[2022] JMCA Civ 35

JAMAICA

IN THE COURT OF APPEAL

BEFORE: **THE HON MR JUSTICE BROOKS JA**
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA

SUPREME COURT CIVIL APPEAL NO 115/2017 &

APPLICATION NO COA2020APP00028

BETWEEN	**LASCO DISTRIBUTORS LIMITED**	**APPELLANT**
AND	**PFIZER LIMITED**	**RESPONDENT**

CONSOLIDATED WITH

SUPREME COURT CIVIL APPEAL NO 118/2017

BETWEEN	**MEDIMPEX JAMAICA LIMITED**	**APPELLANT**
AND	**PFIZER LIMITED**	**RESPONDENT**

Vincent Chen and Leonard Green instructed by Makene Brown of Chen Green & Co for the appellant, Lasco Distributors Limited

Dr Lloyd Barnett and Miss Gillian Burgess instructed by Gillian Burgess for the appellant, Medimpex Jamaica Limited

Mrs Denise Kitson QC, Kevin Williams and David Ellis instructed by Grant, Stewart, Phillips & Co for the respondent, Pfizer Limited

17, 18, 19, 20, 21 February 2020 and 11 November 2022

BROOKS, P WILLIAMS, STRAW JJA

This is the judgment of the court

[1] On 3 November 2017, V Harris J, as she then was ('the learned judge'), awarded damages to Lasco Distributors Limited ('Lasco') and Medimpex Jamaica Limited ('Medimpex') against Pfizer Limited ('Pfizer'). The assessment of damages arose from an undertaking as to damages, which Pfizer, in 2005, gave to the Supreme Court in applying for a grant of an injunction against Lasco, Medimpex and another company, NMF Pharmaceuticals Limited ('NMF'), to prevent them from selling their respective generic versions of a prescription drug, amlodipine, for which Pfizer claimed patent rights. The court granted the injunction, but Pfizer's claim was later ruled to be invalid, and it was ordered to honour its undertaking.

[2] The learned judge awarded Lasco approximately $273,300,000.00, and Medimpex, approximately $170,800,000.00, in damages. Those figures included interest on the various sums that comprised the award. Lasco and Medimpex are both dissatisfied with their respective awards and, in separate appeals, seek to have this court increase them. Pfizer has resisted both appeals, which were consolidated and heard together. Where it is convenient to do so, Lasco and Medimpex will be collectively referred to below as 'the appellants'.

[3] Although the appellants have filed numerous grounds of appeal, the essence of their respective complaints is that the learned judge erred in:

a. miscalculating:
   (1) the size of the amlodipine market; and
   (2) the potential growth of that market;
b. miscalculating the market share for the respective versions of amlodipine sold by each of the appellants;
c. adopting an inappropriate market scenario and applying an inappropriate discount to the market scenario that she adopted;

d. misunderstanding the post-injunction sales scenarios for the respective versions of amlodipine sold by the appellants; and

e. applying an inappropriate rate of interest to the respective awards of damages.

These complaints will be individually assessed below, but it is first necessary to give a fuller background to the case.

The background

[4] Amlodipine Besylate or Salt of Amlodipine ('amlodipine') is one type of calcium channel blocker ('CCB'), which is, in turn, one of several pharmaceutical methods used for treating hypertension. Pfizer developed amlodipine and marketed it, in tablet form, by the name 'Norvasc'. It started selling Norvasc on the Jamaican market in 1994, and initially had a monopoly in the amlodipine market on the island. The appellants and NMF later entered that market by selling branded generic versions of amlodipine. Their respective products were also in tablet form. Medimpex started selling its product, 'Normodipine', in July 2001, and in January 2002, Lasco entered the market with 'Las Amlodipine'. NMF also entered early in 2002.

[5] In January 2002, Pfizer received Letters Patent for amlodipine and, shortly thereafter (by June 2002) sued the appellants and NMF for patent infringement. On 29 March 2005, in pursuing that claim, Pfizer sought and obtained the injunction restraining the three entities from selling their respective generic versions of amlodipine. In applying for the injunction, Pfizer gave "the usual undertaking in damages should it become necessary". The undertaking is also referred to, in law, as a counter undertaking or a cross-undertaking. All three entities obeyed the injunction. The appellants contested Pfizer's claim but NMF took no further part in the litigation.

[6] This court lifted the injunction on 31 May 2012, after affirming an April 2009 Supreme Court ruling that Pfizer's patent was invalid. It then ordered an inquiry into the

damages payable to the appellants "consequent on the undertakings given for the grant of the injunction against them". On 2 July 2014, the Judicial Committee of the Privy Council upheld those rulings. By the time the injunction was lifted, however, other entities were already selling generic versions of amlodipine in Jamaica. Pfizer did not attempt to use any judicial measures to prevent that activity.

[7] In September 2016, when the inquiry into the damages got underway, Lasco had already re-entered the amlodipine market. Medimpex decided not to do so. Both, however, asked the Supreme Court to assess damages to compensate for the losses which, they said, they had respectively incurred as a result of the injunction.

The decision in the court below

[8] In conducting the assessment, the learned judge received a massive amount of evidence: medical, scientific, demographic, sociological, marketing and sales. Each party called experts and other witnesses to support their respective positions. Both appellants sought to demonstrate that, but for the injunction, the amlodipine market would have expanded during the period of the injunction and that each of them would have increased their respective shares of that market. Pfizer sought to show that the amlodipine market would not have increased in relation to the other pharmaceutical methods of treating hypertension. It also generally sought to downplay the influence that it said each appellant would have had on the overall market for treating hypertension if the injunction had not been granted.

[9] An important part of the evidence before the learned judge is a formulation called the "Rule of Halves", which all the parties accepted as valid. The essence of the principle is that only half of all the people suffering from hypertension are aware of their condition; of that number, only half are being treated for the disease; and of those being treated, only half have the condition under control. The application of the rule is not restricted to Jamaica.

[10] In her written judgment (**Pfizer Limited v Medimpex Jamaica Limited and others** [2017] JMSC Civ 162), delivered on 3 November 2017, the learned judge organised and assessed all the evidence in a commendably clinical manner. She used the latter part to set out her analysis of the evidence and the conclusions that she had drawn. The process of analysis that the learned judge used may be summarised as follows:

a. although she was assessing damages on a basis similar to that relating to breach of contract, it was not identical to that process, as "the damages can be assessed liberally but with logical and sensible adjustments";

b. she found that "the task is to reconstruct the hypothetical market 'but for' the injunction";

c. she employed "the conventional method of assessing the damages on a particular hypothesis and then … adjust the award by reference to the percentage chance of the hypothesis happening";

d. following the "Rule of Halves" and other evidence provided, she found that the market for all hypertension drugs was the number of people being treated for hypertension (200,000 persons annually), and, of that number, the subset being the amlodipine market would have increased during the period of the injunction (2005-2012) to between 20,000 and 22,000 persons per year (10%-11%); this converts to total sales of 7,300,000 to 8,030,000 tablets per year (a patient would take one tablet per day);

e. she accepted that if a particular market scenario was discounted by 35%, its result is the one most likely to have occurred had the injunction not been in place;

f. she found that over the period of the injunction, Lasco's share of the amlodipine market would have increased from 37.1% and plateaued at 60%, while Medimpex's share would have subsided from 44% to 25%, and Pfizer's from 18.9% to 10%;

g. she found that the tablet prices to be used for calculating the losses should be "JMD$7.17 and JMD$13.46 for Lasco's 5mg and 10mg [tablets] respectively", and "JMD$19.62 and JMD$28.35 for Medimpex's 5mg and 10mg";

h. she ruled that there should be no damages awarded for the post-injunction period;

i. she awarded both Medimpex and Lasco damages for the stock, which they respectively had to destroy because of the imposition of the injunction; and

j. she awarded interest, based on an agreement between the parties as to the rate, on each of the various sums (the hypothetical loss and the destroyed stock), at 8.23% per annum from 29 March 2005 (the date of the injunction) to 3 November 2017 (the date of the judgment).

The appeal

[11] The grounds of appeal are set out below, purely for convenience, as happily, learned counsel appearing in the appeal assisted the court by identifying the core issues involved.

Lasco's grounds of appeal

[12] Lasco's grounds of appeal are:

"(a) The finding that Mr. [Prem] Lobo [a chartered business valuator and an expert called on Pfizer's behalf] has done this calculation on numerous occasions is contrary to the evidence. Mr. Lobo is a forensic accountant and not an actuary. In any event the demeanour of the experts is not a factor in assessing the evidence that they have given. Further, the learned Trial Judge has failed to give any reasons why she prefers one expert to another in the event that there are conflicts between them.

(b) The trial judge has failed to correctly apply the guidelines set out for the assessment of the value of the opportunity or chance lost by [Lasco].

(c) In selecting Mr. Lobo's scenario 2 the trial judge imported the wrong done by the injunction into a calculation of the counterfactual. This scenario is based on a fundamental error in principle as to the calculation of the size of the Amlodipine market in the counterfactual scenario.

(d) The trial judge has wrongly equated the sales of Norvasc, Las Amlodipine and Normodipine with the market for Amlodipine.

(e) The trial judge has misunderstood the calculation of the market size to determine the Amlodipine market done by Mr. Lobo in his scenario 2 by taking his point of reference of 9,000 persons in the pre-junction period as the size of the market post injunction when his calculation resulted in a calculated market post the injunction of 51,186 persons.

(f) The more than doubling of the market of 9,000 persons to 20,000 to 22,000 persons was contrary to the evidence of the trend which was occurring prior to the imposition of the injunction.

(g) The correct approach in adjusting Mr. Lobo's scenario 2 was to extrapolate the known trends prior to the injunction into the counterfactual after the injunction.

(h) The selection by the learned trial judge of 10-11% of 200,000 persons is unsupported by the evidence, is arbitrary and whimsical and does not constitute a correct exercise of her discretion. It has resulted in a grave miscarriage of justice.

(i) The learned trial judge has asked the wrong question at paragraph 25 of her judgment. Her task was to evaluate

the value of the opportunity or chance lost by [Lasco] as a consequence of the injunction.

(j) The learned trial judge has failed to put any or any sufficient weight on the evidence of the effect on the size of the amlodipine market of the lifting of the monopoly held by [Pfizer] in Jamaica and the United States of America and Canada.

(k) The learned trial judge failed to put any or any sufficient weight on her finding that the sales of medication for hypertension depend primarily on the price and the prescription habits of the medical profession.

(l) The trial judge has disregarded the evidence that there were three segments in the amlodipine market: the high priced [Norvasc]; the moderately priced Normodipine; and the low-priced Las Amlodipine and fell into error in holding that Las Amlodipine was not a first mover in the market.

(m) The trial judge failed to appreciate that the low-priced segment of the market was the largest segment and that the price to the NHF [National Health Fund] would be relevant to the expansion of the amlodipine market as it would enable the NHF to purchase more from [Lasco] at its low prices and sell to the consuming public at a price comparable with or lower than competing medication for hypertension other than amlodipine.

(n) The trial judge has incorrectly applied the 'rules of halves' in disregarding the opportunity to [Lasco] to penetrate those segments of the market with persons who knew that they had the ailment and were not seeking treatment or those that did not know they did.

(o) She also failed to appreciate that the opportunity or chance denied [Lasco] by the injunction included the chance for Las Amlodipine to increase the market for amlodipine by the displacement of other competing drugs being taken by persons already being treated.

(p) The learned trial judge has come to conclusions and made inference [sic] without any evidentiary basis for so doing. By way of example at paragraph 301 of her judgment she concludes that the market normally served by [Lasco] is completely different from the amlodipine market that it sought to enter.

(q) The learned trial judge failed to place any or any sufficient weight on the evidence of switching from other drugs to amlodipine as given by the witnesses for [Lasco] and the tables produced by Mr. Lobo the expert for [Pfizer] (see paragraphs 306-309 of the judgment).
(r) The learned trial judge failed to appreciate that the increased prices used by [Mr W. St. Elmo Whyte (an actuary and expert on Lasco's behalf] was an actual assumption which spread the price over the entire span of the claim (to the year 2022) and was a reasonable assumption for the purposes of his calculation.
(s) The evidence of the actual sales and prices of Las Amlodipine after the injunction was lifted cannot be used to determine what the position would have been in the counterfactual scenario. The trial judge was wrong to make reference to this dealing with the counterfactual.
(t) The discount of 35% and a further 10% of Mr. Lobo's scenario 2 by the trial judge is inexplicable given her findings and is whimsical, arbitrary and unsupported by the evidence and do [sic] not constitute a proper exercise of her discretion.
(u) The learned trial judge has wrongly applied the rate of interest applicable to United States Dollar transactions to the Jamaican Dollar computation that she has directed.
(v) The learned trial judge has failed to give any or any adequate reasons for her findings and decisions."

Medimpex's grounds of appeal

[13] Medimpex's grounds are:

"(1) The findings of fact and conclusions listed at 2(a)(1)-(19) [of the notice of appeal filed 13 December 2017]… are unreasonable and the learned trial Judge misdirected herself in making the said findings and conclusions;
(2) In particular the learned Judge came to the conclusions and made the said findings in relation to the nature and size of the market, [Medimpex's] case respecting the percentage of persons suffering from hypertension who would have been prescribed and treated with generic amlodipine, [Medimpex's] marketing potential, the

nature of the expert evidence, [Medimpex's] actual and potential market share and the value and durability of its first mover advantage which are unreasonable and/or contrary to the evidence.

(3) The learned Judge misdirected herself in law in holding that the correct principle to apply is to ask what loss did the making of the injunctive order cause during its continuation and until its discharge;

(4) The learned Judge misdirected herself in law in holding that [Medimpex] had to prove the losses claimed for the post-injunctive period with a degree of certainty.

(5) The learned Judge erred in law in treating as essential to the proof of loss during the post-injunctive period the details of a marketing plan.

(6) The learned Judge erred in law in treating [Medimpex] as being subject to an essential requirement of proving the factual details during the counterfactual period and thereby ignored the well-established trends before and during the injunction period and Medimpex's established position in the pharmaceutical market.

(7) The learned Judge's adoption and treatment of Mr. Lobo's scenario 2 was contrary to the evidence and established principles of computing the relevant losses as it failed to take into account Medimpex's record of sales, the market trends and potential for Normodipine and the impact of lower price hypertensive drugs.

(8) The learned trial Judge's selection of 10-11% of 200,000 as the market in relation to [Medimpex] is unreasonable and contrary to the evidence as it significantly underestimates the size of the market, the impact of lower prices and Medimpex's established position in the pharmaceutical distribution market.

(9) The learned Judge failed to take into account the effect of the lifting of the monopoly on the sale of amlodipine by the sale of generics as experienced in the USA, Canada and Norway in relation to anti-hypertensive drugs.

(10) The learned Judge failed to distinguish between the data and calculations of Pfizer and Medimpex where it was appropriate by virtue of the differences in their circumstances and marketing strategies.

(11) The learned Judge failed to make a proper distinction between 'market' and 'potential market' and the impact of efficacy and accessibility from one day to another or of the taking of a combination of drugs.
(12) The learned trial Judge's conclusions are unreasonable and contrary to the evidence in that the Jamaican market for amlodipine will be greatly affected by prices and the prescription attitudes of the medical and pharmaceutical professions in Jamaica, which were factors which Mr. Lobo did not take into account properly or at all."

[14] The core issues, which were identified by counsel, have been further consolidated. They were set out in para. [3] above and will be discussed in this judgment.

Some overarching principles

[15] In assessing this unusual case, it is necessary to outline some overarching principles which must be applied. One is well-known, others, less so.

[16] The principle, which is well known, is that this court will not disturb findings of fact made by a judge at first instance unless, without being exhaustive, it finds that the judge has:

a. made a critical finding of fact which has no basis in the evidence;
b. based the findings of fact on a misunderstanding of the relevant evidence;
c. demonstrably failed to consider relevant evidence, or
d. made a decision that cannot reasonably be explained or justified.

(see **Paymaster (Jamaica) Ltd and Another v Grace Kennedy Remittance Services Ltd** [2017] UKPC 40 at para. 29) In addition, the court will not disturb the exercise of a discretion by a trial judge unless the judge has, among other things,

demonstrably misapplied the relevant law to the facts found (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 2 at para. [20]).

[17] The other principles that must be applied are not as generally applicable or commonly used. These apply to cases in which damages are to be assessed on a counterfactual scenario. The parties all accept that the applicable principles to be applied in carrying out the task of assessing damages, in cases such as this, were set out by Norris J in **Les Laboratoires Servier (a company incorporated in France) and another v Apotex Inc and others** [2008] EWHC 2347 (Ch), [2009] FSR 220, [2009] IP & T 600 ('**Apotex**'). Although Norris J's decision, in that case, was overturned on appeal on the basis that he had improperly refused an application to amend pleadings, the Court of Appeal of England and Wales, in **Astrazeneca AB and another v KRKA, dd Novo Mesto and another** [2015] EWCA Civ 484 ('**Astrazeneca AB**'), endorsed the principles that he set out for assessing damages where an injunction has caused loss to the party restrained. In **Astrazeneca AB**, Kitchin LJ said, in part:

> "[12] The parties were agreed before the judge and before this court that the general principles to be applied in assessing the damages payable under a cross-undertaking given in respect of the grant of an interim injunction are those explained by Norris J in [**Apotex**]. In that case Norris J said this:
>
> > '5 The principles of law sufficient to enable me to quantify compensation in this case may be shortly stated:
> >
> > (a) The undertaking is to be enforced according to its terms. In the instant case (as in many others) it is that Servier will comply with any order the court may make 'if the court . . . finds that this order has caused loss to the Defendants'. The question for me is therefore: what loss did the making of the order and its continuation until discharge cause to Apotex?
> >
> > (b) The approach is therefore essentially compensatory and not punitive;

(c) The approach to assessment is generally regarded as that set out in the obiter observation of Lord Diplock in *Hoffmann-La Roche v Secretary of State for Trade* [1975] AC 295 at 361E namely:

> 'The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the Plaintiff and the Defendant that the Plaintiff would not prevent the Defendant from doing that which he was restrained from doing by the terms of the injunction: see *Smith v Day* (1882) 21 Ch D 421 per Brett LJ at page 427.'

(d) What Apotex was trying to do (and what the order restrained it from doing) was to enter a new market for the sale of generic perindopril. It was denied exploitation of this opportunity. The outcome of such exploitation is attended by many contingencies but *Chaplin v Hicks* [1911] 2 KB 786 establishes (per Vaughan Williams LJ at p 791) that whilst 'the presence of all the contingencies on which the gaining of the prize might depend makes the calculation not only difficult but incapable of being carried out with certainty or precision' damages for the lost opportunity are assessable.

(e) The fact that certainty or precision is not possible does not mean that a principled approach cannot be attempted. The profits that Apotex would have made from its exploitation of the opportunity to sell generic perindopril depend in part upon the hypothetical actions of third parties (other potential market participants) and in part upon Servier's response to them. **A principled approach in such circumstances requires Apotex first to establish on the balance of probabilities that the chance of making a profit was real and not fanciful: if that threshold is crossed then the second stage of the inquiry is to evaluate that substantial chance (see *Allied Maples v Simmons & Simmons* [1995] 1 WLR 1602). As Lord Diplock explained in *Mallett v McMonagle* [1970] AC 166 at 176E-G '. . . in assessing**

> **damages which depend on its view as to what . . . would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing . . . would have happened and reflect those chances, whether they are more or less than even, in the amount of damages it awards . . . .**'
>
> (f) **The conventional method of undertaking this exercise is to assess damages on a particular hypothesis and then to adjust the award by reference to the percentage chance of the hypothesis occurring.** In many cases it is sufficient to postulate one hypothesis and make one discount: but there is no reason in principle why one should not say that either Scenario 1 or Scenario 2 would have occurred and to discount them by different percentages. That is the course which Mr Watson QC urged in the present case: and I note that it has some support in *Earl of Malmesbury v Strutt & Parker* [2007] PNLR 570.'
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> [13] I would respectfully endorse that summary…" (Italics as in original, Emphasis supplied)

[18] The similarities between **Apotex**, **Astrazeneca AB** and this case, make the principles expounded by Norris J all the more relevant to this analysis. Those previously decided cases also involved injunctions preventing generic pharmaceuticals from entering a particular market, and the injunctions were later found to have been meritless. The differences, however, are also important. Whereas in **Apotex**, the generic drug was on the market for only a few days, and in **Astrazeneca AB**, it had not even entered the market, the appellants' products were on the market for over three years before the injunction improperly halted their sales. Another important difference is that the litigation, in this case, has taken many times the length of the process in those cases.

[19] The assessment process for the learned judge was somewhat simpler than in **Astrazeneca AB**, for, in this case, there is no dispute that the appellants would have made a profit from the sales of their respective versions of amlodipine. The learned

judge's major task was, therefore, "the second stage of the inquiry", which was to quantify the profit that the appellants would have made, but for the imposition of the injunction.

[20] Norris J also provided invaluable insight into the operation of the ebb and flow of sales in the pharmaceutical market, in cases where there is a challenge to a product which is said to be in breach of a patent. He explained in paras. [13] – [16] of his judgment that there are stages to the introduction and marketing of new drugs:

> "[13] First, the 'at risk' period. Where a drug patent has been registered but its validity is under challenge any company which brings onto the market a competing generic drug does so 'at risk'. The risk is enormous. The 'protected' branded product is generally sold not simply at a 'premium' price but at a hugely profitable price… The whole point of the generic product is to provide a cheaper alternative….
>
> [14] The second feature is the market dynamic. The market ultimately moves from one absolute state (the monopoly of the patent holder) to another (an entirely open market in an unprotected product). But the move from one such state to another is not a smooth transition properly represented by a straight line or a simple curve. There are transitional stages which themselves are characterised by periods of rapid price adjustment ('transition periods') interspersed with periods of relative price stability ('plateau periods'). The transition periods represent the market response to an actual or rumoured new entrant (whose only ability to gain market share from existing participants will be through price advantage, but who will have no interest in driving prices immediately to rock bottom whilst there remains some advantage in sharing in the profit margins established by the earlier and fewer participants). The reason for the plateau period is that if the number of participants in the market is relatively stable, then gradually market shares and unit prices emerge with which each participant is comfortable, and which yield a satisfactory return. **The move from monopoly to open market will take three or four years**. The number and individual length of the intervening 'plateau periods' will depend on the number and timing of new entrants. The steepness of the price fall in the transition periods will depend

on the degree of aggression of the new entrant and the extent to which there is scope for cutting prices to obtain market share.

[15] It is now necessary to interrelate these two features. First, it is in my judgment an inference properly to be drawn from the nature of the 'at risk' market and the market dynamic that where there is a limited number of participants in an 'at risk' market it is not in the interests of either the patent holder or the new entrant to drive down prices hard. … It is in everyone's interests to keep the price as high as is compatible with their obtaining or retaining market share and generating the maximum profit.

[16] The second aspect of the interrelationship between [the] 'at risk' period and the market dynamic in relation to which I make findings is the position of the patent holder in the face of challenge. There are a number of weapons the patent holder can deploy. If he thinks his right to the patent is not impregnable he can himself become a manufacturer to a generic drug supplier. His own original product (perhaps differently coloured or differently packaged) is then placed on the market in the name of some other company. This is called an 'authorised generic' (as opposed to a 'true generic' which is manufactured and supplied by a competing company). The entry of such agreements enables the patent holder, whilst continuing to support its premium brand, to make profitable additional sales (and thereby to avoid losing sales to competing 'true generics') and at the same time have some influence over the volumes in which and price at which generics are marketed. Furthermore, the patent holder can by means of confidential arrangements with its customers, adjust the true price at which its branded products are sold. By this means it can retain market share apparently at the 'headline' price, and the apparent maintenance of the headline price will be reflected in published market data which will in turn influence the NHS [United Kingdom National Health Scheme] reimbursement price. If the challenge to the patent is then seen off and the generic company is forced to leave the market, then the rebates in place during the 'at risk' period can be withdrawn by the patent holder once the risk is eliminated. The patent holder thereby restores his margin and has to a substantial degree avoided any irreversible price decline." (Emphasis supplied)

[21] Although that outline of the market dynamics was set in the context of the United Kingdom National Health Scheme system, there is no doubt that the factors of competition, the entry of new players, price maintenance and price plateaus are relevant to this case. Lasco, for instance, revealed its strategy as one where it priced its Las Amlodipine deliberately low, compared to the competition (although it was making a huge profit on those sales), in order to seize market share, but planned to increase prices when it had established itself in the market.

[22] One final concept for understanding the dynamics of the pharmaceutical market is the principle that a first generic, or "first mover", has an advantage over later entrants. In para. [53] of his judgment, Norris J noted "that there was a genuine advantage to be gained from being the first generic on the market". The advantage is one of garnering customer loyalty. Importantly, however, he notes that "[t]his advantage would diminish with time (as more competitors entered the market)".

[23] Having considered those overarching principles, the issues identified at para. [3] above, may be considered.

The size and potential growth of the amlodipine market

[24] These issues address Lasco's grounds 3(d), 3(e), 3(f), 3(h), 3(j), 3(k), 3(l), 3(m), 3(n), 3(o), 3(p), 3(q) and Medimpex's grounds (8), (9), (11) and (12). The grounds will not be individually assessed.

[25] The issue of the size of the amlodipine market, both in the court below and in this court, lies at the root of the difference between the approach of the appellants and that of Pfizer. As has been mentioned above, the learned judge found that the market for amlodipine was a subset of the number of people who are being treated for hypertension.

[26] The learned judge rejected the appellants' respective approaches to the assessment of the potential of the amlodipine market. She accepted the evidence of Professor Rainford Wilks, a much-published medical expert in treating hypertension, that the people with hypertension in the population numbered approximately 800,000. She

applied the "Rule of Halves", which, Professor Wilks testified, applied in Jamaica. She also found, based on the evidence adduced, that there were other factors that limited the growth of the amlodipine approach to treating the disease. These included:

a. the fact that half of the people being treated for hypertension fail to faithfully take their hypertension medication;
b. cultural resistance by males to taking ethical drugs to treat hypertension because of links to erectile dysfunction; and
c. the existence of other, cheaper, pharmaceutical products, on the market, for treating hypertension.

She, accordingly, in rejecting scenarios formulated by the experts for the respective appellants, found that it "is not a reasonable assumption to make, that every single person who suffers from hypertension or the majority of those who do, would have been prescribed and treated with generic amlodipine. This to me seems quite far-fetched" (see para. [302] of her judgment).

[27] In addition, the learned judge found that the appellants had not provided any evidence, apart from say-so, that they would have implemented steps to "advance their [respective campaigns] to capture and dominate the potential market", had it not been for the injunction (see para. [300] of her judgment).

Submissions on behalf of the appellants

[28] The appellants have both contended that the learned judge has grossly underestimated the amlodipine market. They have complained that she erred in accepting the expert evidence of Mr Prem Lobo, whom Pfizer called to give expert evidence as to the size of the amlodipine market and the likely trajectory of the sales of the respective parties during the period of the injunction. Mr Vincent Chen, on behalf of Lasco, contended that Mr Lobo failed to follow the guidance given in **Apotex**. Learned counsel also contended that Mr Lobo failed to carry out an actuarial analysis of the counterfactual

period, but rather used an accounting approach to the task of assessing the counterfactual.

[29] Lasco, in particular, has posited that the amlodipine market is at least equal to the number of people who suffer from hypertension, whether or not they knew that they had the disease. Lasco contends that, were it not for the injunction, it would have implemented a programme that would have increased awareness in the population in general about the disease, and informed the medical profession, in particular, as to the advantages of amlodipine over all other pharmaceutical methods of treating the disease. It contends that the learned judge improperly rejected its track record in marketing and particularly in dominating the market for the pharmaceutical treatment of the Human Immunodeficiency Virus ('HIV').

[30] Medimpex was more conservative. It contended that the minimum amlodipine market is the majority of the people who are treated for hypertension. Medimpex argues that amlodipine had proved itself to be more appropriate than any of the other hypertension drugs. Not only is amlodipine more convenient (once per day tablet) and more effective in lowering blood pressure, Medimpex claims, but it is cheaper than all the other drugs, save for thiazide-type diuretics, which have the drawback of causing frequent urination; a characteristic that is not only inconvenient but a social disadvantage in countries like Jamaica that do not have readily available public toilet facilities.

[31] Dr Lloyd Barnett, for Medimpex, argued that the learned judge erred in accepting Mr Lobo's evidence, which, Medimpex contends, improperly limited the size of the amlodipine market to the total sales of amlodipine by Pfizer, Lasco and Medimpex, during the pre-injunction period. Dr Barnett asserted that Mr Lobo, as well as the learned judge, ignored the pre-injunction sales figures and the trajectory of growth that those figures represented and, consequently, grossly miscalculated the scenario that should have been applied.

Submissions on behalf of Pfizer

[32] Pfizer has contended that the appellants' approach is unrealistic. That approach, Pfizer asserts, ignores the generally accepted evidence of Professor Wilks as to the size of the population with hypertension and the "Rule of Halves". That evidence, Pfizer argues, automatically limits the amlodipine market. Pfizer also contends that the appellants' approach, especially Lasco's, when taken to its logical conclusion, unreasonably presumes that the amlodipine market would extend beyond the number of people who suffer from the disease, whether or not they were aware of their condition. Pfizer was critical of the evidence of Lasco's expert, Mr W St Elmo Whyte, and Medimpex's expert, Mrs Kathleen Moss. Those experts, Pfizer contends, ignore the facts set out in Professor Wilks' report on the treatment of hypertension in Jamaica.

Analysis

[33] There are two facets to the issue of the market at this stage. The first aspect is the size of the market for hypertension drugs. The second aspect is the size of the amlodipine market as a subset of the market for hypertension drugs.

[34] In assessing the first aspect, as will occur with the second, there will be a reference to and reliance upon aspects of the expert opinion of Professor Wilks, whose opinion was generally accepted by the appellants. Professor Wilks identified the "Rule of Halves" in his expert report titled "The Burden of Hypertension in Jamaica 2005-2014". He identified the principle on page 3 of the report:

> "…Many studies have shown that in the case of hypertension, population surveys have demonstrated the 'rule of halves', i.e. 50% are aware, of which 50% are on treatment and a further 50% are under control. This would mean that only approximately 13% of persons with hypertension would have adequately controlled BP [Blood Pressure] …."

[35] Professor Wilks also gave oral evidence. He testified that since, in his view, everyone with hypertension needed to be on appropriate treatment for the condition, then, in that context, "everyone who has hypertension should be considered as needing the treatment and being part of that market" (see page 768 of Vol VI(B) of the record of

appeal). He also testified that his research has shown that the incidence of hypertension is increasing in Jamaica as elsewhere in the world.

[36] In terms of numbers, Professor Wilks' report sought to show figures for the number of people suffering from hypertension in Jamaica. The report also disaggregated those figures according to age, sex and socio-economic status. In cross-examination, he sought to defend seeming discrepancies in the totals he gave in various tables, which seek to identify the number of people afflicted with the disease. After giving an explanation, he identified the figure that the learned judge used in her analysis. Professor Wilks stated "if you were to put…[socio-economic status] into the model alongside age, then you would get a figure much closer to the 800 [thousand]. In fact, you get seven hundred and odd thousand" (see page 842 of Volume VI(B) of the record of appeal).

[37] Professor Wilks accepted in cross-examination that, applying the "Rule of Halves", the resultant figures for the number of people that are treated for hypertension was about 200,000. He accepted that his report, although indicating that the number of people treated was between 278,283 to 280,971, showed that the treated population had remained roughly static between 2005 and 2014.

[38] He was challenged in cross-examination by Mrs Denise Kitson QC (who also appeared for Pfizer at the trial). Learned Queen's Counsel sought to demonstrate through her questions, that some of Professor Wilks' earlier publications showed more conservative numbers for the number of people suffering from hypertension than his expert report, which had been prepared for the court, sought to convey. Some of those earlier studies showed figures that there were between 469,000 and 580,000 people afflicted with the disease (see pages 869-870 of Volume VI(B) of the record of appeal). In fact, at the end of Mrs Kitson's cross-examination, Professor Wilks accepted that his "technical report…[of] 2007 to 2008, suggests [sic] far smaller number of persons treated for hypertension than [his] expert report" (see page 1009 of Volume VI(B) of the record of appeal).

[39] Both Mr Chen and Dr Barnett challenged the learned judge's use of the figure of 800,000 as the appropriate starting point. They both pointed to figures in excess of that number, which emerged from the evidence. The complaints cannot be supported. There was ample evidence, including the evidence from Professor Wilks, cited above, to justify her finding that the number of people with hypertension was approximately 800,000. In fact, the learned judge noted, in para. [110] of her judgment (although that assertion seems to be now disputed), that that figure had been agreed by the parties. After referring to the inconsistency in Professor Wilks' report, she said, in part:

> "… The figures ranged from a high of over 850,000 to a low of 460,000 persons during the relevant periods. However, it is agreed and I accept that for the purpose of the exercise that the court is engaged in that the total number of persons in Jamaica who are suffering from hypertension is approximately 800,000…."

[40] Applying the "Rule of Halves", accepted by all the parties as relevant means that half of that number were unaware that they had the disease (justifying its moniker "the silent killer"). Of the 400,000 who were aware that they were afflicted, the total number of people being treated for the disease during the counterfactual period was 200,000. The number of people who had the disease under control is 100,000; that is approximately 13% of the total number of those afflicted.

[41] The learned judge also found that the absence of evidence of any programmes by either appellant to raise awareness of hypertension, or the benefits of amlodipine, belied their assertions that the amlodipine market would have ballooned to the levels that they assert. That finding cannot be faulted.

[42] The consideration of the second aspect of this analysis requires an analysis of the number of people who would have been treated with amlodipine during the counterfactual period. In this latter consideration, it is observed that Professor Wilks identified that the several types of pharmaceuticals used for treating hypertension all do so effectively. He said, in part, on page 3 of his report:

> "There are excellent clinical outcome trial data proving that lowering BP [blood pressure] with several classes of drugs, including angiotensin converting enzyme inhibitors (ACEIs), angiotensin receptor blockers (ARBs), beta-blockers (BBs), calcium channel blockers (CCBs), and thiazide-type diuretics, will all reduce the complications of hypertension."

[43] As mentioned before, amlodipine is a type of CCB. In oral testimony, Professor Wilks said that there are stages to the pharmaceutical treatment of people with hypertension. The first line of treatment, he said, was the use of a thiazide-type diuretic. That treatment, however, will not usually be sufficient. In two-thirds to three-quarters of patients, at least two drugs will be required. It has been found, Professor Wilks testified, that for people of African origin, such as the vast majority of Jamaicans, unless there were contraindications, "the second drug of choice is a calcium channel blocker of which Amlodipine is an example" (see page 790 of Volume VI(B) of the record of appeal).

[44] Amlodipine, Professor Wilks testified, is a frequently prescribed medication for hypertension. One of its benefits, he said, was the fact that it was a once-a-day tablet, as opposed to about 50% of its competitors. He testified that amlodipine would be the predominant drug prescribed for treating hypertension, but accepted that he did not have the data to support that hypothesis.

[45] There was a plethora of academic opinions placed before the learned judge on the merits of and preference for one or other of the various types of treatment for hypertension. Professor Wilks seemingly accepted contrasting opinions. He stoutly defended the merits of amlodipine and agreed with a study which concluded that amlodipine, although similar in efficacy to another CCB, nifedipine, had fewer adverse effects than nifedipine (see the review "Amlodipine versus Nifedipine in the Treatment of mild-to-moderate Hypertension in Black Africans" on pages 44-54 of Volume V of the record of appeal). Nonetheless, Professor Wilks agreed with the conclusion of a review of a number of studies, which showed a consensus that ACE inhibitors and AIBs are the most effective antihypertensive drug classes for slowing the progression of renal disease in hypertensive patients. The relevant portion of the review, "Management of High Blood

Pressure in Blacks", which appears on pages 164-165 of Volume V of the record of appeal, states, in part:

> "Thiazide-type diuretics and CCB's show little difference in either BP lowering or clinical outcomes by subgroups (except that thiazides are more effective in primary prevention of HF [heart failure]), including in black populations. Excellent data are available to demonstrate that ACE inhibitors and ARB's are the most effective antihypertensive drug classes for slowing the progression of renal disease in hypertensive patients with diabetic and nondiabetic CKD [chronic kidney disease], including blacks…."

[46] On the issue of the presence of amlodipine in the treatment of hypertension in Jamaica, Professor Wilks testified that, as a medical practitioner, he would have liked to have prescribed amlodipine to his hypertensive patients but the price of the only brand on the market, at the relevant time (namely Norvasc), restricted him from doing so, as some of his patients could not afford it. He speculated that that situation also motivated other practitioners and accounted for the fact that amlodipine only represented 4% of the hypertension drugs in the National Health Fund's ('NHF') scheme (which provided subsidised or free medication to members of the scheme) at the relevant time.

[47] Dr Lorenzo Gordon, on behalf of Lasco, opined that amlodipine was a superior first-line treatment for hypertension and that it possessed advantages over other pharmaceutical hypertension products. He testified that Las Amlodipine, because of its low price, compared to the competition, was the amlodipine product of choice for the majority of his patients.

[48] Faced with those varied opinions, the learned judge accepted, as an objective standard for the Jamaican market, the evidence of the sales of amlodipine by the NHF. The NHF was regarded as the largest purchaser of pharmaceuticals for the treatment of a number of medical maladies, including hypertension. Pfizer's regional sales manager, Mr Ronald Camps, testified that the NHF's purchases of Pfizer's amlodipine product, Norvasc, represented about 40% of Norvasc's sales within the island. He further stated

that amlodipine amounted to 4% of the drugs that the NHF purchased for hypertension for the period 2012/2014 and 3.45% for the period 2015/2017 (data extracted by Mr Camps – see pages 28 and 31 of Volume III of the record of appeal).

[49] Using those data and others, the learned judge found that the NHF regime (including both NHF and Jamaica Drugs for the Elderly ('JADEP') regimes), which accounted for 150,000 persons in Jamaica, "is representative of a significant percentage of the treated hypertensive population". When she disaggregated the purchases through those regimes, she found that "amlodipine represents a very small percentage of [NHF's] total awards (about 4% to 7%)" (see para. [134] of her judgment). She recognised, however, that the higher price of Norvasc could have dampened the growth of the amlodipine market during the counterfactual period.

[50] The learned judge implicitly accepted Professor Wilks' evidence, mentioned above, about the size of the treated market (200,000 persons). In paragraph [312] of her judgment, she said, "the number of persons who are treated for hypertension has remained **relatively constant from 2005 to 2014**" (emphasis as in original). The learned judge found that the market for amlodipine would have at least doubled during the counterfactual period and would have accounted for 10-11% of the drugs in the market for hypertension drugs (see para. [334] of the judgment). She so concluded, based, in part, on the evidence of the efficiency and lower cost of the genetic amlodipine products that had entered the market.

[51] This finding, she found, translated to there being 20,000 to 22,000 patients who would be treated with amlodipine per year. The market, in terms of tablets sold annually during the counterfactual period, would therefore have been 7,300,000 to 8,030,000.

[52] She found that this conclusion roughly coincided with a scenario, when discounted, proffered by Mr Lobo, who, as mentioned above, gave expert testimony for Pfizer. Mr Lobo, for the modified scenario (Scenario 2) accepted by the learned judge, used Pfizer's

actual sales volumes during the counterfactual period as the basis for his hypothesis. He described his approach in para. 257 of his report:

> "Pursuant to Scenario 2, we have assumed that, during the Injunction Period, Pfizer, Lasco and Medimpex would have maintained their 2005 pre-Injunction market shares of 22%-38%-40% respectively for the 5mg tablets, and 16%-36%-48% for the 10mg tablets. Then, using Pfizer's actual tablet sales volumes achieved during the Injunction Period (which we have assumed represent 22% and 16% market shares of the 5mg and 10mg tablets), we have estimated Lasco and Medimpex's tablet volumes based on their respective market shares.
>
> For example, in 2006, Pfizer's actual 5mg tablet sales volume was 1,312,000 tablets. We have assumed that this represented 22% of the market for 5mg tablets, such that Lasco's 38% of the market would have represented 2,266,182 tablets, and Medimpex's 40% of the market would have represented 2,385,454 tablets."

[53] Using that scenario, Mr Lobo arrived at some hefty total tablet sales figures for the counterfactual period:

Year	Estimated Number of Tablets
2005 (30 Mar- 31 Dec)	5,394,000
2006	13,882,000
2007	16,325,000
2008	17,121,000
2009	12,907,000
2010	18,683,000
2011	18,683,000
2012 (1 Jan-31 May)	7,785,000

[54] It is easy to accept the learned judge's rejection, as unrealistic, of the scenario set out in the report submitted by Mr Whyte ('the ACTMAN report'). It was built on an unsupportable model. Mr Whyte assumed, for the counterfactual period, that almost every person in Jamaica afflicted with hypertension would have been treated with amlodipine and that Las Amlodipine would have commanded at least 74% of the amlodipine market. The numbers that Mr Whyte assumed included almost all hypertensive people, whether or not they were aware of their condition. To say that those assumptions are, to use the learned judge's term, "farfetched", would not be unreasonable.

[55] The learned judge also rejected the scenario proffered by Medimpex's expert, Mrs Kathleen Moss, in respect of the counterfactual market scenario. Her reason for that stance was that Mrs Moss' scenario contended that Medimpex's product, Normodipine, would have commanded between 20% to 50% of the treated population of hypertensive people. The learned judge found that that was unlikely, given Medimpex's pre-injunction loss of market share to Lasco and that there would have been other entrants to the generic amlodipine market during the counterfactual period.

[56] Mr Chen contended that Mr Whyte's approach is actuarial, as required by the **Apotex** guidelines. The report, however, falters on the assumptions upon which it is based. Firstly, it disregards the Rule of Halves and secondly, it clashes with the academic opinions which do not support CCBs, particularly amlodipine, as the drug of choice for the second-line pharmaceutical treatment of hypertension.

[57] Mr Chen complained that the learned judge accepted Mr Lobo's "accounting approach" to creating the counterfactual scenario, but the complaint is not valid. Whereas it is true that Mr Lobo based both of his proposed scenarios on Pfizer's actual sales during the counterfactual period, the learned judge rejected his first scenario. She did not say that she accepted his second scenario. In para. [293] of her judgment, she said, in part, "I am unable to accept any of the scenarios *in toto*". She said that she had reservations about them. The learned judge created her own scenario. She set it out concisely in para.

[334] of her judgment. Her comment about Mr Lobo's second scenario was that her conclusions "would be in line with a 35% discount of Mr Lobo's Scenario 2". She concluded, in para. [336], that of the scenarios placed before her by all the experts, "Mr Lobo's Scenario 2, **with the necessary adjustments and discount**, makes the fairest assessment of what would have occurred in the counterfactual scenario" (emphasis supplied).

[58] Dr Barnett submitted that the learned judge erred in conflating Medimpex's stance with that of Lasco. Learned counsel argued that the scenario created by Mrs Moss did not make the claims that Lasco's expert made. He pointed out that Mrs Moss asserted that amlodipine would have accounted for 20% to 50% of the treated hypertensives and that Medimpex would have commanded 40% of the amlodipine products sold. Dr Barnett also submitted that the learned judge erred in using the NHF figures in assessing the size of the amlodipine market. He pointed to Professor Wilks' evidence criticising the use of the NHF data. Learned counsel submitted that the pre-injunction sales figures suggest that the growth of the market was far greater than the learned judge ruled.

[59] The learned judge's reasoning cannot be faulted in this regard. The appellants' complaints about the learned judge's approach to the calculation of the market for hypertension pharmaceuticals, generally, and the amlodipine market, in particular, cannot be supported. Both the report submitted on Medimpex's behalf ('the Sierra report) and the ACTMAN report, ignore the figures given by Professor Wilks, which were reasonably accepted by the learned judge. Mrs Moss used a figure of 304,000 to represent the treated hypertensive population in Jamaica. The appropriate figure for that population was 200,000, as was reasonably accepted by the learned judge. Accordingly, Mrs Moss' figures were skewed.

[60] Neither can the learned judge's approach be criticised as using an accounting approach. She outlined her own scenario. It would be helpful to set out, in full, her concise assessment:

"[334] In my assessment of the counterfactual scenario:

> ***i*) It is very likely that the market for amlodipine would have, at the very least, doubled**. It is reasonable to me that the number of persons who would have taken amlodipine would have been in the vicinity of about 10% to 11% of the total treated hypertensive market (about 20,000 to 22,000 persons) moving from about 9000 persons. In terms of the number of tablets, this would be in the vicinity of 7.3M to 8.03M per annum. I believe that this would be in line with a 35% discount of Mr. Lobo's Scenario 2. **This to my mind would have occurred because of the availability of the cheaper generics and in light of the fact that price is the dominant factor that drives demand. This would have occurred, in my judgment, because of the efficacy of the generics and their availability.** I conclude that this is a fair and reasonable assumption on the totality of the evidence;
>
> ***ii*) It is likely that this increase in the amlodipine market would also have been attained because I have assumed that the NHF would have made awards to various distributors of the generic drugs on account of their low prices**. The final prices to patients would have been very affordable due to the NHF subsidy (another tenet that would influence expansion of the market). Price is also a vital factor, to my mind, that determines the NHF awards since all its transactions are funded from the public purse;
>
> ***iii*) It is likely that this expansion would also have been achieved because there would have been a number of doctors (like Dr. Gordon) who would make the relevant switch to prescribe generic amlodipine to their patients on account of their cheaper prices and efficacy. Similarly, there would be pharmacists who would advise patients of the availability of generics in circumstances where the branded product is prescribed and it is more than likely that some of those persons would switch as well**;

> ***iv*) I have also taken into account that post-injunction Lasco returned to the market and sold more tablets than it did prior to the injunction**. This was taken into account in determining its market share and volume of sales during the counterfactual situation." (Emphasis supplied)

[61] It cannot properly be said that the learned judge's scenario did not have support from the evidence or drew unreasonable inferences therefrom. Lasco's assertion that the amlodipine market would have kept on doubling, year on year, almost indefinitely, runs contrary to the concept set out by Norris J in **Apotex**, that prices and market share will plateau and fall as new generic products enter the marketplace.

[62] One other complaint by Mr Chen must be addressed in this context. Learned counsel submitted that the learned judge did not explain her selection of the figures of "about 10% to 11% of the total treated hypertensive market (about 20,000 to 22,000 persons)" as being the market for amlodipine. It is not a fair criticism. The learned judge explained her rejection of the various scenarios advanced by Mr Whyte and Mrs Moss. She identified, in para. [329], that Mrs Moss' calculation of the range for that market as being 20% to 50% of the number of treated hypertensives, was unlikely. She based that rejection on her earlier analysis and the consideration of the data concerning the NHF allocations. It is on those bases that she arrived at the percentages that she did.

The market share during the counterfactual period of the appellants' respective versions of amlodipine

[63] These issues address Medimpex's grounds (2) and (10). The grounds will not be individually assessed, but it is noted that Lasco does not complain about the learned judge's allocation of market share.

[64] The learned judge allocated market share according to her analysis of the amlodipine market's trajectory prior to the imposition of the injunction. She set out the following table, at para. [330] of her judgment, to demonstrate her finding:

	Lasco	Medimpex	Pfizer	Others
2005	37.1%	44%	18.9%	
2006	44%	37%	15%	3%
2007	55%	30%	10%	5%
2008	60%	25%	10%	5%
2009	60%	25%	10%	5%
2010	60%	25%	10%	5%
2011	60%	25%	10%	5%
2012	60%	25%	10%	5%

[65] Dr Barnett submitted that the learned judge erred in the allocation of market share for Medimpex. He argued that she failed to take into account the market strategies used by Lasco and Medimpex. She ignored, he submitted, the evidence that Lasco intended to increase its prices once it was established in the market. That increase in a price-sensitive market, learned counsel submitted, would have shifted market share in Medimpex's favour. Learned counsel argued that Mrs Moss' projection of a 40% share of the amlodipine market for Medimpex, was reasonable.

[66] An outline of actual sales records in the pre-and post-injunction periods will assist in assessing the accuracy of the learned judge's assessment. These data are extracted from table 2a of para. 59 of Mr Lobo's report:

Year	Lasco	Medimpex	Pfizer	Others**
2002	7%	60%	33%	–
2003	23%	54%	23%	–
2004	28%	54%	18%	–
2005*-2011 (Injunction Period)	0%	0%	100%	–
2012	13%	0%	87%	–
2013	65%	0%	35%	–
2014	73%	0%	27%	–
2015	78%	0%	22%	–

*Figures for March 30 – December 31 2005

** Mr Lobo failed to consider the presence of the other generics on the market.

[67] It is generally accepted that the market for hypertension pharmaceuticals is price sensitive. Both Professor Wilks and Dr Gordon attested to the shift to the less expensive drugs as they became available to the market. Accordingly, a brief look at prices is important. These prices are gleaned from table 2c of para. 59 of Mr Lobo's report:

Weighted average selling price per tablet in J$

	Lasco		**Medimpex**		**Pfizer**		**Others**
	5mg	**10mg**	**5mg**	**10mg**	**5mg**	**10mg**	**–**
2002	5.80	10.86	17.70	25.10	43.23	75.67	–
2003	6.99	13.13	18.99	27.22	43.23	75.67	–
2004	7.37	13.73	20.38	29.50	44.60	77.49	–
2005*	7.23	13.67	20.94	29.99	42.65	73.86	–
2012	7.59	11.03	Not		68.62	93.69	–
2013	3.51	6.01	In		74.66	103.58	–
2014	3.48	7.57	The		75.95	101.42	–
2015	6.20	12.36	Market		94.98	125.96	–

*Figures for 30 March – 31 December 2005

[68] Mr Whyte indicated that Lasco would have used increased prices during the counterfactual period. That evidence was aimed at amplifying the level of loss that Lasco would have suffered because of the injunction. The learned judge reported that Mr Whyte "used a price of JMD$19.13 for the 5mg and JMD$23.42 for the 10mg during the period" (see para. [261] of her judgment). Those prices would be very close to Medimpex's prices at the time that the injunction was imposed. The learned judge noted, however, that at the time that Lasco re-entered the market, its prices were very much lower than at the time that the injunction was imposed. She did not accept that Lasco would have so dramatically increased its prices during the counterfactual period.

[69] Importantly, and contrary to Mr Chen's submissions, the learned judge did take into account the effect of other entrants to the amlodipine market. She not only recognised that NMF was already in that market prior to the imposition of the injunction, but found that, if it were not for the injunction, there would have been other entrants. The participation of those third parties would have restricted the rise in prices in the market, and the learned judge properly so found at para. [260] of her judgment. The timeline that Norris J set out as being the standard for the transformation from monopoly to open market (three to four years) is appropriate in this context.

[70] The data cited above, combined with the learned judge's findings, suggest that, because of its price model, Lasco would have had a significant advantage in the price-sensitive amlodipine market. In that context, the learned judge's appraisal of Lasco's increase in the market share is not unreasonable. Similarly, despite its higher price, Pfizer's product continued to have a significant presence in the market, both before and after the injunction, and despite the greater number of generics in the market during the latter period. The learned judge's findings as to the market share for the parties in this case, including Medimpex, are not unreasonable. They should not be disturbed.

[71] It is important to note that Lasco contends that the learned judge improperly failed to award sufficient weight to the evidence of Dr Gordon and two pharmacists (Ms Hulyn Blackwood and Ms Juliet Kossaly-Chang). They testified about the preference in the

market for Las Amlodipine. Both appellants also assert that the learned judge placed undue emphasis on the data from the NHF in arriving at her scenario as to the amlodipine market.

[72] In assessing these complaints, it is also important to note that the learned judge recognised, as both Mrs Moss and Mr Lobo testified, that there was a dearth of information as to sales figures for the relevant drugs in Jamaica. The reliable data that were available were those from the NHF. The learned judge considered those data at paras. [127] - [135] of her judgment. At para. [133], she set out a table which showed the data regarding awards for hypertension drugs to the successful supplier. The allocation data shows a shift from there being no award for amlodipine for the periods 2003/2005 and 2005/2006 to moderately increased awards between 2009 and 2017. In introducing the table, the learned judge said:

> "For the period 2015 to 2017 the NHF award went again to Indies Pharmacy which supplied a total of 11,571 and 14,286 units of the 5 mg and 10 mg dosages respectively. (See the table below for comparative purposes)."

[73] The following data for amlodipine are extracted from that table:

Tablet size	2007/2009 units	2009/2011 units	2012/2014 units	2015/2017 units
5 mg	No data	8,000	18,000 (No award)*	11,571
10 mg	No data	14,400	30,000 (No award)*	14,286

* Although there was an allocation of the units indicated, there was no NHF award.

[74] Those awards were relatively modest compared to the awards for another CCB, Nifedipine, whilst being many multiples of another alternative hypertension drug, Verapamil.

[75] Those data from the NHF support the learned judge's rejecting, as not being sufficiently probative, the evidence of Dr Gordon and the two pharmacists about the shift by prescribing physicians and patients from other competing drugs to Las Amlodipine. The learned judge found that the evidence from those witnesses did not provide sufficiently broad a base to support an assertion that there was an island-wide shift to Las Amlodipine. She correctly identified, by way of contrast, that in **Astrazeneca AB**, the evidence adduced to support the claim for damages was elicited from several authorities from various areas in the United Kingdom.

[76] Given the variety of opinions in the academic studies as to the advantages and preferences of the competing types of pharmaceutical treatment, the learned judge was justified in finding that the sample provided by these three witnesses was too small to be relied upon as being indicative of an island-wide trend. Medimpex's complaints in this regard cannot be supported.

The appropriate sales scenarios and discounts

[77] These issues address Lasco's grounds 3(a), 3(b), 3(c), 3(g), 3(i), 3 (r), 3(s), 3(t), and Medimpex's grounds (6) and (7). Again, the grounds will not be individually assessed.

[78] The discussion of the size of the amlodipine market and the shares of the respective parties, has necessarily included an analysis of the four scenarios that were placed before the learned judge. It has already been said that her acceptance of a modified version of Mr Lobo's Scenario 2 as being consistent with her own scenario, cannot be faulted as it was based on the evidence before her.

[79] Mr Chen's complaint about the discount that the learned judge applied must nevertheless be considered. Learned counsel asserted that contrary to the approach set out in **Apotex**, the learned judge applied two discounts in arriving at her assessment of the counterfactual position. Mr Chen submitted that the learned judge not only discounted Scenario 2 by 35% but further discounted the resultant position by a further 10%. Norris J in **Apotex**, as Mr Chen pointed out, did say that in arriving at the counterfactual

position, the tribunal should compile a scenario and then discount it. What Norris J said, in para. [5](f), is, for convenience, repeated below:

> "…In many cases it is sufficient to postulate one hypothesis and make one discount: but there is no reason in principle why one should not say that either Scenario 1 or Scenario 2 would have occurred and to discount them by different percentages…."

[80] Mr Chen is correct that the learned judge created just one scenario, but she did not apply two discounts in the way he suggested. As was mentioned above, the learned judge, after creating the scenario that she found to be appropriate, found that it was consistent with Mr Lobo's Scenario 2 if the latter were adjusted by 35%. She set out her stance in this regard in para. [336], where she said in part:

> "Based on my assumptions I believe that of the four scenarios that were presented to the court Mr. Lobo's Scenario 2, **with the necessary adjustments and discount**, makes the fairest assessment of what would have occurred in the counterfactual scenario…." (Emphasis supplied)

[81] Her "adjustment" was to reduce the result of Scenario 2 by 35%, and her single "discount" was 10%, which was for "vicissitudes, contingencies and uncertainties". This is what she said in para. [340] of her judgment:

> "In the circumstances, I conclude that Mr. Lobo's Scenario 2 has a probability of about 65%. A 10% discount for all the possible 'vicissitudes, contingencies and uncertainties' is appropriate."

[82] The appellants' complaints, in this regard, cannot, therefore, be supported.

The post-injunction sales scenarios

[83] This issue addresses Lasco's grounds of appeal 3(b), 3(i) and 3(v) and Medimpex's grounds of appeal (3), (4) and (5).

Submissions on behalf of Lasco

[84] One of the issues identified by counsel for Lasco is "whether the damages for loss subsequent to the lifting of the injunction is recoverable". Counsel accepted the learned judge's ruling that there was no cut-off period known to the common law and that the court had jurisdiction to order damages for loss occurring after the lifting of the injunction. Reference was made to the discussion by Addy J in the case of **Algonquin Mercantile Corporation v Dart Industries Canada Limited** [1988] 2 FC 373 (Federal Court of Canada) ('**Algonquin**'), wherein it was found that there was no reason why damages should not be awarded for the post-injunction period, if it was established that there was a market for the product at that time. However, learned counsel took issue with the learned judge's estimation of the counterfactual scenario.

[85] Further, learned counsel submitted that the learned judge's finding that post-injunction loss had to be proven should be set aside as being wrong in law. It was contended that all that was required was evidence that a market for amlodipine existed after the injunction, and there was ample evidence of this before the learned judge.

[86] It was contended that the instant case was an appropriate one for damages to be assessed for the period subsequent to the lifting of the injunction. Reliance was placed on the conclusion of McCombe LJ in his dictum in **Richard John Hone and others v Abbey Forwarding Ltd (In Liquidation) and another** [2014] EWCA Civ 711 at para. 63 ('**Richard Hone**'). This is to the effect that the court is to compensate for losses caused by the injunction applying the usual rules as to remoteness derived from the law of contract.

[87] Counsel submitted that the loss arising after the lifting of the injunction was not remote and should have been allowed on the basis that Pfizer, being an experienced and major participant in the trade, ought to have known of the possibility of the intervention of third parties into the market. This intervention which occurred during the period the appellants were injuncted, had been brought to Pfizer's attention. Pfizer took no action, and that omission was likely to give rise to the particular type of loss.

[88] The issue of the facts to be established to support a finding for damages after the injunction is lifted, as referred to by Addy J, relates to the then market for the commodity in question. In the **Algonquin** case, the sale of griddles had plateaued in 1983 and started to decline. What the "injunctee" was required to prove was that there was still in existence a market for his product, not that he entered it or that he lost sales. In the instant case, it was contended that Lasco had established that amlodipine was being sold when the injunction was lifted, and it also re-entered the market.

[89] Counsel took issue with the learned judge's finding that Lasco had not proved its post-injunction loss. It was contended that there was no requirement for the facts to be proved with a "degree of certainty"; the test in civil matters being on a balance of probabilities or on a preponderance of the evidence. Further, the errors in Lasco's case had nothing to do with whether loss was proven, and there was no requirement to prove loss. Therefore, Lasco should be entitled to recover compensation for the market share that it would have attained in the counterfactual period. It was submitted that the actual sales, after the injunction was lifted, could not be used to determine what the counterfactual would have been.

Submissions on behalf of Medimpex

[90] Counsel for Medimpex made similar submissions in respect of the learned judge's finding that the losses for the post-injunction period had not been proved on a balance of probabilities "with any degree of certainty". It was contended that the learned judge's formulation of the burden of proof in a civil case and in a post-factual scenario, was manifestly inconsistent with well-established principles of law.

[91] It was submitted that it is a fundamental principle of law that in civil cases, the burden of proof is on a balance of probabilities, and no degree of certainty is required. Furthermore, in a situation of future projections, reasonable estimates are all that could be provided and all that would be required. The cases of **Dingwall v J Wharton (Shipping) Limited** [1961] 2 Lloyd's Rep 213 and **Secretary of State for the Home Department v Rehman** [2002] 1 All ER 122 were cited in support.

[92] In relation to the conduct of an inquiry/assessment as to damages, counsel referred the court to the dictum of Lord Diplock from **F Hoffmann-La Roche & Co AG and others v Secretary of State for Trade and Industry** [1975] AC 295 ('**F Hoffman-La Roche**'), where he stated that the assessment is made upon the same basis as that upon which damages for breach of contract would be assessed, if the undertaking had been a contract between the claimant and defendant and the claimant had not been restrained.

[93] It was submitted further that the burden of proof rested on the defendant, who was restrained, to prove that the loss was suffered because of the order. For this purpose, to show that the loss would not have been suffered "but for" the injunction, may well not be sufficient. However, once the defendant showed that he had suffered loss, which was prima facie caused by the order, then the evidential burden of any contention that the relevant loss would have been suffered regardless of the making or continuance of the order, passes to the plaintiff.

[94] The court was also referred to **Apotex**, where the defendant was prevented from entering the market. Counsel submitted that the instant case is one of preventing the continuation in the market, and as such, the inference of losses was clearer and stronger.

[95] In support of the contention that recoverable losses were not to be limited to the period for which the order was in effect, but should include losses which continued as a result of the order subsequent to the discharge, counsel commended the cases of **Tharros Shipping Co Ltd and another v Bias Shipping Ltd and others** [1994] 1 Lloyd's Rep 577, and **Algonquin**. Additionally, the reference was made to page 166 of Mareva Injunctions and Anton Piller Relief (Fourth Edition) by Steven Gee QC.

[96] Reference was also made to the acknowledgment by Sales J (at first instance) in **Astrazeneca AB and another v KRKA, dd Novo Mesto and another** [2014] EWHC 84 (Pat), of the "first mover" advantage and the application of a liberal assessment. This

was affirmed by the Court of Appeal in **Astrazeneca AB**, which repeated the formulation by Sales J, on which Medimpex relied.

[97] Counsel contended that the entitlement of Medimpex to claim damages in the post-injunction period is to be determined by the evidence as to whether it acted reasonably in not re-entering the market. He referred the court to the evidence of Mr Lobo, who conceded that the decision to re-enter or not was one for persons experienced in marketing (Volume VI(C)); that Mr Basil Wright (witness for Medimpex) was the only person who gave evidence in that regard (Volume VI(B), pages 1054-1055). It was contended that in cases of prospective loss, the plaintiff may be compensated even if there is a substantial possibility of losses of less than 50%. The cases of **Davies (AP) v Taylor** [1974] AC 207, **Hawkins v New Mendip Engineering Ltd** [1966] 1 WLR 1341 ('**Hawkins v New Mendip**') and **Mallet (AP) v McMonagle** [1970] AC 166 were cited in support.

[98] Counsel submitted that the evidence given by the persons with marketing experience was to the effect that Medimpex was unable to re-enter the market without suffering losses. However, the appeal of amlodipine in the market continued to be robust, thus supporting the inference that, but for the injunction which destroyed its position in the market and its prospects of recovery, Medimpex would have continued to conduct profitable sales of Normodipine after May 2012.

[99] Finally, it was contended that the principles established for assessing the damages in the cases cited did not involve quantification of the gains made by Pfizer, which may very likely exceed the losses suffered by Medimpex and Lasco, since it virtually recaptured its lost segment of the market and has always exacted higher prices from its higher-priced drug (Norvasc). In any event, counsel submitted, Pfizer did not disclose any data as to its production costs nor the profits it made during the injunction period or the period immediately after, when Lasco recovered lost ground, and Medimpex did not re-enter the market.

Submissions on behalf of Pfizer

[100] Counsel for Pfizer submitted that the claim by the appellants for damages in the post-injunction periods is entirely untenable, and neither of them is entitled to recover any damages beyond the date when the injunction was dissolved on 31 May 2012. While it is permissible that the calculation of damages in the period that the injunction was extant (March 2005 to May 2012), could conceivably cover net profits lost during this period, it was not permissible in law to award damages for a period: (a) when the injunction was not in place; (b) where any losses claimed cannot be substantiated on the evidence; and (c) where such a claim would represent future profits for which there is no basis for inclusion and which would be remote or would not be reasonably foreseeable, especially in circumstances where the appellants never notified Pfizer of any such likely losses, in the period when the injunction was extant.

[101] It was submitted that the learned judge did not misdirect herself on the legal principles to be applied in conducting the assessment exercise and was justified in making her findings of fact and applying appropriate discounts. It was patently evident from para. [291] of the learned judge's judgment, that she properly analysed the evidence, applied the correct principles of law and directed herself accordingly in her findings.

[102] Reference was made to the evidence adduced before the learned judge, which learned counsel submitted, made the following clear:

(i) Medimpex made a calculated decision, independent of Pfizer, after the injunction had been dissolved, not to return to the amlodipine market due to their analysis of the market. In this regard, any damages for the post-injunction period would be entirely unreasonable; and

(ii) Lasco did return to the market, was successful in obtaining the NHF award for 2014/2016, and, in fact, sold a greater volume of Las Amlodipine tablets (in the immediate post-injunction period) than it did before the injunction was

> granted in March 2005. In this regard, it would also be unreasonable to award damages for the post-injunction period.

[103] It was submitted that based on the evidence led before the learned judge, the appellants' contention of losses in and/or for any period subsequent to the dissolution of the injunction is a matter of speculation and conjecture. It could not be said that the trial judge erred, as contended by the appellants, or at all, in confining the assessment of damages to the period when the injunction was extant. The learned judge was clear that no post-injunction losses had been proven, and her reasons for her findings were clearly set out at paras. [351] - [353] of her judgment.

[104] It was pointed out that the learned judge clearly demonstrated that she relied on the evidence of Lasco's managerial witness, Mrs Wincella Cummings, who agreed with counsel for Pfizer, that in calculations for the post-injunction period, the actual prices should be used for Las Amlodipine, rather than assumed prices. Reference was made to the case of **Smith v Day** (1882) 21 Ch D 421, 428 and 430 for the principle, that on an enquiry as to damages consequent on the dissolution of an injunction, the damages must be confined to the immediate natural consequences of the injunction.

[105] It was submitted that no evidence was led before the learned judge of any notice being given to Pfizer, of any particular contract or losses that would be affected by the injunction. In **Smith v Day**, there was some evidence that there were discussions between the defendant and a prospective tenant for the letting of the defendant's building, the construction of which was affected by the injunction obtained by the plaintiff. While there were some discussions, no tenancy had been concluded, and as such, the court refused to award damages under the undertaking on this basis.

[106] By analogy, counsel submitted that if there was a refusal to make an award of damages based on evidence which demonstrated that there had been a serious discussion regarding the potential tenancy, there could be no damages awarded in this case for a

further period of six years, up to 2022, where there is no evidential or legal basis in support. Accordingly, the learned judge could not be said to have erred in this regard.

[107] The cases of **Schlesinger v Bedford** (1893) 9 TLR 370 and **Richard Hone** were cited in support. In particular, paras. 40 and 41 of the dictum of McCombe LJ from **Richard Hone** were commended for this court's consideration.

[108] Counsel submitted that in the case at bar, the only "notice" given, if any, was the indication from the appellants that other parties were entering the amlodipine market in Jamaica while the injunction was extant. This, counsel submitted, was not the nature of the notice contemplated by **Smith v Day** or **Hadley and another v Baxendale and others** (1854) 9 Exch 341 ('**Hadley v Baxendale**'), which would allow for an award of damages outside the usual principles relevant to breach of contract cases.

[109] Further, it was contended that the damages claimed by the appellants for the period 2012 to 2022 are not recoverable, even on the basic principles of law adumbrated in **Hadley v Baxendale**. There is no basis in law to support the payment of such future damages for this period when the injunction is not in place. Reference was made to the headnote of **Hadley v Baxendale**.

[110] With regard to the "liberal assessment" mentioned by Norris J in **Apotex**, it was submitted that this would not entitle the appellants to damages which cannot be supported by the evidence. Reference was also made to Lord Wilberforce's enunciation in **General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd** [1975] 1 WLR 819, wherein a "liberal assessment" was defined as a means of assessment, which may be utilised by a judge, who, when faced with a hypothetical scenario, must estimate a realistic award based on the relevant indications available and admitted into evidence. The principle does not serve as a substitute for the fundamental principles of the law of evidence.

[111] **Astrazeneca AB** was described by counsel as analogous and was commended to this court as instructive. It was submitted that unlike the case at bar, in **Astrazeneca**

AB, both Sales J (at first instance) and Kitchin LJ (on appeal) were privy to more detailed evidence in relation to the defendant's commercial pharmaceutical motives, details as to market trends and regulated market pricing of pharmaceuticals. Nonetheless, the learned judge embarked on a balancing exercise of all the relevant evidence in order to determine the respective weight that each would have on their final judicial estimate.

[112] The dicta of Kitchin LJ, at paras. [27] - [34] and [81] -[86], were commended to the court for consideration in support of the contention, that even in the face of a liberal assessment, a judicial estimate must be based on the evidence and further, the greater the degree of imprecision which is involved, the greater the need for the imposition of an appropriate discount for "difficult-to-predict-vicissitudes".

[113] For these reasons, it was contended that the learned judge cannot be faulted for the manner in which she conducted the enquiry and in the award that she made to the appellants. Accordingly, it was submitted that the relevant grounds by Lasco and Medimpex are without merit and should be dismissed.

Discussion and analysis

[114] No issue has been taken with the learned judge's restatement of the appellants' respective contentions, namely, that Medimpex claimed damages for nine years post-injunction (up to 2021) and Lasco claimed that it was entitled to damages for 10 years post-injunction (up to 2022) (see paras. [17], [20] and [346] of the judgment).

[115] What has to be resolved is whether the learned judge erred in law in declining to make any award for both or either of the appellants in the post-injunction period. To that extent, there is significant interplay between Lasco's grounds 3(b) and 3(i) and Medimpex's grounds (3), (4) and (5); these grounds will be considered jointly, as they attack the learned judge's assessment and application of the relevant law relating to the assessment of post-injunctive damages. Lasco's ground 3(v) will be considered first as it is a general complaint regarding the learned judge's lack of adequate reasons for her findings and conclusions.

Lasco's ground 3(v)- "The learned Trial Judge has failed to give any or any adequate reasons for her findings and decisions."

[116] The learned judge found that the losses claimed post-injunction were not substantiated by the required evidence. She set out the principles of law that she regarded as relevant to the assessment of damages by reference to a number of authorities. This was done initially at paras. [25] - [29] of her judgment.

[117] Further, at para. [291], the learned judge concisely restated the general principles at the outset of her analysis and findings. In particular, reference is made to her observations at para. [291] h, i, j, k and l:

> "h. in making the assessment as to what would have occurred in the counterfactual scenario, I have, like Sales J in **Astrazeneca AB** and Norris J in **Apotex**, compared the extent to which Lasco and Medimpex were successful with their generic products in penetrating the market prior to the injunction and in Lasco's case, after the injunction with the relevant counterfactual position. However, I recognise that the task is to reconstruct the hypothetical market 'but for' the injunction;
>
> i. mirroring the method adopted in two authorities cited in (h.) above I will employ the conventional method of assessing the damages on a particular hypothesis and then to adjust the award by reference to the percentage chance of the hypothesis happening;
>
> j. In [sic] carrying out the exercise I am engaged in, I am guided by the dicta of Sales J in **Astrazeneca AB that**, '*The function of the Court at trial is to assess the evidence it hears for itself, bringing to bear its own understanding of the surrounding circumstances and making its own evaluation of the sincerity, reliability and credibility of the evidence given, in the context of an overall assessment of probabilities and of possible prejudices or incentives to embroider or distort. This is not a matter for expert evidence.*'
>
> k. I have also taken into account and adopted the approach of Norris J in **Apotex** (who relied on Stuart Smith LJ in **Allied Maples Group Ltd** (supra) who '*warned against*

placing reliance on the evidence of a claimant as to what he would have done in hypothetical circumstances, and I consider that similar caution must be exercised in relation to the evidence of the defendant....One must measure what a witness now says he honestly believes he would have done against such objective benchmarks as are available...' The court therefore recognises that evidence presented by the parties in this matter may be innocently self-serving and must be subject to careful scrutiny. Reasonable inferences are therefore to be drawn from actual transactions which took place and are in line with commercial realism. In my assessment of the counterfactual position, I have guarded against what may seem to be generous estimates of market shares, the number of tablets sold, the prices at which they were sold (which are some of the factors used to calculate the lost profits), as well as, estimations that may be modest;

l. finally, there was a dearth of evidence as it relates to how the pharmaceutical market operates in Jamaica and evidence as to sales made by other distributors and pharmacies of the drug in issue was simply not available/forthcoming. The experts in this matter all testified as to the challenges they faced in obtaining this information. This is a factor that would, in my view, as well as theirs, have been of tremendous importance to inform their respective reports. This shortfall, no doubt, will have implications for the assessment of the true market for amlodipine in Jamaica. Nonetheless, the court must arrive at its findings in the context of all the circumstances of the instant case." (Italics as in original)

[118] She addressed damages for the post-injunction period specifically at paras. [346] - [353], where she agreed in principle with the dictum of Addy J in **Algonquin** but demonstrated her reasoning in relation to her finding that there should be no award for the post-injunction period. She indicated at para. [349] that the appellants had failed to prove the losses for the post-injunction period "on a balance of probabilities 'with any degree of certainty'", as their respective cases were premised on certain errors of principles and facts. The learned judge summarised these principles and facts at para. [350]:

> "I say so because I found that their cases were premised on certain errors of principles and facts (most, if not all of which were over-stated) such as:
>
> **i)** the size of the market;
>
> **ii)** the market shares they would have attained;
>
> **iii)** the market for amlodipine;
>
> **iv)** the unit prices at which they would have sold their generics which seems to me to ignore the dynamics of a truly open market, which would have occurred during the counterfactual (such as transitional periods, periods of price adjustments and period of plateaus);
>
> **v)** their volume of sales;
>
> **vi)** very little, if any, allowances being made for the entrance of other players in the market during the period that the injunction was in place and a paucity of evidence as to how they would have responded to this; and
>
> **vii)** the time that they say the market would have plateaued."

[119] These statements of the learned judge comport entirely with the objective of fairness which an undertaking in damages strives to ensure. This is reflected in rule 17.4(2) of the Civil Procedure Rules ('CPR'), which requires parties, like Pfizer, who seek and obtain interlocutory injunctions to "undertake to abide by any order as to damages caused by the granting or extension of the order" (see para. [11] of the learned judge's judgment). The words "caused by", which were highlighted by counsel for Lasco before the learned judge, are indeed quite significant.

[120] The learned judge demonstrated that she was guided by the principle as enunciated by McCombe LJ in his dictum in **Richard Hone**, wherein he stated:

> "[63] In the result, therefore, and perhaps not surprisingly, I reach the conclusion that the law as to the recoverability of

> loss suffered by reason of a cross-undertaking is as stated by Lord Diplock in his dictum in *Hoffmann-La Roche*, but with this caveat. Logical and sensible adjustments may well be required, simply because the court is not awarding damages for breach of contract. It is compensating for loss for which the Defendant 'should be compensated' (to apply the words of the undertaking). Labels such as 'common law damages' and 'equitable compensation' are not, to my mind, useful. The court is compensating for loss caused by the injunction which was wrongly granted. It will usually do so applying the useful rules as to remoteness derived from the law of contract, but because there is in truth no contract there has to be room for exceptions."

[121] As it relates to this ground, it cannot be contended that the learned judge failed to give any, or any adequate reasons for her findings and ultimate decision. The reasons have been set out during the course of her judgment. This court has been left in no doubt as to the basis upon which the learned judge came to her conclusions, namely, that losses the appellants ascribed to the injunction in the post-injunction period were not substantiated by the requisite evidence.

[122] Accordingly, Lasco's ground 3(v) is without merit.

Lasco's grounds 3(b), 3(i) and Medimpex's grounds (3), (4) and (5)

[123] Although the assessment of damages is often regarded as not being an exact science, there are clear principles upon which an assessment is conducted and, as stated by Lord Diplock and duly followed by the learned judge, "if the undertaking is enforced the measure of damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear" (see **F Hoffmann-La Roche** at page 361 D-F and para. [13] of the learned judge's judgment).

[124] Generally speaking, any judge tasked with conducting an assessment of damages of this nature must be satisfied that damages flowing from the grant of an injunction have been caused (the principle of remoteness being relevant), and as such, parties who are found to be wrongly restrained by an injunction, such as the appellants, must establish their losses by adducing relevant evidence. The onus is both on Lasco and

Medimpex to establish the damage that arose from the imposition of the injunction. The damage must be estimated on the basis of evidence adduced, which would establish the damage on a balance of probability (see paras. 39 and 40 of **Algonquin**). In particular, paras. 40 - 43 of the judgment of McCombe LJ from **Richard Hone** are set out as being instructive:

> "40. The case [**Schlesinger v Bedford**] turned upon interesting facts. The claimants were the personal representatives of the famous author, Wilkie Collins. They sought to restrain the defendant, an actor, from performing on tour his own dramatized version of Collins' famous novel, 'The Woman in White', a novel from which Collins had also written a play. On 6 December 1889, the claimants obtained an injunction restraining performance of the play, against their cross-undertaking in damages. At the trial on 11 December 1890, the judge dismissed the action and directed an inquiry as to damages. The inquiry was conducted initially by the Chief Clerk who assessed damages at £600, making allowance for a salary actually earned by the defendant in the last half of the period of the injunction. The claimants applied to vary the Chief Clerk's certificate as to the loss, on the basis that the defendant had spent the time, when he could have been earning as an actor on tour, working instead as his own solicitor in preparation of his defence of the action. Kekewich J reduced the damages by a further £100 in respect of what the defendant might have earned if he had 'devoted to his profession the time which he spent in conducting the litigation'. The claimants appealed further to this court, contending that the certified loss should be reduced further. The court (Lindley, Lopes and AL Smith LJJ) allowed the appeal, reducing the damages to £250.
>
> 41. Lindley LJ (as he then was), with whom Lopes and AL Smith LJJ agreed, said:
>
> > 'The real nature of an undertaking of this kind and the extent to which damages ought to be awarded thereunder were carefully explained by the late Master of the Rolls in the well-known

case of 'Smith v Day' (21 Ch D 421). **That case was instructive for this reason, that it showed that all the remote consequences of obtaining an injunction which was afterwards dissolved, were not to be taken into account in assessing the damages to be paid to the defendant under the Plaintiff's undertaking. It would be unduly straining such undertaking to include in it damages which did not naturally flow from the injunction.**

……

That case was followed by '*Ex parte Hall*' (23 Ch D 644), where a receiver obtained an injunction restraining a man from the selling [sic] certain goods, and damage resulted from the receiver restraining him from removing the goods. The Court held that the man against whom the injunction was obtained was not entitled to recover any damage except such as resulted naturally from his being restrained from selling and that the damage was too remote. So here the plaintiffs ought not to be exposed to damages which were not fairly consequential upon the injunction, and which they could not have foreseen when the injunction was granted.'

42. The claimant in *Schlesinger's* case was not liable …for the loss that was not fairly consequential upon the injunction and which they could not have foreseen when the injunction was granted, namely the loss of all the profits that would have been made by playing on tour…..

43. In my judgment, that is a clear decision …that the 'remote consequences' of obtaining an injunction are not to be taken into account in assessing damages and 'it would be unduly straining such undertaking to include in it damages which did not naturally flow from the injunction...'"

[125] Therefore, the court is looking for damages that are fairly consequential upon the injunction. The general principle as set out in the headnote of **Hadley v Baxendale** also remains relevant:

> "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, [that is], according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it…."

[126] In this regard, the learned judge cannot be faulted in her statement and application of the law. The course of thought that runs throughout the authorities relating to the assessment of damages, where an injunction has been discharged, is that the aggrieved party must show that it suffered loss which flowed from the injunction, even if it is unusual, and that this must be established by evidence to the requisite standard, namely, on a balance of probabilities (see **F Hoffmann-La Roche** and **Richard Hone**).

[127] The thrust of the appellants' arguments is understood this way, that the learned judge was wrong in law with respect to the burden and standard of proof. Firstly, the learned judge was wrong in finding that there was a burden of proof on the appellants with respect to establishing their losses in the post-injunction period by adducing relevant evidence. Secondly, learned counsel for Lasco contended that all that had to be proved was that a market for amlodipine existed and that there was an abundance of evidence of this.

[128] With respect, counsel for Lasco's contention is somewhat difficult to follow. On one hand, it was submitted that the learned judge was correct in her acceptance of the principle in **Algonquin** and in applying the reasoning of Addy J. On the other hand, it was submitted that she erred in finding that the appellants needed to prove the losses they ascribed to the injunction. The correct view, according to counsel, was that there be

evidence that a market for amlodipine existed post-injunction, and that there was abundant evidence of this. However, this contention is wholly unsupported by any of the authorities that were put before the learned judge or this court. In fact, Addy J in **Algonquin** stated thus at paras. and 38 and 39:

> "38. The plaintiff claims that the findings of 30,000 [griddle] sales lost during the existence of the injunction and of 20,000 sales following the lifting of same were erroneous and exaggerated and not supported by evidence.
>
> 39. **It is undisputed that the onus in this case is on the defendant to establish the damage which it claims arose from the imposition of the interlocutory injunction**." (Emphasis added)

[129] Further, while the court assessing damages is exhorted not to subject the methodology of a party proving damages to 'minute criticism', it remains for that party to establish its loss by adducing the relevant evidence (per Sales J in **Astrazeneca AB**, para. [9]). There can be no doubt, therefore, that both Lasco and Medimpex would have the burden to show that the damages in the post-injunction period were fairly consequential upon the injunction. The learned judge had this in regard at all times.

[130] In relation to the submissions by counsel for Medimpex, it should be said that the learned judge's comments should be interpreted differently. At first blush, the addition of "any degree of certainty", as stated by the learned judge at para. [349] of her judgment, to the standard formulation of the civil standard of proof – on a balance of probabilities- and, in particular, the word "certainty" (which is more familiar to the standard of proof in criminal cases), may appear to have the effect of requiring the parties to meet a higher evidential standard. However, when considering the context in which the words "any reasonable degree of certainty" were used by Addy J in **Algonquin**, and adopted by the learned judge (save for the word "reasonable"), it is apparent that these words do not have the effect of heightening the standard of proof or even creating a new standard. It is useful to set out para. 37 of the judgment of Addy J (which was reproduced by the learned judge at para. [347] of her judgment):

> "37 The usual undertaking given to the Court by parties requesting an interlocutory injunction in the context of today's society in Canada involves, in my view, an undertaking to pay all damages which flow from the granting of the interlocutory injunction and is not in any way restricted to those which occurred during the period of the existence of the injunction itself, nor does the common law impose any artificial cut-off date. **The assessment for the period following the injunction remains subject to the usual limitations as to remoteness, that is, as to whether in the particular circumstances of the case, after a certain period of time has passed and other circumstances have intervened, losses, if any, can still on a balance of probabilities, be attributed to the injunction with any reasonable degree of certainty.**" (Emphasis added)

[131] The use of these words "with any reasonable degree of certainty" appear to recognise the obvious fact, that in assessing a lost opportunity (in this case, to continue to sell the specific drug) and in **Algonquin**, the opportunity was to make sales), which is a speculative task, certainty or precision is impossible or as Addy J went on to state:

> "40 It is obviously impossible to calculate with mathematical certainty the number of sales which would have been made had the injunction not been granted. The damage must therefore be estimated on the basis of the evidence actually adduced which would establish the damage on the balance of probabilities…."

[132] Having quoted para. 37 of the dictum of Addy J, the learned judge then stated at para. [348] of her judgment:

> "[348] In principle, I agree with [Addy] J. In my opinion it is only fair and just that if it can be proven that as a result of an interlocutory injunction a party suffers loss that extends beyond the injunction period, I see no reason why that party should not be compensated for it. The question is whether or not in the circumstances of this case, taking into consideration the factors that [Addy] J stated are to guide the court, the application of the principle is merited."

[133] When one examines the full context of the impugned words, it cannot be supported that the learned judge was intimating that the appellants had to prove their

case at a standard higher than the usual civil standard. The learned judge had to consider whether there was evidence that the post-injunctive loss was determinable at all and not in the realm of speculation or remoteness.

[134] In **Apotex**, Norris J similarly recognised the speculative nature of the exercise and the corresponding impossibility of certainty and supplemented the usual formulation of the standard of proof – on a balance of probabilities – by the addition of the words "real chance". In the statement of principles at para. [5](e), Norris J's exact words were:

> "(e) The fact that certainty or precision is not possible does not mean that a principled approach cannot be attempted. The profits that Apotex would have made from its exploitation of the opportunity to sell generic perindopril depend in part upon the hypothetical actions of third parties (other potential market participants) and in part upon Servier's response to them. **A principled approach in such circumstances requires Apotex first to establish on the balance of probabilities that the chance of making a profit <u>was real and not fanciful</u>**: if that threshold is crossed then the second stage of the inquiry is to evaluate that substantial chance (see *Allied Maples v Simmons & Simmons* [1995] 1WLR 1602). As Lord Diplock explained in *Mallett v McMonagle* [1970] AC 166 at 176E-G
>
> > '…. in assessing damages which depend on its view as to what… would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing…. would have happened and reflect those chances, whether they are more all less than even, in the amount of damages it awards…'" (Emphasis added)

[135] Therefore, the learned judge did not misdirect herself in law, in her formulation about which the appellants have complained.

[136] As such, Medimpex's ground (4) is without merit.

[137] Turning to Lasco's grounds 3(b) and 3(i) and Medimipex's ground (3), these complaints relate to the correctness of the question that the learned judge asked herself, namely, "what loss did the making of the order (i.e. the injunction granted by N. McIntosh J) and its continuation until discharge cause to Medimpex and Lasco?". As the learned judge pointed out, this was the question asked by Norris J at para. [5](a) in **Apotex**, which was approved by Kitchin LJ in **Astrazeneca AB**.

[138] The learned judge did not confine her consideration to the injunction period. Rather, in keeping with the indication (at para. [30] of her judgment), she elected to address the question of the post-injunction damages separately. As previously mentioned, this detailed consideration was done at paras. [346] - [353]. Reference was made to the parties' respective submissions on this point. The learned judge indicated her agreement with the principle from **Algonquin**, that loss beyond the injunction period could be awarded. She found, however, that the application of the principle was not merited.

[139] As stated by Norris J at para. 5(e) of **Apotex**, the principled approach to estimating any such damages is, first, to establish on a balance of probabilities that there was a real chance of making a profit and, if that threshold is crossed, the second stage would be to evaluate that substantial chance. The salient factor in the case at bar would be the evidence relevant to the substantial chance.

[140] Dr Barnett submitted that the decision for Medimpex not to re-enter the market on the lifting of the injunction was made on the basis of marketing factors. He contended that Medimpex was excluded from the market for seven years and other generics had entered the market during that time; Lasco re-entered the market with cut-throat prices, and it had been concluded by persons with marketing expertise that Medimpex could not successfully re-enter the market; and that there was no independent or empirical data to conclude as Pfizer's expert Mr Lobo did, that Medimpex would have been able to recover its place on re-entering the market. He submitted also that in case of prospective loss, compensation should be given even if there is a substantial possibility, even one of less than 50%, of loss occurring.

[141] However, the authorities relied on by Dr Barnett in support of this submission, depend on the particular factual circumstances that exist when the court is assessing the issue of the substantial possibility of loss. In **Davies (AP) v Taylor**, a decision of the House of Lords, Lord Reid stated that if the sole issue is whether the chance or probability of benefit is substantial, it must be evaluated; if a mere possibility or speculative, it must be ignored (see page 212, para. D). In that case, an estranged wife was refused an award of damages under the Fatal Accidents Act as a result of the death of her husband. The court found that she failed to prove that reconciliation with her husband was more probable than not. In **Hawkins v New Mendip**, a decision of the English Court of Appeal, an employee had developed a minor form of epilepsy as a result of a workplace injury. He was diagnosed with a 50/50 chance of major epilepsy occurring, but no firm diagnosis could be made until after five years. The substantial prospect of loss was, therefore, evidentially based. The rationale in each of these cases is quite understandable.

[142] In the case at bar, the learned judge would have been looking for evidence of the loss of a substantial chance of benefit, not merely speculation as to losses. Although Dr Barnett decries the lack of empirical data in relation to the effect of Medimpex re-entering the market, it appears he would have been asking the learned judge to make an assumption as to the substantial possibility of loss, as there was no independent or empirical data to suggest that Medimpex could not have successfully re-entered the market at some point.

[143] Mr Wright gave evidence that the market was analysed in 2012; that there were about eight generics in the market at that time; and that "we decided it did not make economic sense to re-enter the market. It would have taken a lot of effort to rebuild our business given the level of competition that was in the market" (see Volume VI(B), page 1053). It appears, therefore, that the restraining force was due to the other entrants in the market.

[144] In that regard (in relation to the issue of third parties entering the market which were not restrained by Pfizer), there is no evidence that could support the view that these

third parties would not have entered the market, whether or not Medimpex (or indeed Lasco) had been injuncted. Was there evidence as to how Medimpex would have reacted under those circumstances? The learned judge lamented that this was lacking in that regard. At para. [350] vi), which bears specific relevance to the post-injunction period, she indicated that "very little [by Lasco and Medimpex], if any, allowances being made for the entrance of other players in the market during the period that the injunction was in place and a paucity of evidence as to how they would have responded to this". It is apparent, therefore, that she was looking for some basis to assess whether losses in the post-injunction period could be determined to be fairly consequential upon the injunction.

[145] However, the learned judge referred to the issue of third parties at paras. [341] - [345] of her judgment. In particular, she stated that her assessment of damages, as it related to the period of the injunction, had taken into account that Pfizer had taken no steps against third parties that had entered the market while Lasco and Medimpex were injuncted. Both Lasco and Medimpex would therefore have been granted compensation for this period due to these other entrants.

[146] It is true that the learned judge did not specifically address the submissions by counsel for Lasco that there should be allowance given for the time that was needed to restart the marketing and sale of Las Amlodipine after the discharge of the injunction. It is similarly true that some time would have been needed to have the product imported and placed on the shelves of pharmacies etc. It is also noted that, at first instance in **Astrazeneca AB**, damages were also awarded for the period between the removal of the injunction (29 July 2012) and the launch of the defendant's generic product in September of that year. Nonetheless, the learned judge's comments at para. [350], particularly sub-paragraph iv), in which she criticises the lapses by the appellants in respect of:

> "the unit prices at which they would have sold their generics which seems to me to ignore the dynamics of a truly open market, which would have occurred during the counterfactual

> (such as transitional periods, periods of price adjustments and period [sic] of plateaus);"

are such that it may be taken that she decided not to allow damages for that transitional period between the withdrawal of the injunction in this case and Lasco's resumption of sales. That would have not only been within the learned judge's discretion, but in addition, may be said to be minimal in the scheme of things. The learned judge's ruling in this regard should not be disturbed on account of this point.

[147] Based on this assessment, it may be taken that she decided not to allow damages for the transitional period between the withdrawal of the injunction in this case and Lasco's resumption of sales. That would have not only been within the learned judge's discretion, but in addition, may be said to be minimal in the scheme of things. The learned judge's ruling in this regard should not be disturbed on account of this point.

[148] Based on the above assessment, any post-injunction loss, as it relates to Medimpex, remains in the realm of speculation. Further, as it relates to Lasco, based on the evidence, it appears to have done quite well during the post-injunction period, in spite of the presence of third parties. The learned judge referred to Lasco's success at para. [351] of her judgment.

[149] Therefore, the appellants have not advanced, in any meaningful way, how the learned judge erred in this regard, nor have they demonstrated any failure by the learned judge to properly evaluate the value of the opportunity, or chance lost by the appellants as a consequence of the injunction. The learned judge stated that the losses claimed were not substantiated by the required evidence (see para. [352] of her judgment).

[150] Accordingly, Lasco's grounds 3(b) and 3(i), and Medmipex's ground (3) are without merit.

[151] Finally, Medimpex's ground (5) may be disposed of summarily. The complaint that the learned judge erred in treating as essential to the proof of loss during the post-injunctive period, the details of a marketing plan, is without foundation. The learned

judge's only reference to a marketing plan was at para. [300], under the analysis and findings relating to the determination of the market for amlodipine, where she held:

> "There is no evidence from Lasco or Medimpex as to the details or what steps they would have taken to advance their campaign to capture and dominate the potential market (such as detailed marketing plans and strategies which I observed were presented to the courts in both the **Apotex** and **Astrazeneca AB** cases). I do not regard mere 'say so' as proof that this is a reasonable assumption. I am of the belief that it required and certainly it would have been helpful to the court if more detailed and cogent evidence had been made available. The inadequacy of the evidence in this area, therefore, did not persuade me."

[152] It is clear that the learned judge, in keeping with the aim of awarding "realistic compensation" for what occurred, was merely pointing out that there was no evidential basis on which she could find that the appellants would have dominated the market for amlodipine in the manner that was contended. Far from treating it as essential or even a requirement, in relation to the post-injunction period, marketing plans were only mentioned by the learned judge (in relation to the determination of the size of the amlodipine market) by way of example of some of the evidence that might have been adduced, as was done in similar cases. Her main concern was the inadequacy of the evidence in this regard.

[153] Ultimately, the learned judge cannot be faulted for her finding that she was unable to make findings in the absence of evidence in relation to the potential market.

[154] The learned judge relied on a consideration of the factors that Addy J stated are to guide the court in **Algonquin**, in concluding that the application of the principle relevant to post-injunction loss ought not to be ascribed to the appellants. As stated previously (see para. 37 of **Algonquin**, as quoted at para. [130] herein), she indicated that the cases for both Lasco and Medimpex were premised on certain errors of principles and facts. She listed what these were at para. [350] of her judgment. These included the

size of the market, the market shares the appellants would have obtained, the market for amlodipine and the volume of sales.

[155] In relation to the above, there was evidence from various sources placed before her. She weighed all this evidence (set out at paras. [295] - [345] of the judgment). The learned judge extrapolated and accepted some of the evidence from Professor Wilks but rejected aspects. This was also true in regard to some of Mrs Moss' conclusions. She rejected Mr Lobo's evidence in relation to Scenario 1.

[156] She assessed the evidence in relation to unit prices and made certain conclusions based on her assessment of the evidence. She accepted that the downward trajectory of Lasco's prices when they re-entered the market, illustrated what would have occurred in the open market, that is, the entrance of other generics on the market. She concluded that both Lasco and Medimpex would have responded to other entrants in the generic amlodipine market in a similar manner, by this reduction in prices and that this would have marked during the counterfactual period, periods of time adjustments as the market transitioned before any price plateau (see paras. [322] and [323] of her judgment). She rejected the evidence of the experts for Medimpex and Lasco as to the prices that their generics would have traded during the counterfactual scenario. It is for these reasons that she regarded and preferred the alternative calculations of Mr Lobo in relation to unit prices.

[157] In considering market shares, she stated that she did not agree with Mr Lobo that the market shares would have been fixed at the pre-injunction level, but stated that she was not persuaded by the evidence of Mrs Moss and Mr Whyte on the matter. She also stated that there was no evidence to support submissions that Lasco and Medimpex would have dominated the market to such an extent that there would have been no need for other players to enter the generic amlodipine market. The learned judge carefully considered all the evidence, rejected certain aspects of the various experts and came to her own assessments of the facts. This is what she was required to do.

[158] Further, she made a crucial finding at para. [338] of her judgment which bears repeating:

> "I have accepted Mr Lobo's evidence and the methodology he has used to arrive at his calculations. While I found all the experts to be honest and straightforward, one of the vital issues for me in this case (more so as it concerns the experts) is that of reliability. As far as this is concerned, I found Mr Lobo to be more reliable and his responses in cross examination more cogent. I have also taken into account, and I mean no disrespect by this, but am [sic] merely stating a fact, that unlike the other two experts who were undertaking this exercise for the first time, and who spoke quite candidly….of some of the difficulties of the exercise, Mr Lobo has done calculations of this kind on numerous occasions. I was impressed with his demeanour and approach to the task at hand. Nevertheless, I have taken into account all the factors that limited the scope of his report."

[159] Her overall assessment of the witnesses is an important aspect of a trial judge's function and one with which this court would be very slow to interfere without good reason. This aspect of her findings also impacted her assessment of the factors listed above at para. 37 of **Algonquin** that were key to her ultimate conclusion as to whether post-injunctive losses were proved. Therefore, there is no good reason to interfere with her findings in relation to post-injunction damages.

[160] Lasco's grounds of appeal 3(b) and (i) and Medimpex's grounds (3), (4) and (5) of appeal therefore fail.

Application to adduce fresh evidence with respect to interest rates

[161] Before considering the appellants' complaints about the rate of interest used by the learned judge, it is necessary to consider Lasco's application to adduce fresh evidence about possible rates of interest that, it contends, should have been used.

[162] On 11 February 2020, prior to the hearing of this appeal, Lasco filed an application to adduce fresh evidence before this court of the relevant applicable Jamaican interest rate – the Domestic Currency Weighted Loan Interest Rates obtained from the Bank of

Jamaica ('BOJ table'). This application is related to ground 3(u) of its grounds of appeal, which states:

> "The learned trial judge has wrongly applied the rate of interest applicable to United States Dollar transactions to the Jamaican Dollar computation that she has directed."

[163] Medimpex has consented to the admission of the BOJ table; the third order sought in its notice of appeal (filed 13 December 2017) states: "[i]n the event that the Court should determine the amount ordered to be paid by [Pfizer] to [Medimpex] should be denominated in Jamaican dollars that the Court should order that the interest rate should be at the appropriate commercial banks' weighted time deposit rates as published by the Bank of Jamaica".

[164] Counsel for Pfizer has indicated that it did not consent to the admission of the BOJ table. As a result, Lasco seeks the following order:

> "1. [Lasco] be permitted to rely on the Bank of Jamaica Domestic Currency Weighted Interest Rates as contained in the 2nd Affidavit of Makene Brown which is exhibited to the Affidavit at paragraph 10."

[165] The above order was being sought on two grounds, namely:

> "(1) The Claim was pleaded in United States Dollars; [sic] the Learned Trial Judge awarded a sum in Jamaican Dollars; [sic] this would change the applicable commercial interest rate;
>
> (2) This evidence, if given, would probably have an important influence on the total award payable to the Appellants."

[166] On 17 February 2020, prior to the commencement of the appeal, this court heard oral submissions from counsel on behalf of Lasco, Medimpex and Pfizer. We reserved our decision on this point and proceeded to hear the appeal.

[167] The learned judge awarded interest on the damages at the rate of 8.23% per annum. Although the learned judge delivered her reasons for judgment on 3 November 2017, the parties were required to recalculate the final damages to be awarded based on her reasons. At paras. [354] and [357] of the judgment, she stated:

> "[354] These findings will resolve the disputes between the parties, it is my belief. I am of the view that the awards that have been made are neither too modest nor over-generous but realistic based on the evidence that was presented to the court. **What remains is for a recalculation of the final damages that are to be awarded based on my decision. The recalculation of the final figures is to be done in Jamaican currency and is to be agreed by the counsel for the parties and their respective experts.** A draft order of the award is to be presented to the court on or before the 24th November, 2017. Counsel for the parties and the experts may make further representation to the court if they require clarification on any aspect of the findings before the final order is made.
>
> …
>
> [357] Interest on the final figures for the awards at 8.23% per annum, as agreed, from March 29, 2005 to November 03, 2017." (Emphasis added)

[168] The draft order, filed on 24 November 2017, was duly presented to the learned judge and was finalised on that date and entered in the following terms:

> "1. The 1st Defendant, Medimpex is awarded damages of **J$90,181,800.00** plus interest thereon of **J$69,769,000.00** calculated at the rate of 8.23% from March 29 2005 to November 3 2017.
>
> 2. The 1st Defendant, Medimpex is also awarded **J$5,322,799.50** plus interest thereon of **J$5,523,237.00** calculated at the rate of 8.23% from March 29 2005 to November 3 2017 for disposal of stock.
>
> 3. The 3rd Defendant, Lasco is awarded damages of **J$158,571,900.00** plus interest thereon of

J$114,389,000.00 calculated at the rate of 8.23% from March 29 2005 to November 3 2017.

4. The 3rd Defendant, Lasco is also awarded **J$155,738.90** plus interest thereon of **J$161,604.00** calculated at the rate of 8.23% from March 29 2005 to November 3 2017 for disposal of stock.

5. Costs to [Lasco and Medimpex] to be agreed or taxed."

Submissions on behalf of Lasco

[169] At the outset of his oral submissions, counsel for Lasco, Mr Chen, endorsed as accurate, the following statement contained in the affidavit of Mr David Ellis (filed 13 February 2020) in response to the application to adduce fresh evidence:

> "3. During the assessment proceedings before Harris, J in the Court below, both the Appellants and [Pfizer] submitted calculations of damages in United States currency, orally and in writing, to the learned judge. Additionally, during closing submissions, counsel for [Lasco] submitted and all parties agreed, that the appropriate rate of interest to be applied ought to be 8.23% as extrapolated from the Bank of Jamaica's foreign currency commercial lending rates."

[170] Mr Chen contended that the claim was in United States of America dollars ('USD'), and it was agreed that the USD interest rate would be used before the learned judge made her pronouncement. In fact, he stated that it was the learned judge who instructed that the calculations be done in USD. He submitted that when the reasons for judgment were provided, the parties were told to use the figure of 8.23% as the rate of interest. Reference was made to the email correspondence among the parties on 23 November 2017 in support of his contention.

[171] It was submitted that while there was an agreement to use the rate as being applicable to the USD amount, the learned judge used it in Jamaican dollars ('JMD'), as being an agreed amount, which was wrong. In effect, the learned judge took the

agreement in USD and used it in a JMD judgment, and that error is the basis of this complaint.

[172] In response to whether the interest rate would be a live issue in the determination of the appeal, Mr Chen submitted that it would depend on how this court decided the calculations were to be done. It was stated that the utility of this present application was to allow this court to do justice; and that if this court (in determining the appeal), decided to enter the judgment and calculate the damages, using a JMD base, it would have the evidence as to what was the JMD rate of interest during the relevant time. Counsel contended that real hardship would be done to the appellants, if it turns out that this court decided that the calculations should be based on JMD. Further, this would only place great hardship on the appellants but not Pfizer.

[173] Mr Chen contended that the granting of the application to adduce fresh evidence was, as such, not probative of any issue in dispute between the parties, it would merely be the adducing of the compilation of the rates of BOJ, which, in any event, already existed in the public domain.

[174] Reference was made to the learned judge's statement at para. [354] of the judgment, set out above at para. [167], in relation to the recalculation of the figures.

[175] He stated that he did not think any issue could have been raised before the learned judge at the time, but that this was something to be dealt with by way of an appeal. Based on that view, counsel merely sought to follow the direction of the learned judge.

Submissions on behalf of Medimpex

[176] Counsel for Medimpex, Dr Barnett, made brief submissions in support of the application. He stated that his understanding of what transpired was that the learned judge sent the parties the final judgment, excepting the mathematical exercise to be done. The learned judge, in her email, stated, as indicated in the judgment, that interest on the final figures was 8.23%, as agreed. Similar to Mr Chen's submission, Dr Barnett contended that that figure was in contemplation of the USD claim and that both appellants

submitted their claim in USD and were merely adhering to the instructions that the interest of 8.23% was to be used. There was no agreement on a JMD claim.

[177] Dr Barnett stated that he was of the view, based on the authorities, that there could be no interference with a draft judgment and that it would not have been right to raise an issue on a substantive matter. Rather, it was thought that the appropriate course was to raise, by way of an appeal, that the wrong interest rate was used. He submitted that, even if it could have been raised before the learned judge, it still remains that an obvious error was made.

Submissions on behalf of Pfizer

[178] Mrs Kitson submitted that counsel for all the parties had agreed on the proposed method of calculation and the quantum of 8.23% pre-judgment interest rate.

[179] Lasco failed to bring any objection which they had regarding the pre-judgment interest rate of 8.23% to the attention of the learned judge; as such, there was no challenge to the application of 8.23%. In support of this, counsel referred to the email correspondence between the learned judge and counsel on 23 November 2017.

[180] In keeping with the principles and public policy concerns regarding the court's duty to prevent the re-litigation of issues as espoused in **Henderson v Henderson** [1843] 67 ER 313 and **Wilson and another v Liverpool City Council** [1971] 1 All ER 628, Lasco should be estopped from adducing fresh evidence in order to bolster the challenge to the learned judge's decision.

[181] The reason advanced by counsel for Lasco as to their omission to challenge the use of the 8.23% pre-judgment interest rate is completely inadequate, namely, that they were mistaken. This was so, in light of the presence of the detailed revised schedules of calculations which were provided by Mr Lobo (Pfizer's expert witness); the assistance counsel for Lasco received from their own expert witnesses; and the opportunity provided by the learned judge, for counsel to seek clarification and directions of her judgment in between 3 to 24 November 2017. During that opportune period, counsel only objected

to the time stated by the learned judge, in which the pre-judgment interest rate should be applied, and counsel subsequently agreed to the final figures after receiving clarification.

[182] In these circumstances, Mrs Kitson contended that the **Henderson v Henderson** estoppel principles applied. In support of this contention, she helpfully put before the court excerpts from **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd and another** [1975] AC 581 and **Wilson and others v Liverpool Corporation** [1971] 1 WLR 302. She referred the court to the case of **Kimola Meritt (Suing by her mother and next friend Charm Jackson) v Dr Ian Rodriquez and another** [2015] JMCA Civ 31 ('**Kimola Merritt**') where both of these cases were applied by this court. While counsel conceded that the facts of **Kimola Meritt** were not analogous to the case at bar, she commended the examination of the principles by McDonald-Bishop JA (Ag) (as she then was) as set out at paras. [56] – [58], [73] – [73] and [77] – [78].

[183] Similarly, in the instant application, it was submitted that the appellants were obligated to bring their entire case before the learned judge, including any objections which they had regarding the parties' calculation of the pre-judgment interest at the rate of 8.23%.

[184] Counsel reminded the court that in order for the application for fresh evidence to succeed, the principles enunciated in **Ladd v Marshall** [1954] 1 WLR 1489 must be satisfied conjunctively. She contended that, save for the limb of credibility (with which no issue was taken), the application had not satisfied the first two limbs. Mrs Kitson submitted, in relation to the first limb, that with reasonable diligence, counsel (who also represented the appellants in the court below) could have produced the BOJ table prior to the learned judge's ratification of the agreed recalculated figures on 24 November 2017. At all material times, it remained the prerogative of Lasco to put forward all issues to be litigated during the assessment hearing and given the multiple opportunities afforded to Lasco, the BOJ domestic rates could have been produced during the

assessment hearing. She reiterated that these opportunities would have been prior to the learned judge's ratification of the final figures as agreed by all parties.

[185] Secondly, in relation to the second limb, as to whether the BOJ table would have had an influence on the result of the hearing, it was submitted that this was no longer a live issue among the parties. The appellants should be estopped from resiling from the clear and unambiguous agreement to the applicability of the 8.23% interest rate and the use of the rate and manner in which the pre-judgment interest was calculated. The appellants cannot now claim that the use of the interest rate was an error.

[186] In relation to the **Ladd v Marshall** principles, counsel referred to **Rose Hall Development Limited v Minkah Mudada Hananot** [2010] JMCA App 26 ('**Rose Hall Development**'), and in particular, the dictum of Panton P, at paras. [8] and [9].

[187] Counsel also referred to the dictum of Phillips JA at para. [28] of **Rose Hall Development Limited**, where the question of whether the evidence could have been obtained with reasonable diligence was considered. Further, she submitted that the **Henderson v Henderson** and **Ladd v Marshall** principles go hand in hand.

Analysis and determination

[188] In applications of this nature, the court is guided by the well-known principles as expressed in **Ladd v Marshall**. The relevant principles are summarised below:

1. The evidence sought to be adduced must be evidence which could not have been obtained with reasonable diligence for use at the trial;
2. The evidence would probably have an important influence on the result of the case; and
3. The evidence is credible.

[189] Although these criteria must be satisfied conjunctively, Panton P in **Rose Hall Development Limited**, at paras. [8] and [9] of his judgment, in a discussion of the **Ladd v Marshall** principles, placed them within a certain overarching context:

"[8] In determining the fate of this application, the court was guided by the well-known principles expressed in ***Ladd v Marshall*** [1954] 3 All ER 745. Halsbury's Laws of England Fourth Edition Reissue Vol 17(1), in acknowledging this, states at para 441:

> '…These criteria need to be applied as guidelines rather than rules and subject to the overriding objective of dealing with cases justly. The critical question is whether the fresh evidence could have been obtained with reasonable diligence for use at the trial and if it could have been then permission to adduce it in evidence should be refused.'

[9] In note 5 relating to the above-quoted paragraph, the editors of Halsbury's referred to the case of ***Taylor v Lawrence*** [2002] 2 All ER 353, where Lord Woolf, CJ states that the rule in ***Ladd v Marshall*** was 'an example of a fundamental principle of the common law – that the outcome of litigation should be final. Where an issue has been determined by a decision of the court, that decision should definitively determine the issue as between those who were party to the litigation. Furthermore, parties who are involved in litigation are expected to put before the court all the issues relevant to that litigation'."

[190] The matter of putting before the court all relevant issues to that litigation, can also be expressed in terms of the **Henderson v Henderson** principle (referred to by counsel for Pfizer) as stated by this court in **Kimola Merritt**. McDonald Bishop JA (Ag) at para. [77] of that judgment stated:

"**Henderson v Henderson estoppel**

[77] The principle giving rise to **Henderson v Henderson** estoppel, was that expressed by Wigram V-C (in that case at pages 381 and 382) thus:

> '…In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the

> parties to that ligation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time...'"

[191] In relation to this application, Lasco has woefully failed to meet the most fundamental criteria as established in **Ladd v Marshall**. The learned judge in the case at bar delivered her judgment on 3 November 2017. Based on her disposal of the matter and, in particular, the statement of her findings, she gave directions to the parties (at para. [354] of her judgment, set out above). She stated that she required the calculation of the final figures to be awarded based on the scenario she had accepted, together with her modifications; further that the recalculation should be denominated in JMD. All the parties were therefore aware that there would be a final recalculation in JMD as of that date. They would also have been aware that the interest rate granted by her was set out at 8.23% on the final calculated figures (see para. [357] of the judgment (set out at para. [167] above)). The learned judge had also stated at para. [354] of that judgment that she was permitting the parties to "make further representation to the court if they require[d] clarification on any aspect of the findings before the final order is made".

[192] The recalculated figures were sent by counsel to the learned judge by e-mail on 23 November 2017. These figures were then placed in the body of the judgment on 24 November 2017.

[193] By all appearances, there was ample time between 3 and 24 November 2017 for the parties to have raised any concern about the applicable interest rate and to make the point that the rate was not agreed, as asserted at para. [357] of the learned judge's judgment. Based on the orders of the learned judge also, she made room for the parties to make representations in relation to any aspect of the findings requiring clarification before the final order.

[194] In fact, as pointed out by Mrs Kitson, counsel for the appellants availed themselves of the opportunity by sending an email to the learned judge on 23 November 2017, seeking clarification on the period that the pre-judgment interest rate was to be applied. There was no challenge, or any indication given to the learned judge that the interest rate was the basis of any query; and that the finding of the learned judge, that the rate of interest was agreed, would not be applicable to the JMD recalculation.

[195] In any event, the application of the interest at 8.23% per annum was calculated on the USD figures and then recalculated in JMD. So, both the final awards that had been denominated in USD and the interest rate on those awards were recalculated in JMD. The parties are not disputing that this was, in fact, the case.

[196] It is difficult, therefore, to accept the submissions of counsel for both appellants that the learned judge erred in applying the interest rate of 8.23% to the USD figure (which was then recalculated in JMD). They contended that it was inappropriate to have brought the issue to the attention of the learned judge in order that a determination could be made on the matter. It is curious, however, that it was thought fit to query the dates to which the pre-judgment interest rate should apply, but not the rate of interest on which they are alleging that there was no agreement. So, this was not an oversight on their part. The words of Phillips JA, at para. [28] of **Rose Hall Development Limited** are apt when the conduct of counsel is evaluated. In relation to the question of whether evidence could have been obtained with reasonable diligence, she stated:

> "[28] …Counsel for the applicant submitted that modern authorities indicate that the courts now apply the ***Ladd v***

> ***Marshall*** criteria in accordance with the overriding objective of the new Civil Procedure Rules (CPR). He conceded that if this application was being made before the CPR, he would have had no argument whatsoever, but the applicant is no longer constrained within 'a straightjacket'. Counsel relied on the following cases: ***Hamilton v Al Fayed*** [2000] EWCA Civ 3012, ***Gillingham v Gillingham*** [2001] ECWA Civ 906 and ***Paterson et al v Howells & Anor*** [2005] ECWA Civ 1519. **However, in my view, in these cases there was some evidence to show that efforts had been made to obtain the evidence or there was evidence to explain why not. In this case before us, there was no evidence at all with regard to any attempts to obtain this information which was obviously in existence at the time of trial. There was therefore absolutely nothing on which this court could exercise its discretion. Indeed, in answer to a specific question posed by the court, learned Queen's Counsel said that he could not say why there had not been any efforts made by the applicant before the trial to obtain the images, and stated quite frankly that perhaps the applicant was of the view that its case was strong enough, as the diligence shown subsequent to the trial, if done previously, would have produced the same results.** In ***Hamilton v Al Fayed***, Lord Phillips MR in delivering the judgment of the court, indicated that in arriving at their decision, the court was utilizing an approach which accords with the overriding objective and in adopting that approach, the court was following the guidance to be found in the judgment of May LJ in **Hickey v Marks** (CA, 6 July 2000), of Morritt V-C in ***Banks v Cox*** (17 July 2000) and of Hale LJ (as she then was) in ***Hertfordshire Investments Ltd v Bubb*** [2000] 1 WLR 2318." (Emphasis added)

[197] The appellants have therefore failed to satisfy the first criteria set out in **Ladd v Marshall** for the determination of an application to adduce fresh evidence, that is, that the evidence could not have been obtained with reasonable diligence for use at the trial. The table containing the BOJ domestic rate could have been easily attached to the email thread between 3 and 24 November 2017 for the learned judge's assessment.

[198] It is the opinion of this court that the second criterion, as set out in **Ladd Marshall**, has not been satisfied. This is whether the fresh evidence would have

influenced the result of the hearing. It appears to be highly unlikely, as the interest rate of 8.23% was first applied to the award, as denominated in USD, and then recalculated in JMD. The failure to satisfy the first and second criteria is sufficient to dispose of the application, however, it is acknowledged that the third criterion (the credibility of the BOJ table) is not in dispute.

[199] Additionally, it is noted in passing that the CPR require claimants who make claims for specified sums in foreign currencies, to state the equivalent sum in Jamaican currency and the date and basis on which the calculation was made (see rule 8.7(5) of the CPR).

[200] The submissions of counsel for Pfizer are meritorious. This application appears to be an attempt to re-litigate an issue that ought to have been placed before the learned trial judge for her determination. It was the prerogative of the appellants to put forward all pertinent issues before the learned judge, and they failed to do so. They have also failed to provide a satisfactory basis for this failure on their part that could persuade this court to grant this application.

[201] The application to adduce fresh evidence is, therefore, refused.

The appropriate rate of interest to be applied to the respective awards of damages

[202] As has been explained in the analysis of the application for fresh evidence, there is no basis to complain about the learned judge's use of the rate of interest that was applied to the damages that she awarded.

[203] Lasco's ground of appeal, 3(u), in that regard must, therefore, also fail.

Summary and conclusion

[204] The appellants are entitled to damages for the period that they were improperly prevented from marketing and selling their generic versions of amlodipine. The procedure that the learned judge used for assessing the damages was consistent with that set out

by Norris J in **Apotex**. She created a counterfactual scenario for the relevant period, decided on the likely market size, the likely price for each product and the likely market share that each appellant would have enjoyed. Her findings were based on credible evidence, and therefore, her conclusions on these matters should not be disturbed. Similarly, her conclusions in relation to damages for the post-injunction period should not be disturbed.

[205] There is no basis to set aside the learned judge's decision on the interest rate that she ordered to be applied to the damages. The fact that it was the rate that the parties had agreed to be applicable to damages that were calculated in USD does not automatically mean that she erred in applying it to an award in JMD. Not only did the parties do the calculation themselves, being well aware of the change in the currency, but they calculated the interest on the USD before converting it to JMD. For those reasons also, the evidence that Lasco proposed to have admitted, having been available to them at the time of their making the calculations and before the delivery of the judgment, does not constitute fresh evidence.

[206] The application to admit the Bank of Jamaica Domestic Currency Weighted Interest Rates as fresh evidence is refused.

[207] The complaints by the appellants in this appeal must, accordingly, fail.

[208] The orders therefore are:

1. The application for the admission of fresh evidence is refused.
2. The appeals by each of the appellants are dismissed.
3. Costs of each appeal and on the fresh evidence application awarded to the respondent, Pfizer, to be agreed or taxed.