite section 53 as if it is nothing in Part 2 of the Act applies except for section 36 and that's what the submission says. There is nothing on the face of that, section 53 which would necessarily lead to that being the logical conclusion, certainly not on the plain wording of it and nor is there anything in the purpose of the Act as we have all accepted here, is to achieve appropriately beneficially health outcomes under the Act.

Effectively there's still an argument asymmetry through all of this obviously because those who have to deal with Pharmac must somehow determine whether or not they are exercising market power in a permissible way, or in a way which is not permissible. The problem with that of course is that, as I believe from the comments from the bench and certainly my submission this

morning, is that and Justice Wilson succinctly than I ever did, inevitably there's a trade off between market powers of Pharmac and suppliers in a negotiation of these kinds in respect of pharmaceuticals.

My learned friend wishes to have his cake and eat it too in the sense that he's saying well, of course suppliers can lawfully use their market power, they simply can't misuse it. That just comes back to my point, that that's effectively trying to carve out, from Part 2 under section 53, the operation of section 36. It still has this awkwardness which is that you will not know unless you go and invite Pharmac nicely to perhaps treat in respect of a bundle of products, whether or not you're going to caught up in something which is effectively in perhaps asserting a position, an allegation not just by Pharmac, possibly by competitors challenging the outcomes, that there was an attempted use of market power in the context of a negotiation.

Then of course, in the ebb and flow of a negotiation, there will always be times when one party says no, I'm not going to do that but why would you do this? How would one know that the purpose is "antithetical" to the objectives of Pharmac? When you put up the proposal, it really does depend upon Pharmac accepting what's been put forward. Whose market power is in play? When in a negotiation like this, there will inevitably be times when both parties could have market power in play. In a situation where, for instance, there is an innovative drug which has been developed by a pharmaceutical company, a proposal to Pharmac and I don't shy away from example 4, that may well be a situation that section 53 covers.

If Pharmac wishes to treat with a company that says, I would like a 10 year contract, even though in three years some other competitor is coming along, if Pharmac thinks that is a worthwhile outcome then it may well negotiate that. Why should that not be something which is entering the arena in terms of a desirable outcome but why should the pharmaceutical company have to make assessments about whether that is something desirable to achieve the outcomes in the minds of Pharmac?

I just want to deal with those points first. I have a few other points which I would like to address in reply to my learned friend's submissions. The first point is, just quickly on legislative history, Chief Justice asked before lunch had any of the Judges dealt with it. Justice Fogarty did deal with it in the Court of Appeal at paragraph 48. He referred to the previous provisions which at that stage the predecessors to section 53 only exempted the application of Part 2 of the Commerce Act to agreements which were narrowly defined at first and then more expansively and secondly, at first only to any act done to give affect to them and then to any act, matter or thing.

Section 53 went further, as is now it exempts agreements expansively defined and secondly, any act, matter or thing done by any person, that was introduced, to give affect to such an agreement and thirdly, any act, matter or thing done by any person for the purpose of entering into such an agreement. Justice Fogarty rightly said that plainly in 2000 or shortly before, a mischief was identified. It was that pre-agreement conduct by Pharmac, or a pharmaceutical supplier, might itself be in breach of Part 2 of the Commerce Act. So there was a reference to that legislative history.

ELIAS CJ:

But there's no legislative materials which explain the change, in particular that last change, the expansion of the scope?

MR DUNNING:

Not helpfully, no.

ELIAS CJ:

No.

MR DUNNING:

There was reference in the Court of Appeal which Justice Fogarty in his judgment was relatively dismissive of in terms of extrinsic materials, comprising a memorandum to the cabinet committee on health and something

and His Honour said well, you know, that's not really much of a guide so we won't refer to that –

TIPPING J:

Well, it's a bit over the line too.

MR DUNNING:

Absolutely, yes.

McGRATH J:

Unreliable.

MR DUNNING:

Yes and that's exactly what he said. It wasn't me that submitted it I have to say. Yes, so exactly that Your Honour, there's nothing helpful particularly.

ELIAS CJ:

No.

MR DUNNING:

Merely looking at the legislative history itself can at times be useful and that's what Justice Fogarty did.

ELIAS CJ:

Yes, yes.

MR DUNNING:

The next point I'd just like to address is, my learned friend took you to what he said is the possibility that tying can somehow lead to a sort of bilateral vacuum if you like but it can lead to outcome where it doesn't involve an agreement. The use of the word agreement here, bear in mind the expansive definition in section 53, it doesn't have to be some formal document. It is a very expansive definition which refers to, "agreement, arrangement, contract,

covenant, deed or understanding, whether oral or written, whether express or implied and whether or not enforceable at law."

BLANCHARD J:

Looks as though it's come out of the income tax.

MR DUNNING:

Exactly, all encompassing and all-inclusive. The point being that it just defies credibility, that the alleged threat that if you don't do A, I won't do B, or vice versa from a customer, doesn't lead to therefore all right, I will do this if you do that, that's what it's designed to achieve. It's not just designed to exclude and of course the mere outcome whereby it does say achieve exclusion of a competitor, is because I, the party that is the threatenee, have agreed that I'll continue to treat with you, that I would not let in that competitor, or I will not do X or Y. One cannot have a conceptual vacuum, that there is not some level of understanding of compliance, or some understanding, some mutuality, that all right, I succumb or whatever, however one wants to describe it. We can't have, there's no vacuum here and tying by its very nature and the alleged conduct here, the alleged threat here, is very specific, IV and CR. Not something more general, not something about excluding a competitor.

There was never any suggestion by the Commission, at any stage when they were asked pointedly throughout this proceeding, that in fact what we're really exploring is, were you genuinely, were you genuinely having the purpose here of entering into an agreement, or were you actually doing something else. The two points from that plainly are one and they've never articulated anything else and secondly, as was said this morning, you can't have a notice for one purpose which is actually really trying to explore some other purpose.

I want to come back to that right now, in terms of what they were exploring. This morning I was taking you to the ambit of the investigation. My friend, just after lunch, was taking us through this correspondence between AstraZeneca and Pharmac but one thing he didn't take you to was at page 117 of volume C

which is a fax from AstraZeneca to Pharmac, dated 23 May 2007. That's the fax which, at the end of it, you'll see is a paragraph right at the end, above the signature, on page 118 which is alleged to be the threat, the threat and tie. Because if you look in the same volume to page 151 which is from Mr Crystile's internal memorandum seeking a section 98 notice. That's what he says. In other words, the supposed conduct which the Commission is considering might be this threat and tie, was done way back before, when my friend was taking you to those other documents, the first point. So plainly, it was during negotiations, the Commission itself thought so, and what were they negotiating about if not towards an agreement in relation to CR, which is self-evident, and if not in respect of what role IV might have going forward.

So either on one view of it, as we have always said, on the face of it, the alleged conduct was during the negotiations in respect of two pharmaceuticals which could be subsidised within section 53, or my friend is left with this, which is he tried to suggest to you that because negotiations, in his view, had ended, and plainly, they had not, and I'll come back to what the current situation is and what happened post that period, if it had ended, then, as Fogarty J said well, where's the anti-competitive act? There's no threat any more. If they then, after negotiation, decided, for their own commercial reasons, to stop supplying IV, that's not an attempt to exercise market power, that's an unilateral act for commercial reasons by AstraZeneca, if it's post negotiations they've got nothing to achieve by it any more. My friend says it's to deter some other competitor coming in. It's too late. Negotiations are over. There is no anti-competitive act. So Fogarty J said, they can't have it both ways. So the notice either is standing on the face of it, asserting certain conduct, and that conduct is within section 53.

TIPPING J:

Just, just, would you mind, because I think this could be very important. Would you mind just taking this, "Can't have it both ways" analysis again rather more slowly, Mr Dunning?

MR DUNNING:

I'm sorry, Sir. It goes like this. The allegation is that AstraZeneca, threatened with, apparently, a belief it had some market power in respect of IV –

TIPPING J:

Yes.

MR DUNNING:

That it would withdraw that product, unless certain thing occurred in respect of CR, the tablet, continuing subsidisation of it, to send it to a listing agreement.

TIPPING J:

Yes.

MR DUNNING:

We say that if that's the allegation, then plainly, that conduct was designed to achieve an agreement, an outcome, which was an agreement between Pharmac and AstraZeneca regarding CR. Inherent in that, and my friend tried to suggest to the Court, if you will, with the idea that listing agreements are something that are magical and plainly, they have a big role in this industry. But if Pharmac had said, all right, we agree with that, well, then plainly, there is an agreement within the terms of section 53 of the Act, because it's so broadly expressed –

McGRATH J:

Because it can just be an understanding.

MR DUNNING:

It can be an understanding, exactly. And it's plainly, also, a term of, and collateral to, or related to, the agreement regarding CR. It's a bundle of terms. That's why I spent so much time taking you to bundling and tying, because plainly, the relationship, or relating drugs one to the other in a package, is very common. We mustn't lose sight of the fact, here, that the other product they were negotiating at the same time was Crestor.

TIPPING J:

So one side of the equation is that they make this tiny proposal and Pharmac agrees, and then it's protected under the agreement provision?

MR DUNNING:

And we still have that conundrum, yes.

TIPPING J:

And what's the counter?

MR DUNNING:

Well, the counter is that apparently, negotiations are all at an end. My learned friend tried to suggest that not all tying leads to an agreement, by which he may mean something formal, but by which I mean it must lead to some understanding, however you want to couch it because that's the purpose of the threat. So if what he's saying is that the negotiations –

TIPPING J:

So if negotiations are at an end, there's no improper exercise of market power?

MR DUNNING:

Exactly. It is the unilateral act of a party for commercial reasons electing to terminate its product. Now, the notice that Your Honours were referring to before is a formal notice which is sort of a pro forma notice which Pharmac requires suppliers to give when they terminate supply products. They don't just stop one day, and that's it. They're meant to, I believe, on the 12th of each month, give a notice of discontinuance effective from the following month. That's the procedure.

TIPPING J:

I rather, what's troubling me at the moment and you can probably untrouble it, is that your first step which was on the basis that the conduct of tying the two

was designed to achieve agreement, the disagreement with you is that it may well have been, but it's more than just speculatively possible that it wasn't?

MR DUNNING:

And in my submission, it is not more than speculatively or even speculatively possible because by its nature, a threat to tie is only effective if you get the outcome you want, which must involve an arrangement, an understanding, however you want to put it, whereby the other person concurs.

TIPPING J:

But you seem to be begging, in your first step, you seem to be begging the question that's in issue between the parties, that it definitely was conduct designed to achieve an agreement. Are you saying there's no other possible interpretation of?

MR DUNNING:

I'm not begging that question, I'm relying upon the notice, I'm relying upon the documents sought pursuant to that notice, all of which are consistent only with an allegation of tying between IV and CR, i.e. they're exploring the relationship of a threat –

TIPPING J:

There's no doubt that they were proposing or threatening to tie. There's no doubt about that. But the question is, what was their purpose in doing so? Was it inevitably to secure an agreement, or is it possible that it was for some other purpose not linked with trying to achieve an agreement? That's the argument against you, and I'm not entirely sure how you answer that, and that's why I'm being a bit persistent, Mr Dunning.

MR DUNNING:

Well, I answer it by saying that that is just simply not rationally possible. Because at the end of the day, my friend's example, which was that, oh, it could have been done simply to say, well, we don't want ourselves to have any further arrangement with you regarding CR, but we don't want you

to have any arrangement with anybody else regarding that sort of therapeutic product.

TIPPING J:

That's all I wanted to, I mean, I'm not trying to stop you from elaborating it, but your answer is, that it's not rationally possible that the conduct had any other purpose than to reach agreement.

MR DUNNING:

Yes, and why would you, if you were AstraZeneca, say, well, I don't want anything from you in regard to CR, that's given up, I've lost all hope of getting anything from that, but I'm going to stop the other party, I'm going to stop you dealing with somebody else. If that works, you're going to have an understanding with Pharmac about what's happening with CR. It's not going to be a vacuum.

TIPPING J:

Well, that's why they want to try and find out, whether there was such a collateral understanding.

MR DUNNING:

Well, if that's the case, then section 53 is pretty well useless and ineffective, because that means that the context, so called, will always justify an inquiry.

ELIAS CJ:

Well, section 53 is not directed at section 98. It's directed at the substantive question of whether you are exempt. So it's a different –

MR DUNNING:

Well, you don't have a section 98 power, if I'm correct, on section 53.

ELIAS CJ:

Well, you have a power of inquiry, unless you can confidently exclude the possibility of a substantive breach, yes.

MR DUNNING:

Which is all that I was saying, which is that on this approach, one can never confidently exclude application of section 53, because there will always be a contextual inquiry one could make. And the second point about this is, if that is truly an inquiry –

ELIAS CJ:

Sorry, can you pause? I just want to think about that.

MR DUNNING:

Well, it's contexture because it's all very easy to say well, in the context of the thing, let's have a look, you know, we need to know whether there was this purpose. Was that genuinely the purpose? Now, you know, we could find all sorts of expose facto reasons why something might be valid if there were other theoretical possibilities. That's not what this notice says. This notice didn't ever articulate, we believe that AstraZeneca may have had some purpose other than entering into an agreement with Pharmac, by virtue of threatened conduct to tie IV to CR.

TIPPING J:

No, but it's you that's saying you're off the hook because you're exempt, not them. Therefore, they didn't have to assert it. It's for you to exclude it.

MR DUNNING:

Well, I can exclude it on their language, because their language says what it says. They say, ah, but there are other possibilities about the genuineness of that purpose. If that's the case, why didn't the investigation focus on that? None of the documents sought relate to that and the notice itself, in aptly describing what the investigation is about, didn't say that, nor does the Crestor memo.

TIPPING J:

How do you know that, how do we know that they are not concerned, or are not entitled to be concerned about the genuineness of the purpose, the actuality of the purpose, just because there's a whole heap of documents referred to in the notice?

MR DUNNING:

Because, as I took you to the Crestor memo which set up why the section 98 notice was required, there's no mention whatsoever about that, none.

TIPPING J:

So, you're saying really, that this argument is now adventitious, that they never really, truly had this in their minds at the time?

MR DUNNING:

Well, it's never be raised ever before and it certainly is a nice way to try, after the event, justify why the notice might be valid. All we've ever said is, on the face of it, that conduct by definition, during that conduct, alleged time of those pharmaceuticals during negotiations with Pharmac which plainly were occurring, is within section 53. That's all we've said. Now, at no time was the response, ah but hang on, we're not so sure your purpose was genuine, what about, you know, something else.

TIPPING J:

Or you mightn't have had some other purpose. I think Mr Goddard wants to...

MR DUNNING:

Yes, well he referred me to paragraph 27, page 155, of the memorandum –

TIPPING J:

I'm sympathetic to your point, that it's come out of the blue at the last stages of the exercise but I'm not quite sure where there takes you. If it's now asserted that this was a tenable –

MR DUNNING:

It takes me there which is, we do not accept that as being consistent with the notice and the person investigation, to say simply that there might have been some other purpose beyond what we assert. Now, I better deal with my friend's points since he wants to make it to you Your Honour and I will which is page 155 that I want to explore, to what extent it endeavoured to prevent competition on the Betaloc CR tablet by tying IV intravenous injection to it. Well plainly, that's what tying did want to achieve. The outcome here, satisfaction to AstraZeneca, would plainly have been as no doubt it seems, an ongoing subsidy for CR and IV would have continued to be supplied.

McGRATH J:

Mr Dunning, unless you want to say anything further on that, I'd just like you to address yourself specifically to page 121 of volume C, the discontinuation threat. If you could, relating to that, repeat the point you've made in terms of the only commercially sensible way to understand that threat, whilst a desire to conclude an agreement.

MR DUNNING:

Well yes.

ELIAS CJ:

Sorry, in answering that, I had understood you to say that the threat was the one in the May fax. So you'll have to answer the question in the context of that as well.

MR DUNNING:

Sorry Sir, if I may just deal with that quickly. Well yes, that's what was identified in the Commission's memorandum as being the threat, 23 May. As a threat because by 30 July, the allegations, the negotiations, have ended and that somehow therefore this is not protected by section 53 because it's no longer during negotiations. I'm saying they can't have it both

ways. If that's the case then it's not an anti-competitive act if it's a unilateral commercial decision.

TIPPING J:

The fact that they protest at the end of this letter of May, that they're committed to reaching a negotiated resolution, isn't a conclusive bar on the Commission making sure that they're telling the truth. It's not an unfamiliar experience in competition litigation that people sort of lay a bit of a trail of cover.

MR DUNNING:

Sorry which letter are you referring to Sir?

TIPPING J:

The one of May. I mean, I'm not saying this is so here, please not misunderstand me. I'm just saying, the Commission shouldn't be expected just to accept that statement at face value.

MR DUNNING:

I'm sorry Sir, I'm not addressing –

ELIAS CJ:

He's not addressing that, he's addressing the threat.

MR DUNNING:

All I'm saying is, that was not contrived, that was back in the day when they were negotiating and that's simply what was said.

TIPPING J:

Yes, well I'm just, all right, we may be at cross purposes but I just want to put that point on the table in case you feel it necessary to say anything about it. They aren't obliged to take a statement like that at face value, as I understand the position. In other words, the fact that they say here, that we're genuinely

committed to reaching a negotiated resolution, doesn't preclude the possibility that they may have had another purpose.

MR DUNNING:

Yes, this is just a piece of evidence in terms of the communication at the time. The Commission said well, this is the basis of a threatened tie, that was going to lead to the investigation of the notice being issued as a result –

TIPPING J:

It's a question of how strictly we're going to construe these notices in separate letters, isn't it?

MR DUNNING:

With respect Sir, certainly, as I tried to make clear this morning, it's just about this notice and this investigation. It's not meant to go any further than that. There's no particularly broader principle beyond –

TIPPING J:

But how strictly are we going to hold people to these rather broad and loose statements, or how much have these things got to, sort of, approach formal pleadings?

MR DUNNING:

Oh no, look I've said this morning that I accept the proposition well established, that the notices themselves are not like a pleading and shouldn't be approached that way. In terms of if issues are being raised before a Court about that sort of thing, we have said and the Court can accept it or not but we have said, it's not just the letter we're relying upon but Justice Fogarty quite rightly and we agree with this, said well, let's look at the document's actually in the notice, not the letter which says this doesn't incorporate the notice but the documents sought in the notice and they are only consistent with an inquiry into tying between IV and CR. Therefore, he said quite rightly, the letter is an accurate representation of what the investigation was about. I've added to that, let's look at the internal

memorandum upon which the notice is based and that is also consistent and only consistent with an allegation of tying during negotiations. So all I've said is that taking all of those together, you can conclude that the basis and the only basis for the investigation is accurately set out in that letter which is about tying IV and CR.

TIPPING J:

You're really saying they can't retrospectively try and justify it on some other, alternative premise.

MR DUNNING:

No, certainly not, certainly not. We can't have a roving –

TIPPING J:

Because that's really what you're saying, isn't it?

MR DUNNING:

– Commission which accordingly because there's some uncertainty they say. Now, just on this uncertainty point. Bear in mind that by this stage they had had voluntary interviews with a number of parties, both Pharmac and AstraZeneca had done some investigation. They're not in a position of ignorance. This is not also, if I may say, a position of the Commission, you know, needing powers to investigate cartels. It only become aware of this because of the sort of inflammatory media releases by Pharmac which went out and said that AstraZeneca is holding patients' lives to ransom. So they thought well, maybe there's something here we should look at, interviewed some people, got a view of things, with that knowledge, it's not like they're ignorant of what was going on, did the memorandum should have a notice.

You know, the perversity of this idea that because you might not know what's going on, you can somehow perhaps allow a Commission to have a vague notice –

TIPPING J:

No, it's not that retrospectivity I'm talking about, it is there now according to your submissions as I understand it. Trying to justify their notice on a premise different from that on which the notice was issued.

MR DUNNING:

Well that too, yes but I was just making the point that my learned friend has said that, you know, some how because there might have been some doubt about what was going on they should be given some leeway if you like in the notices. My point is (a), they didn't really have that much doubt because a way down the track had some interviews and (b), it's a paradox that the less you know as a Commission, the more justifiable your notices may be in terms of their breadth.

ELIAS CJ:

I deflected you from answering and I regret it, Justice McGrath –

McGRATH J:

My question was really directed towards the words "for the purposes of" entering into such an agreement under 53(2)(b) and I was looking at page 121. This is a passage that Mr Goddard highlighted. Just wanting to know what your answer is to this, whether the, under the Betaloc discontinuation, what I would say is the, we are now in the language of a threat and I'm not meaning that pejoratively. I just want to say how I understand your position to be, that that has to be, can only be read as consistent in a commercially sensible way as being consistent with the desire to enter into an agreement. Am I right in understanding that's your position and if so, I'd just like you to explain by reference to what's been said there, why that's so?

MR DUNNING:

I think this is beyond that. I mean, you can interpret it in two ways. The first point I make is this, that negotiations, you can either interpret it as still part of ongoing negotiations and interpret it as a threat, an ongoing threat, as part of

that commercial negotiation because things plainly didn't end here, plainly arrangements were continued in various respects which I'll come back to.

McGRATH J:

Is it a bluff, in that context?

MR DUNNING:

You can either interpret that way.

McGRATH J:

Yes.

MR DUNNING:

Or you can interpret it as saying, this is the notice on 30 July when things were over and they were saying well, we've always said that if we didn't get CR subsidised IV is no longer commercially viable. We always said that and now we're doing it, we are withdrawing IV and that's the other way of interpreting.

McGRATH J:

So depending on whether the negotiations are continuing in reality or –

MR DUNNING:

Either way, either way.

McGRATH J:

– they're over, it has one of those two meanings?

MR DUNNING:

It does and either way, we say the notice is invalid because if it is simply then saying, we told you we were going to stop it and this is just stopping it because there's nothing more to be gained –

McGRATH J:

Just, you're going fast. Can I just say, if I'm understanding what you're saying, is if the negotiations in fact are not over and this is just a cautionary – that the only way of interpreting it is that you've still got the opportunity we want to enter into an agreement and you should do it.

MR DUNNING:

Yes, yes.

McGRATH J:

But if the negotiations are over, you're saying well, then it's a refusal to supply but it's got no competitive consequences and doesn't fall foul of section 36(b)?

MR DUNNING:

That's right.

McGRATH J:

And you're saying those are the only ways, the only ways it can be interpreted. It can't be interpreted as simply and solely a desire to stop Pharmac entering into an agreement with another generic or other supplier?

MR DUNNING:

In respect of CR which it must only be in the event?

McGRATH J:

Yes, yes.

MR DUNNING:

What would be in that for AstraZeneca, beyond simply then making mischief which seems irrational, really what would be in it would be some understanding about well, you will not, you Pharmac will not let another competitor in. There's still a bilateral notion happening there. There's still a result which is, I'm doing this to try and get you Pharmac to do something and

the result of you doing something is that you've gone along with what I've forced you to do, to put it in those terms. So either way –

McGRATH J:

I understand your position.

MR DUNNING:

I mean, we're getting far and far away from the real world of what's actually alleged here but those are the possible alternatives.

BLANCHARD J:

Can I ask you about another aspect of the same thing. The expression "loss of the Betaloc CR tablet business to a generic competitive", now in order to retrieve such a loss, assuming it was going to occur, was it going to be necessary for there to be a new contract between AstraZeneca and Pharmac?

MR DUNNING:

No and what happened and I'm glad you raised that, I was going to come on –

BLANCHARD J:

That's what I thought Mr Goddard was arguing.

MR DUNNING:

I was going to come on to your point there that the current position, I mean, we mustn't lose sight of the fact that before lunch he said oh, no contract was entered into well, no that's right, no new contract was. The first point is that that in itself doesn't alter the context of allegations of there still being negotiations. One can be negotiating for a contract that you don't enter into, so there were negotiations –

BLANCHARD J:

Presumably, even if the same contract was continuing, the price for the forward period was up for grabs?

MR DUNNING:

That was my next point Your Honour, if I may –

BLANCHARD J:

And that, making a new arrangement about price, would be a new agreement?

MR DUNNING:

Or at least an understanding or addendum or a change, but yes, in a broader sense of the term.

BLANCHARD J:

Yes, yes, that's all, you don't need to go any further. I just wanted to see whether you could close off that point?

MR DUNNING:

I can and I do want to close it off and my learned friend Mr Colson in paragraph 3.2 of his submissions, I think also makes the point, that the listing agreement which is the underlying evergreen agreement didn't stop but of course the subsidies and the pricing relating to it does, so he said the agreement itself did not expire at that time, it carries on. Now, what happened –

BLANCHARD J:

In one sense it carries on but every time you fix a new price, you're actually making another agreement.

MR DUNNING:

Well exactly, exactly. My friend is wanting me to say that there hasn't been agreement on a price but there is in fact, right now as we speak, the prices have gone up for CR and Pharmac is subsidising it fully. Now, he might try and argue that's not an agreement but we're doing X and they're doing Y and we're quite happy with that, that's a change to the funding arrangements under the previous listing agreement, as a matter of fact. Secondly, in respect

of IV which is continued to be supplied, pursuant to an arrangement between Pharmac and AstraZeneca, on three months' notice of termination. There are arrangements in place in respect of these pharmaceuticals which have flowed from the obviously acrimonious negotiations but negotiations nonetheless which are in place.

The issues which were alleged here, despite all that, regardless of what happened following on to maintain arrangements, the issues alleged to have arisen, arose during negotiations. Plainly, everybody accepts that was what was going on. There was no other purpose for these parties to be doing this, than wanting to get some sort of outcome but in the nature of negotiations, that doesn't always satisfactorily occur.

I just make the point also that there was much discussion at the start of my friend's submission about reasonable basis for suspecting and so on. I'm not sure that's relevant any more but my point again, as in our primary submissions, is that this isn't really a case for sort of Wednesbury reasonableness or what have you, it's a question of law. I would just, in terms of what the approach in section 98 might appropriately be, I take you back to the decision of Justice Gallen in the *Telecom* case which was under tab 6 of the appellant's authorities, page 162. He was referring to the wording of the section 155 of the Australian provision and 162 where he says well, "Section 155 specifically states the information must relate to a matter that constitutes, or may constitute, a consternate of the Act. Similar words do not appear in the New Zealand statute, however there is also reference to purpose in section 98 which may be regarded as limiting. The information may be sought only where it is considered necessary and desirable for the purposes", there's that phrase again, "of carrying out the functions of the Commission and exercising the powers of the Commission or the Act.

The Commission does not have an unlimited power to require citizens to furnish information and although the words in the two Acts differ, I think the same conclusion follows and in each case the powers of the investigative body are defined for the purposes for which those bodies may be exercised.

Section 155 of the Australian Act allows the investigative body to act where it has reason to believe. In New Zealand, the jurisdiction is triggered by the Commission considering it necessary or desirable. The words in the New Zealand Act are clearly wider. Nevertheless, the nature of the information sought as distinct from the decision to seek it, is still defined by the need to show that it is related to the particular subject matter which gives the investigating body jurisdiction to investigate it at all".

I think finally, just in terms of this idea of competing market powers, although I think this is a well trammelled sort of a discussion, was said by my learned friend and seems to be the key part of his submission but in terms of the asymmetries, "No way is the exercise of unilateral market power against Pharmac is that authorised by section 53." That is a sweeping statement. I think even he, at the end, was prepared to concede that it's available on the words with a heavy overlay of purpose, as he would put it but, in my respectful submission, it is to rewrite section 53 in a way which would be inconsistent with the protections that pharmaceuticals companies can justly have under that provision when they deal with Pharmac. Otherwise we have the awkwardness which we discussed this morning, in terms of proposals and dealings with Pharmac.

Your Honours have made comments that what might have happened, or where things went wrong below. Where things went wrong below was that they were going admirably up to the point where they were saying, this is within section 53 but there might be something else. With respect, at the end of the day, this about the interpretation as a matter of law of section 53 and it's about the containment of the exercise of what are significant administrative and coercive powers by a regulatory body, public body and it is this Court which decides what that law is and contains that, whereas there seemed to be an erring –

TIPPING J:

You're saying that there may be some theoretical force in the supply-side, demand-side but it's just simply not open on the language?

MR DUNNING:

No, I don't even think there's theoretical force in it. I think it's a complete construct.

TIPPING J:

All right.

MR DUNNING:

It's an absurd – I mean, my friend would like to suggest that we're absurd but, at the end of the day, there's just such an overland of section 53 –

TIPPING J:

We'll settle for, "it's just not available on the language".

MR DUNNING:

– as to not to be available. Unless there are any further questions, those are my submissions in reply thank you.

ELIAS CJ:

Thank you Mr Dunning. Thank you all counsel, it's been very helpful and we will reserve our decision.

COURT ADJOURNS: 3.39 PM