



The Competition Commission Appeal Tribunals

NOTICE OF APPLICATION UNDER SECTION 46 OF THE COMPETITION ACT 1998 CASE NO. 1001/1/1/01

Pursuant to Rule 13 of the Competition Commission Appeal Tribunal Rules 2000, the Registrar of Appeal Tribunals gives notice of the receipt of an application under section 46 of the Competition Act 1998 ("the Act") by Napp Pharmaceutical Holdings Limited and Subsidiaries, of Cambridge Science Park, Milton Road, Cambridge CB4 0GW ("the applicant"), in respect of a decision of the Director General of Fair Trading ("the Director") No. CA 98/2/2001, dated 30 March 2001 ("the Contested Decision"), relating to infringements of section 18 of the Act. The Contested Decision finds that the applicant has abused a dominant position by supplying sustained release morphine tablets and capsules (trade name MST Continus) to patients in the community at excessively high prices while supplying hospitals at discount levels that block competitors, and orders the applicant to pay a penalty of £3.21 million. In addition the Director issued directions dated 4 May 2001, No CA 98/2D/2001 ("the Directions"), requiring the applicant to bring the infringements to an end, and in particular to:

- reduce the NHS List price of MST tablets and capsules by at least 15% within 15 working days, and thereafter to supply MST tablets and capsules at a price no higher than the new NHS List price less the normal wholesaler's discount of 12.5%; and
- not without the prior consent of the Director to supply or offer MST tablets and capsules to a hospital or hospice in the United Kingdom at a price which is lower than 20% of the NHS List price.

By a separate application lodged at the Competition Commission Appeal Tribunals on 11 May 2001, the applicant submitted a request for interim relief pursuant to Rule 32 to suspend the effect of the Directions. Following a hearing before the Tribunal on 22 May 2001 and the giving of certain undertakings by the applicant, the Tribunal has by consent ordered that the Directions shall not take effect pending the determination of this appeal. The judgment was published on the Tribunal website on 24 May 2001.

The applicant now seeks the following relief:

1. that both the Contested Decision and the Directions be set aside in whole or in part;
2. that the penalty imposed be set aside or reduced;
3. a declaration that the conduct of the applicant which is alleged by the Director to infringe section 18 of the Act does not in fact infringe the Act;
4. that the Director pay the applicant's costs of and incidental to this appeal; and
5. such further relief as the Tribunal may consider appropriate.

The principal grounds on which the applicant relies are that:

1. the Director has erred in fact and in law in concluding that the applicant has infringed the Act. In particular, the applicant is not dominant in any relevant market because the Pharmaceutical Price Regulation Scheme is effective to prevent the applicant from being able to abuse any dominance it might otherwise enjoy;
2. in the alternative, even if the applicant does enjoy a dominant position in a relevant market, it has not abused that position. In particular, the applicant has not charged excessive prices for MST; its practice of discounting the price of MST to hospitals represents normal competition; and its conduct has not been such as to justify its acquiring a reputation for "aggression", such as to deter other firms from competing with it;
3. the Director did not follow fair procedures or observe the applicant's fundamental rights to a fair trial;
4. in the alternative, the applicant did not commit any alleged infringement intentionally or negligently and the Director is not therefore empowered to impose any penalty under section 36 of the Act;
5. in the alternative, the Director's decision to impose the penalty is unlawful because the Director has not decided whether the applicant's infringement was intentional, on the one hand, or negligent, on the other, and he has therefore failed to have regard to the different levels of penalty which might be appropriate in these two different cases;

6. in the alternative, the Director's decision to impose the penalty is unlawful because the applicant's infringement is novel and it could not reasonably have been expected to know how to avoid its infringement;
7. in the alternative, the decision to impose the penalty is unlawful because it is excessive in all the circumstances of the case; and
8. in any event, the Directions comprise directions which go beyond what the Director is empowered to adopt under section 33 of the Act and/or comprise directions which are not appropriate to bring the supposed infringement to an end.

Any person who considers that he has sufficient interest in the Contested Decision may make a request for permission to intervene in the proceedings, in accordance with Rule 14 of the Competition Commission Appeal Tribunal Rules 2000.

A request for permission to intervene should be sent to the Registrar, The Competition Commission Appeal Tribunals, New Court, 48 Carey Street, London WC2A 2JT, so that it is received within one month of the publication of this notice.

Further details concerning the procedures of the Competition Commission Appeal Tribunals can be found on its website at competition-commission.org.uk. Alternatively the Tribunal Registry can be contacted by post at the above address or by telephone (020 7271 0395) or fax (020 7271 0281). Please quote the case number mentioned above in all communications.

C. Dhanowa, Registrar

30 May 2001