



Neutral Citation Number: [2019] EWHC 3503 (Comm)

Case No: LM-2018-000236

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**London Circuit Commercial Court (QBD)**

Royal Courts of Justice  
The Rolls Building, London EC4A 1NL

Date: 18/12/2019

Before :

**HHJ DAVID COOKE**

Between :

**Athena Brands Ltd**  
**- and -**  
**Superdrug Stores Plc**

**Claimant**

**Defendant**

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**Jonathan Cohen QC** (instructed by **Keystone Law**) for the **Claimant**  
**Joseph Sullivan** (instructed by **Gowling WLG (UK) LLP**) for the **Defendant**

Hearing date: 30 October 2019  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
HHJ DAVID COOKE

## HHJ David Cooke:

### Introduction

1. By its application dated 22 March 2019 the claimant (Athena) seeks summary judgment on the issue whether, as pleaded in its Particulars of Claim, a contract was made by exchange of emails between the claimant and defendant on 23 and 25 May 2017 binding the defendant (Superdrug) to purchase specified minimum quantities of various cosmetic products to be sold under the brand "Natures Alchemist" in a 12 month period from September 2017, the sale price of which would have been just over £1.3m. The application also seeks summary judgment dismissing part of the defence, but that was not pursued at the hearing.
2. The emails said to give rise to the contract were exchanged between Ms Stephanie Whincup, an employee of Athena with the title "Senior Brand Manager", and Iain Sisson, an employee of Superdrug with the title (at that time) "Buyer- Body Skin, Suncare and Travel Accessories". Athena had proposed the establishment of a new brand, initially under the name "Natural Alchemist" but which later became "Nature's Alchemist" or "Natures Alchemist", which it would supply to Superdrug and there then was a period of discussion and negotiation of terms for such supply. Those discussions followed arrangements made earlier for supply of a different product range with the brand name "HiGlow" on, Athena says, similar terms.
3. On 23 May 2017 Ms Whincup emailed (bundle p 55):

"Hi Iain

... Just to confirm, you are placing orders and committing to the yearly quantity against all lines detailed below based on the ROS you have provided... We have agreed that you will call off stock, in exactly the same way as HiGlow, on an ad hoc basis within a 12 month period...

[there was then a table of 9 products with quantities and prices]

If you could drop me a note to confirm all the above ASAP that would be great, I shall then be in a position to push the button at this end.

Thanks

Steph"

Mr Sisson replied on 25 May (p 54):

"Hi Steph

Please go ahead with the below, happy on Nature's Alchemist...

Regards

Iain"

It is not in dispute that "the below" refers to the preceding email chain, including Ms Whincup's email of 23 May.

4. The claimant's case is that these emails plainly show an agreement committing Superdrug to purchase the stated minimum quantities of the products at the specified prices, to be called off over a 12 month period. The period itself is not specified, but must run at latest, it says, from the date of the first delivery, which was in October 2017. What then happened was that the products sold much more slowly than had been anticipated and on 7 February 2018 Superdrug emailed to state that "orders going forward would be unlikely". No further orders were in fact placed. Athena seeks its losses from the shortfall in the alleged minimum quantities, which it puts at just under £980,000, plus storage charges for unsold stock and interest.
5. Superdrug defends on a variety of bases. For the purpose of this application, Mr Sullivan submits it has, on the evidence it produces, a real prospect of success on three of them which are (not in the order he put them):
  - i) As a matter of construction in context, these emails do not give rise to any agreement in the terms alleged. Superdrug was not committed to purchase any products unless and until it issued a specific purchase order for those products and was not bound to issue purchase orders for the alleged minimum, or any other, quantity.
  - ii) If they did express the agreement alleged, there was no intention of the parties to create legal relations.
  - iii) Mr Sisson did not have actual or ostensible authority to commit to any such contract in any event.

Resolving these issues, Mr Sullivan submits, requires the court to determine disputed questions of fact that cannot be determined without oral evidence of the witnesses, and expert evidence as to industry practice that Superdrug will seek leave to rely on.

6. The law applicable on a summary judgment application was not in dispute. The claimant has the initial evidential burden of showing that there are credible grounds on which the defence may be found to have no real prospect of succeeding. It is not suggested Athena has not surmounted this hurdle. Thereafter it is for the defendant to show that one or more of its defences has a real, as distinct from a fanciful, prospect of succeeding. In general, disputed questions of fact are to be taken on the basis of the defendant's evidence, unless the court is satisfied that there is no real prospect of that evidence being accepted at trial. The court must not engage in a "mini trial" of the relative weight or credibility of disputed factual evidence and so in general takes the facts as asserted by the respondent's evidence, unless satisfied there is no real prospect of that evidence being accepted at trial. The court must take into account the evidence that has been adduced on the application, and also any further evidence that can reasonably be expected to be produced at trial.
7. In reality the factual bases of the three defences are intertwined, so I will set out the factual background in more detail before considering those defences individually.

## **Factual background**

8. The trading relationship between the parties began in 2016, when Athena proposed the HiGlow product range. It is accepted that Athena was provided with a "Superdrug Stores Plc Supplier Pack" (p 68) which sets out the process Superdrug envisaged with its suppliers. That document included the following:

“...This guide is provided for the exclusive use of Superdrug's existing and prospective suppliers. Its aim is to provide a thorough understanding of the way we work to enable us both to get the best from our shared supply chain.

In this Supplier Guide we explain each stage of supply relationship with Superdrug, from initial negotiations with our buyers, through the order process, delivery, replenishment and invoicing...

Once negotiations with the Superdrug Buyer are finalised, we will draw up a summary of the agreed 'Trading Terms'... This will form an important reference document for both parties, covering payment terms, distribution discounts, damages allowance etc....

We also need to confirm the contractual framework for supply of the products to us. Therefore, as well as any applicable Trading Terms ... We need each Supplier to acknowledge our General Conditions of Purchase, which form the contractual backdrop for each Purchase Order...

The Category Supply team will create initial purchase orders with a specified delivery date and time allocated to you ... ”

9. The Supplier Pack had appended to it a set of "general conditions of purchase" for the A.S. Watson group (of which Superdrug is a member). Those conditions (p95) stated that they would apply "to each Contract (and Purchase Order)" to the exclusion of any other conditions of the supplier. They defined "Contract" as "each agreement in any form for the purchase of Goods by ASW", "Purchase Order" as ASW's written instruction to supply the Goods, whether placed by formal purchase order, EDI [an electronic ordering system] or other written communication and "ASW" as including any company within the A.S. Watson group.
10. In October 2016 Ms Whincup and Mr Sisson discussed the proposed HiGlow products. On 13 October Mr Sisson emailed (p431) "do get in touch with commercials etc so we can push this along". On 17 October Ms Whincup sent a schedule of proposed prices. Mr Sisson replied on 2 November "Below are the costs that I need you to get to on the range" followed by a table of prices for the six products under discussion. Ms Whincup replied on 7 November "As promised on Friday, I have worked with the factory on increased volumes for HiGlow. I have attached a revised quote detailing increased volumes and reduced financials... We are able to meet cost targets on the [3 products] below based on volume increases as detailed in the quote sheet... We have already submitted the very best price for [2 others]... Feel free to give me a call if you need to talk through. I do need to mention we need to move fairly quickly should you want to progress with the increased volumes..."

11. Mr Sisson replied on 10 November "as per our telephone conversation, please go ahead with the costs and volumes quoted in your document." Ms Whincup responded "Thanks for the call. Just to recap and confirm I have attached the quote sheet confirming the amended volumes as discussed. If you could confirm that these amended volumes replace the LOI volumes previously submitted that would be great... Noted you generally work to a monthly buy frequency and order one event in advance and that you tend to sit on six weeks' worth of stock at any one time." Mr Sisson turn responded "as requested please accept this as confirmation that the volumes in your email below replaced the original forecasts supplied in the LOI".
12. The LOI (letter of intent) referred to is not in the bundle, but it is not in dispute that it refers to some earlier document proposing lower annual purchase volumes.
13. Mr Cohen submits that these emails evidence an agreement to purchase a minimum quantity of HiGlow products over a 12 month period, the reduced prices quoted for those products having been agreed in exchange for commitments on Superdrug's part to purchase greater volumes that had been initially envisaged. Mr Sullivan submits that on the contrary the express acknowledgement that Superdrug "generally work to a monthly buy frequency" indicates that Ms Whincup was aware that there would only ever be a commitment to purchase once a purchase order had been issued, and that these were expected to be issued on a monthly basis.
14. The construction of the arrangements for the HiGlow products is not directly in issue in these proceedings. I was told that no issue arose about the alleged annual commitment, because the volumes that had been quoted for were exceeded by purchase orders placed well before the end of the 12 month period. Both parties however rely on those arrangements as context for the later negotiations, on the basis that the structure of the proposed supply arrangements was to be similar.
15. I am in no doubt that, subject to any points arising from the scope of Mr Sisson's authority, Mr Cohen's construction of these emails is to be preferred. The negotiation of reduced prices was plainly in exchange for increased volumes and makes no commercial sense unless Superdrug was committing to purchase those volumes. In asking Ms Whincup to "go ahead with the costs and volumes quoted" Mr Sisson was giving that commitment. It is not in the least inconsistent with the existence of a minimum purchase commitment that actual orders would be placed on a monthly frequency, or that it was to be anticipated that individual orders would aim to maintain six weeks' supply of stock in hand. That would only mean that, if there was a shortfall at the end of the period, an additional order would have to be placed for the balance of the commitment. For the reasons stated below, nothing in the points made about the scope of Mr Sisson's authority leads to any different conclusion.
16. Discussions about the Natures Alchemist range began at the end of 2016. It is not in dispute that Mr Sisson and his colleagues were enthusiastic about the proposed brand. According to Ms Whincup, there were some people within Superdrug who wanted to launch the products under Superdrug's own brand. It was however eventually agreed that the brand would remain owned by Athena, but the particular products with that brand name that were to be purchased by Superdrug would be sold to it on an exclusive basis. Mr Sisson told Ms Whincup that it was his intention to launch the products in 389 stores, and provided a sales projection that he had made based on figures for ROS (Rate of Sale, i.e. the number of items of each product expected to be sold per store per week) produced by him. These figures were his own projections,

based on experience in selling similar products, and his own view of the sales potential of the new products.

17. On 8 May 2017 Ms Whincup sent an email (p59) reporting that samples of the products had arrived and saying "Just a note on volumes. I have your ROS and a store count of 389 which is all I need to work out the annual quantity – all detail below. Do you know based on the volumes below the commitment you will be giving for the first order? This will help me bring the correct info to our meeting on Thursday." There was then a table showing the annual sales volume derived from Mr Sisson's ROS figures, multiplied by 389 stores and 52 weeks in a year.
18. They then met on the following Thursday, i.e. 11 May 2017. According to Ms Whincup's witness statement, which Mr Sisson has not contradicted, at that meeting she provided him with alternative quotations for the cost of the products based on different volume options, respectively for 100%, 75%, 50% or 25% of these annual figures. Mr Sisson, she says, confirmed at the meeting that he wanted to go ahead with the figures based on 100% of the projected volume.
19. The following day, Mr Sisson sent an email (p58) which in part discussed the HiGlow sales but went on to say "I have been through the Nature's Alchemist range sheet that you left with me... In Shower Moisturisers... are the only cost prices I have an issue with, is there anything you can do on these?..." Over the following few days Ms Whincup replied on this price issue, eventually saying on 16 May that she could not improve the price of that product by reason of the cost of the ingredients but "of course I will be able to look at value engineering these lines going forward, but for now, we are really stretched due to the premium nature and credentials of the ingredients." Mr Sisson responded (p56) "Let's proceed, I do not want to hold things up".
20. There then followed Ms Whincup's email of 23 May, and Mr Sisson's reply of 25 May referred to above.

### **Evidence relating to the pleaded defences**

21. In his witness statement, Mr Sisson said, in the context of describing the negotiations to establish the HiGlow range (p159)

*“To be absolutely clear, I do not have Superdrug's authority to order stock from a supplier. Orders are placed by the supply chain team via purchase order. It is not my job to raise a purchase order and I do not know how it is done. As a buyer, my role is to decide what products I think will sell well and to work with the suppliers to deliver those products at a price that will yield a margin that is acceptable to the business... I explained this process to Athena and my impression was that Steph was familiar with it because she told me that she had a background in retail...” (Italics added)*

22. Mr Sullivan relied on this passage at the hearing as indicating that Ms Whincup was aware that Mr Sisson did not have authority to enter into binding contractual commitments. Mr Cohen said that it was ambiguous and invited me to direct that Superdrug should make clear whether it was its case that Mr Sisson had expressly told Ms Whincup that he did not have authority to order stock from a supplier. I declined

to make that order, but after the hearing Athena made a part 18 request for that information, to which its response was that it was not Mr Sisson's evidence or the defendant's case that he had expressly used the italicised words, but that he had explained to Ms Whincup that he did not have authority to order stock.

23. Mr Sisson goes on to say that in April he told Ms Whincup that his plan was to launch the Natures Alchemist products in 389 stores "but I made clear to her that the numbers could go up or down depending on store openings or closures and on the performance of the products. I did not say that 389 was a firm commitment." Ms Whincup's evidence is that she was aware that the total number of stores available could be affected by openings and closures, but that this was likely to be a minor variation. She was not at any stage told that the Natures Alchemist products would not be launched in all the stores that were available.
24. On 5 May 2017, Mr Sisson sent an email confirming a telephone conversation the day before about additional products to be added to the HiGlow range. He says "In that email I confirmed the cost price and the sales forecast, i.e. the number of units of each product that I anticipated would sell. On the call and in the email I was very clear that this was a forecast and not any sort of commitment to buy that number of products. I would have used the words 'forecast' and 'ROS'. I would never have said that 'we will sell' a certain number or committed to a minimum order." That email (p228) does indeed use the word "forecast", saying "As per our conversation yesterday please find below confirmation of intent to range three extensions to the HiGlow range with effect from week 40 (if available). [1<sup>st</sup>] £3.75 cost price, forecast of 24,276 units per annum...[2 others]".
25. This conversation and email seem to me to be of little relevance to the present issue. They refer to the addition of three products to the HiGlow range, some months after agreement had been reached (as I have found) for purchase of minimum quantities of the products that were initially included in that range. Whether the new products were added on the basis of a commitment to volume or not does not affect the agreement already reached. Contrary to the impression Mr Sisson seeks to give, his email does not make or emphasise any point to the effect that he is not generally authorised, or that he does not in practice, ever give binding commitments to purchase minimum volumes.
26. In relation to his own email of 25 May, Mr Sisson says (p163):

"I do not recall thinking very much about the email at the time because its purpose was to confirm what we had already discussed. I was clear in my own mind that Steph knew that it was not my job to place orders and that this was done by the supply chain and there was no commitment until a purchase order had been raised and, then, the commitment was only for the product in the purchase order. I would have expected anyone working in her position in the industry to know this. I also saw the reference to 'based on the ROS' and I knew that I had explained to Steph on more than one occasion that our only commitment was to the pipefill order and that any further orders would depend on the ROS, i.e. actual sales, to replenish the stock we have sold. I never once talked about committing to a certain volume or minimum order quantities. I have never confirmed an order other than by purchase order. It is not the

way that ordering works in Superdrug and it is not how it worked when I was a buyer at Homebase or at Carphone Warehouse. In all my conversations with Athena I made it clear that our orders would be based on achieving a particular rate of sale.”

27. Ms Megan Potter, who is "Head of Buying Haircare, Skincare & Suncare" for Superdrug has filed a witness statement (p230) in which she says:

“10. I can categorically confirm that Superdrug does not give volume commitments of this kind on products other than those that are Superdrug own branded. That is because we cannot know for certain in advance how well a product will sell. The only commitment we give is in respect of the initial order, which is called an "intake order" or a "pipefill". This commitment is only confirmed when the supply chain actually places an order...

11. I am confident that [Ms Whincup]... knew very well that [Mr Sisson's] email was not intended to commit Superdrug to buying 483,449 units of a brand-new and untested range. Any reasonable person in Ms Whincup's position in the industry would know this...

11.2 ... In my experience, other retailers in the fast-moving consumer goods sector also do not agree to buy significant quantities of new products upfront... Rather, retailers place an initial order, which is a binding commitment, and they only place further orders based on the actual rates of sale... I know this because I have spoken to buyers at Superdrug that have come from Asda, Sainsbury's and Boots and they have confirmed that the buying practices there are aligned with our own. I also know that Iain used to work at Homebase and Carphone Warehouse and he has confirmed that they operated in the same way... It is correct that own brand products are bought by agreeing a specific volume of stock at a price, but branded ranges like Natures Alchemist (and HiGlow) work by agreeing a forecast and calling off stock is necessary with no stock commitment at all. Seasonal and "when it's gone it's gone" products are also treated differently from ongoing ranges, as the former are also normally based on a specific volume commitment.

13 ... It is well known in the industry that orders for non-own brand products are made by purchase order, that buyers do not typically raise purchase orders and that retailers do not enter into commitments to buy quantities of non-own brand goods in excess of the quantity set out in a particular purchase order. Accordingly no reasonable person in the industry would expect a "buyer" to have authority to agree a contract of the sort alleged by Athena. Secondly, even if this standard practice was to be departed from, the "order" Athena relies on in this case would be a significant commitment that clearly would have



required a formal written contract and sign off at a senior level... No reasonable person in the industry would think that a contract of this sort could be agreed so casually.

14 To be clear, a buyer in Superdrug does not in fact buy stock in the sense of placing orders or giving contractual commitments. A buyer's role is to identify products that s/he would like Superdrug to stock and to work with the supplier to negotiate and agree a price at which Superdrug will place any orders for that stock for resale. The buyer him or herself does not place an order ...”

28. It is on this basis that Superdrug argues it has a real prospect of adducing evidence of an industry practice so well known and established that Athena could not have believed that Mr Sisson, whatever he said, was committing Superdrug to purchase minimum quantities of stock.

### **Discussion**

29. Starting with the question of construction, the relevant law is also not in dispute. The court engages in an objective exercise to determine the meaning of the words in which an agreement, or alleged agreement, has been expressed, to determine what a reasonable independent person would consider them to have intended. In doing so it may have regard to that surrounding circumstances or factual matrix in which the words have been used, to determine whether the parties intended some meaning other than the ordinary meaning of those words. Any question whether the parties intended to enter into legal relations is to be similarly objectively determined. An employee has ostensible authority to enter into transactions binding on his employer to the extent held out by the employer, either expressly or by implication from what would normally be expected of an employee in a similar position. A party relying on such ostensible authority must also show that they reasonably relied on that authority in entering into the transaction in question.
30. I am in no doubt that the wording used in the relevant emails, considered first as a question of their prima facie meaning, is as the claimant submits. In her email of 23 May 2017 Ms Whincup asks for confirmation that Mr Sisson is "placing orders and committing to the yearly quantity ... below... you will call off stock... on an ad hoc basis within a 12 month period". This in my view plainly means she is seeking a commitment to purchase those annual quantities, to be called off over 12 months. Mr Sisson's reply "Please go ahead... happy on Nature's Alchemist..." is a clear acceptance. The reference to "placing orders" does not mean that there will not be individual purchase orders at a later stage; Ms Whincup well knew that would be the case, as shown by acknowledgment that stock would be "called off" over a 12 month period. In context, what she meant is that there was a commitment to placing such orders to reach the yearly quantity stated.
31. The question then is whether any of the various lines of defence shows an arguable case that an objective observer would conclude that the parties meant something different, or that notwithstanding Mr Sisson's apparent acceptance, Superdrug is not contractually bound by reason of lack of authority or lack of intention to create legal relations, or that Athena acted unreasonably in relying on any ostensible authority..

32. For present purposes Athena does not contend that Superdrug has no real prospect of showing Mr Sisson had no actual authority to agree an annual commitment, so the focus is on his apparent or ostensible authority. He was on the face of it held out by Superdrug as the person with whom terms of trading were to be discussed and agreed. The supplier pack makes this plain, and does not contain any indication of any limits on the terms that he might agree. It is I think clear that Ms Whincup understood he would not be immediately responsible for placing individual orders for stock- that would be done by others in due course depending on sales and restocking requirements from time to time. But that does not preclude an overriding agreement that a minimum quantity will be purchased over a stated period, and if a commitment is given to that effect it means that at the end of the period if the minimum has not been met a balancing order must be placed. There is nothing in the supplier pack to suggest that a Superdrug buyer cannot agree such a term. On the contrary, it is to be expected that it is the sort of perfectly normal commercial term that a buyer would be discussing.
33. Nor is there anything to indicate that what is agreed by the buyer is in any way subject to ratification or confirmation by anyone else at Superdrug. The supplier pack envisages that a document will be drawn up by Superdrug setting out the terms of trade that have been agreed (which does not seem to have happened in this case or in relation to the HiGlow range) but it is expressed in terms of recording what has been agreed between the supplier and the buyer, not as a selective ratification of such of those terms as Superdrug accepts as binding on it.
34. Mr Cohen accepts, for present purposes at least, that Superdrug's standard conditions of purchase apply to any agreement made between the buyer and the supplier. Those terms are expressed to apply to any "Contract", which was no doubt deliberately widely defined to include any agreement for purchase of goods, and so is apt to include an agreement as to the terms on which goods would be bought, even if it is not an actual order for purchase of such goods. But there is nothing in those terms to indicate that Superdrug does not or will not agree terms for purchase of minimum quantities, or will not be bound by any such terms if its employees do agree them.
35. I do not consider that Ms Potter's evidence creates a real prospect of establishing an industry practice so well established that Ms Whincup must have known that Mr Sisson could not intend to commit Superdrug to a minimum purchase. Although she asserts such a practice, what she says about the "fast moving consumer goods sector" does not show, even arguably, that there is any such definable industry sector as might have a uniform and well known method of purchase. From her own evidence it is apparent that "fast moving consumer goods" is a very loose term and that goods that might be considered to fall within that description must be purchased by a huge range of different retailers (let alone other buyers such as wholesalers). It would take much more than the opinion of one participant in such a market to establish the inherently unlikely proposition that all such purchasers were known to buy only on a particular basis. There is nothing to support her views beyond her own report that a limited number of other buyers she has spoken to agree with her. There is no evidence from these buyers, and no indication who they are or what propositions were put to them with which they are said to have agreed. Mr Sullivan referred me to *Proton Energy Group SA v Public Company Orlen Lietuva* [2013] EWHC 334 (Comm), in which expert evidence of market practice was held to be admissible, but that was a very different case. The parties there were dealing in goods for which there was a well recognised commodity market (oil) such as might be likely to have generally

recognised practices and procedures. There is nothing here to suggest that "fast-moving consumer goods" is in any way comparable.

36. Even what Ms Potter says about such standard practice does not support any generally known clearly defined practice of not agreeing minimum purchase quantities. She says that retailers in this sector do not agree to buy "significant quantities of new products up front", leaving open what any particular buyer might consider "significant". Her attempt then to define what is "significant" by retrospective consideration of the actual sales rate in the present case further undermines her evidence as capable of establishing any general practice.
37. Further, her own evidence does not support the existence of a known clear practice of avoiding minimum purchase obligations even at Superdrug. She states (p 233 at para 11.2) that:

“It is correct that own-brand products are bought by agreeing a specific volume of stock at a price, but branded ranges like Natures Alchemist (and HiGlow) work by agreeing a forecast and calling off stock as necessary with no stock commitment at all. Seasonal and 'when it's gone it's gone' products are also treated differently from ongoing ranges, as the former are also normally based on a specific volume commitment.”

This contradicts what she said at para 10 above. Further, as Mr Cohen pointed out, there is no other evidence of any generally known clear market distinction in buying practice between "own brand" and "branded" products, and from a commercial point of view there is very little difference between a product which is manufactured under the retailer's own brand and one which is produced under a brand that the retailer does not own, but which the supplier and brand owner agrees to sell on an exclusive basis to the retailer. Neither can be sold elsewhere, so the supplier has the same commercial interest in minimising the risk that he will commit to purchasing stock which he cannot sell. The commercial position is very different in the case of products marketed under a generally distributed brand, where the supplier would have the option of disposing of stock not taken by one purchaser by selling it to someone else in the market.

38. Far from establishing the generally known market practice that Superdrug asserts, Ms Potter's evidence in my view shows only that Superdrug and other purchasers will enter into minimum purchase commitments when they consider it suits them commercially to do so. Although she asserts that the mere fact that Superdrug did not own the Natures Alchemist or HiGlow brands means that they are bound to be treated in the same way as all other products that are not Superdrug branded, the reality must be that, in the absence of a known market practice to that effect, it would be a matter for negotiation in a particular case whether a supply was more akin to an own brand product or was to be regarded as equivalent to the generally available brand.
39. Nor in my view does Mr Sisson's evidence show a real prospect of establishing that anything he told Ms Whincup about shows that she must have known, when she asked him to commit to a yearly quantity and he accepted, that he did not mean it or did not mean to bind Superdrug. Mr Sullivan points to paragraph 18 of his witness statement, which relates to the negotiations for the HiGlow range. He sets out how he "would have" explained to Ms Whincup that purchase orders would normally be placed so as to maintain a stock of six weeks, and that she had noted that in her own email to him

dated 10 November 2016. But as I have said above such an ordering practice is not at all inconsistent with an overarching commitment to purchase a minimum quantity over a 12 month period.

40. Mr Sisson goes on to say "In due course, this was the way the ordering process HiGlow range operated: there was no 'commitment' by Superdrug to purchase any particular quantity in excess of the amount set out in any individual purchase order, and I believe and I have always believed that Athena understood. It was something I spoke about with Steph many times...". But he does not say here that he specifically told Ms Whincup either that Superdrug would never commit to an annual quantity, or that it had not done so in the case of the HiGlow range, he merely asserts that there was no such commitment and sets out his belief that that was what Ms Whincup understood. What he says he spoke about with Ms Whincup "many times" was not the absence of any commitment to a minimum quantity but the mechanics of the ordering process, which were neutral as to the existence of such a commitment.
41. Mr Sullivan points further to the fact that Mr Sisson's projected annual volumes were based on estimates for the sale of the products, and that he says he explained to Ms Whincup that while he intended to launch the Natures Alchemist products in all 389 stores, that number could go up or down depending on store openings or closures. But that evidence, it seems to me, goes no further than showing that entering into a minimum purchase commitment would represent a commercial risk for Superdrug – which would be inevitable anyway. It does not show either that Superdrug would never undertake such a risk (and Ms Potter's evidence shows that it was prepared to do so when it considered it was appropriate) still less that he told Ms Whincup, or Ms Whincup would inevitably have understood, that it would never do so.
42. The furthest Mr Sisson's evidence goes in this connection in my view is in paragraph 30 of his witness statement where he says "...I knew that I had explained to Steph on more than one occasion that our only commitment was to the pipefill order and that any further orders would depend on ... actual sales...". He does not say when this was said, and again puts it in the context of explaining to Ms Whincup that actual purchase orders would not be placed by him but by others. He does not, in particular, say that he said this at the meeting on 11 May.
43. He says very little about that meeting (see para 26) and has not responded to Ms Whincup's evidence (p 416) that at that meeting she put forward a range of possible prices depending on whether Superdrug would commit to a minimum purchase of 25%, 50%, 75% or 100% of the projected annual requirement, and that Mr Sisson elected to take the 100% option. That evidence post-dated his own witness statement, but Ms Whincup's statement is dated 29 May and Mr Sisson has therefore had several months in which he could, if he had been able to, have either denied this account or have put forward evidence that he responded to these alternative figures by stating that Superdrug could not and would not give any commitment to minimum quantities. No doubt an application would have been necessary, but if such evidence was available to meet an important point I have little doubt the application would have been made.
44. Although Mr Sisson says in his witness statement that "I do not have Superdrug's authority to order stock from a supplier" and Superdrug indicates in the recent Part 18 response that he will say he explained this to Ms Whincup, although not in those words, this does not in my view take Superdrug's case any further. As I have indicated above, it does not seem to be in dispute that Ms Whincup understood that Mr Sisson

would not himself be placing individual purchase orders, but this is not at all the same as his telling Ms Whincup that he had no authority to enter into minimum purchase commitments. He has not given any evidence to that effect.

45. Even if Mr Sisson had therefore, at various stages in the past, gone so far as to tell Ms Whincup that Superdrug would only give a commitment to the quantities stated in its initial "pipefill" order, and even if he might have initially understood her email of 8 May asking "Do you know based on the volumes below the commitment you will be giving for the first order?" as referring to a pipefill order, he cannot have failed to understand at the meeting on 11 May that she was offering prices that were dependant on a commitment to a particular quantity ranging from 25% to 100% of the amounts he had estimated. There would be no purpose at all in putting forward such prices if the quantity he elected for remained no more than a non binding estimate. He has not disputed that he elected for the 100% option, or taken any opportunity to give evidence that in doing so he expressed any qualification that he has not or could not bind Superdrug to such a term. Accordingly even if I assume that his evidence may be accepted that he had in the past said Superdrug would not give a minimum commitment, by the time of the meeting he must have changed his position such that he did give such a commitment, which he later unambiguously confirmed by email.
46. I should say that although as I have stated above the court may have regard not only to the evidence presently available but also that which may be reasonably expected to be available at trial, that does not mean (and Mr Sullivan did not submit) that the court can or should assume that witnesses will by the time of trial amplify their evidence so as to make good the pleaded case. I do not, therefore, take in to account any possibility that Mr Sisson, for instance, might in future give more specific evidence that would go beyond what he has said so far, in order to fill in the gaps that I have referred to. He has had the opportunity to do that and has not taken it; I must assume that he is not properly able to do so.

## **Conclusion**

47. The position then is that in my judgment none of the proffered defences has any real prospect of success. Mr Sisson was held out as a buyer authorised to negotiate terms of trade, with no relevant restriction identified to Athena. There is no basis to assert that such terms could not include a minimum quantity commitment, if he on behalf of Superdrug considered it commercially appropriate in the circumstances. There is no evidence that he or anyone else on Superdrug's behalf told Athena that he in fact lacked authority to agree a minimum quantity commitment, and even if he may have at some point in the past during negotiations stated that he did not intend to agree such a commitment, he must have changed his position as he plainly did do so at the end of the negotiations. There is nothing in the history of the negotiations capable of showing that Athena or an objective observer would have understood that his apparent agreement to a minimum quantity was not or could not be taken as being what it seemed or that in making it he did not intend to bind Superdrug. In particular the HiGlow transaction involved a materially similar quantity commitment which, for the same reasons, would not have been interpreted by an objective observer as meaning anything other than what it appeared to be. There is no doubt that Athena relied on Mr Sisson's confirmation as binding Superdrug, and nothing in the evidence adduced is capable of showing that it acted unreasonably in doing so.
48. There will be summary judgment for the claimant accordingly. I will list a hearing in Birmingham at which this judgment will be handed down, without requiring

attendance, and invite the parties to agree the order resulting. If there are any matters arising that cannot be agreed, I will deal with them on paper if parties agree, but otherwise they should contact my clerk with an agreed time estimate and dates of availability for a later hearing.