Neutral citation [2017] CAT 7

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1275-1276/1/12/17

Victoria House
Bloomsbury Place
London WC1A 2EB

9 March 2017

Before:

PETER FREEMAN CBE QC (Hon)

(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) FLYNN PHARMA LIMITED
(2) FLYNN PHARMA (HOLDINGS) LIMITED

Appellants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

AND BETWEEN:

(1) PFIZER INC.
(2) PFIZER LIMITED

Appellants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING (PERMISSION TO INTERVENE)

APPEARANCES

Ms Kelyn Bacon QC (instructed by Macfarlanes LLP) appeared for the Flynn Appellants.

Mr Mark Brealey QC and Mr Tim Johnston (instructed by Clifford Chance LLP) appeared for the Pfizer Appellants.

Mr Mark Hoskins QC, Mr Hugo Leith and Ms Jennifer MacLeod (instructed by CMA Litigation Unit) appeared for the CMA.

Ms Sarah Love (instructed by Morgan, Lewis & Bockius UK LLP) appeared for the proposed Intervener, Concordia International Rx (UK) Limited.

Ms Jemima Stratford QC (instructed by Stevens & Bolton LLP) appeared for the proposed Intervener, the British Generic Manufacturers Association.

Introduction

1. On 7 December 2016, the Competition and Markets Authority (the "CMA") issued a decision entitled "*Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK"* addressed to Pfizer Limited and Pfizer Inc. (together, "Pfizer"), and Flynn Pharma Limited and Flynn Pharma (Holdings) Limited (together, "Flynn") (the "Decision"). In the Decision the CMA found that: (i) Pfizer's supply prices to Flynn; and (ii) Flynn's selling prices, for the prescription medicine phenytoin sodium, supplied in capsule form, were unfairly high in breach of the Chapter II prohibition of the Competition Act 1998 (the "1998 Act") and Article 102 of the Treaty on the Functioning of the European Union. Phenytoin sodium is a prescription drug primarily used to treat epilepsy.

2. Further background on the Decision is set out in my judgment of 19 January 2017 ([2017] CAT 1) refusing an application by Flynn by which it sought interim relief in the form of a suspension of the directions given by the CMA at Annex B of the Decision. For present purposes, it suffices to record that each of Pfizer and Flynn have since appealed the Decision pursuant to section 46 of the 1998 Act (the "Appeals"). On 8 March 2017 a case management conference ("CMC") took place in relation to the Appeals, at which various case management directions were made, and various intervention applications dealt with.

3. Pfizer and Flynn each applied for permission to intervene in the Appeal of the other, pursuant to Rule 16 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "Tribunal Rules"). Although the CMA had indicated in inter-party correspondence prior to the CMC that it had not consented to Pfizer's application to intervene in Flynn's Appeal, it was confirmed at the CMC that the CMA was not pursuing any objection to Pfizer's intervention. Accordingly, I granted permission to each of Pfizer and Flynn to intervene in the Appeal of the other.

4. Further, and separate, applications for permission to intervene in the Appeals were made by two third parties: (i) Concordia International Rx (UK) Limited ("Concordia"), whose application was filed on 3 March 2017 (the "Concordia Application"); and (ii) the British Generic Manufacturers Association (the "BGMA"), whose application was filed on 6 March 2017 (the "BGMA Application") (together, the "Applications"). There were written and oral submissions from Ms Love on behalf of Concordia, and oral submissions from Ms Stratford on behalf of the BGMA. As neither counsel had had sight of the Decision, their arguments were based on the publicly available information relating to the Appeals. Pfizer (for whom Mr Brealey QC appeared) and Flynn had no objections to the Applications and Ms Bacon QC for Flynn displayed at least a degree of support for them, submitting that they might be positively helpful. The Applications were opposed by the CMA, for whom Mr Hoskins QC appeared.

5. Having heard the parties, the Applications were refused by me at the CMC, and this ruling sets out the reasons for refusing the Applications.

The Tribunal Rules

6. Rule 16 of the Tribunal Rules provides for intervention in the following terms:

> "(1) Any person with sufficient interest in the outcome may make a request to the Tribunal for permission to intervene in the proceedings.
>
> […]
>
> (6) If the Tribunal is satisfied, having taken into account the observations of the parties, that the intervening party has a sufficient interest, it may permit the intervention on such terms and conditions as it thinks fit."

7. Thus, in order to be granted permission to intervene, an applicant must show a "sufficient interest in the outcome" of the proceedings. As stated by Mr Hoskins in his submissions for the CMA, this has been described as the "threshold question" which must be satisfied before the Tribunal may exercise its discretion to permit an intervention (see *Barclays Bank Plc v The Competition Commission* [2009] CAT 15).

The Concordia Application

8. As set out in its application, Concordia is a pharmaceuticals company based in the UK, some of whose products are the subject of ongoing investigations being pursued by the CMA in the pharmaceuticals sector, including in relation to suspected excessive pricing. As such, Concordia is a party to an investigation concerning the same form of alleged competition law infringement, in the same industry, as the Appeals. On this basis, and on the basis that the Appeals raise issues that are of far-reaching importance to generic pharmaceutical producers in the UK and have the potential to affect its business significantly, Concordia asserted that it had a sufficient interest in the outcome of the Appeals and that its intervention was essential to preserve its procedural right to be heard on matters that are of direct and substantial concern to it. In her very clear oral submissions, Ms Love pointed to fundamental issues being raised in the Appeals, including in relation to the approach to the calculation of a benchmark rate of return for individual generic pharmaceutical products (as addressed in Ground 5 of Flynn's Notice of Appeal and Ground 3 of Pfizer's Notice of Appeal). The determination of these issues by the Tribunal would, in her submission, have an immediate and direct impact on Concordia's business. She relied on the judgment of this Tribunal in *BetterCare Group Limited v The Director General of Fair Trading* [2001] CAT 6 in support of her case that Concordia should be granted permission to intervene in the Appeals.

9. The CMA objected to the Concordia Application on the basis that Concordia did not have a sufficient interest in the outcome of the Appeals (relying in this regard on the Order of the Court of First Instance (now the General Court) in Case T-15/02 *BASF v Commission* [2003] ECR II-215 and this Tribunal's decision in *Verizon UK Limited and Vodafone Limited v Office of Communications* [2013] CAT 15). Concordia's interest was at best indirect, insofar as it was not an interest in the outcome of the Appeals themselves, but the potential "knock-on" effects of the outcome of the Appeals (see *Verizon* at para 8). In his oral submissions, Mr Hoskins stated that whilst the Appeals were a matter of general interest to the industry, this was not specific to

Concordia. Nor did the fact of an ongoing CMA investigation establish a sufficient interest. If the Tribunal was against the CMA on the sufficient interest point, Mr Hoskins' further submission was that the Tribunal should not exercise its discretion to permit the Concordia Application, as this would not be "consistent with the just, expeditious and economical conduct of proceedings" (see in this regard *British Sky Broadcasting Limited v Office of Communications* [2012] CAT 18 at para 5).

10. As an alternative fallback submission, Mr Hoskins suggested that if the Tribunal was not persuaded to refuse the Concordia Application outright, a decision on permission to intervene could be deferred until the second CMC with a non-confidential version of the Decision provided to Concordia in advance of that, so that it could make further submissions in relation to its application at the second CMC.

The BGMA Application

11. As set out in its application, the BGMA is a trade association representing the interests of UK based manufacturers and suppliers of generics and biosimilar medicines. It has 31 members, ranging from SMEs to global suppliers. In her oral submissions for the BGMA, Ms Stratford made the point, in common with Ms Love, that the Appeals raise issues of profound importance to the generic pharmaceutical industry. She contended, in summary, that the BGMA had a sufficient interest in the outcome of the Appeals because the outcome would have a direct impact on the BGMA and its members, whose broader views it wished to represent and that the BGMA was uniquely placed to provide relevant evidence to the Tribunal about the way in which pharmaceutical prices are arrived at across the generic medicines industry. Notably, the BGMA did not intend to support the position of any party to the Appeals, at this stage at least. In support of the BGMA Application, Ms Bacon for Flynn considered that the BGMA would be in a position to give an industry-wide view in relation to a distinct point of principle regarding the industry standard for returns on pharmaceutical products, including in relation to the Department of Health's Scheme M framework. She acknowledged that

the BGMA did not cover the entire industry but submitted that the fact that Flynn itself is not a member of the BGMA was a factor in support of BGMA's intervention. Neither counsel was attracted by Mr Hoskins' alternative fallback submission (to the extent that it also applied to the BGMA Application), were the Tribunal minded to take that course. As to the consequence for the Concordia Application of BGMA's submissions, Ms Stratford sensibly accepted, in response to the Tribunal's question, that the case for permitting Concordia to intervene on the basis of the more general ground advanced by it was likely to be weakened if the BGMA were given permission to intervene.

12. The CMA also objected to the BGMA's application. Mr Hoskins pointed to the BGMA's stated position that it did not intend to support any party to the Appeals and contended that before making an application to intervene, a representative body should have a clear mandate from its members as to the position it is actually adopting. He referred to a BGMA press release which was published shortly after the Decision was issued and in which the Director General of the BGMA was quoted as apparently being critical of Pfizer and generic companies that had engaged in similar activity. In contrast, Concordia, itself a member of the BGMA, had indicated an intention to support Pfizer and Flynn. Mr Hoskins submitted that the BGMA had not thought its position through, and that there would be increased complexity in the proceedings as well as confidentiality issues between its members and vis-à-vis Flynn were the BGMA granted permission to intervene.

Reasons for refusing the Concordia Application and the BGMA Application

13. My reasons for refusing the Concordia Application and the BGMA Application are as follows.

14. I have considered very carefully the authorities relied on by counsel for the respective parties. On the question of establishing a sufficient interest, the *BASF* case referred to by Mr Hoskins, whilst important by way of background, is of limited value here as it applies a different rule. The Tribunal's own

decisions are more directly relevant but at best they provide examples of cases where a sufficient interest was established (as in *Bettercare*, relied on by Ms Love) or was not (as in *Verizon*, relied on by Mr Hoskins). They provide a useful framework for assessing the Applications but are not in themselves decisive. The same can be said for how the Tribunal's discretion should be exercised in relation to the Applications.

15. In the case of the Concordia Application, I find that Concordia has not established a sufficient interest in the outcome of the Appeals. As a party to a similar ongoing investigation by the CMA in the same industry, it is clear that the Appeals are of interest to Concordia but I accept Mr Hoskins' submissions that the nature of the interest is at best an indirect one. Although Ms Love said that Concordia's intervention would focus on Grounds 3 to 5 of Flynn's Notices of Appeal, which she said contained matters of principle equally applicable to Concordia, this could just as well be said of any generic pharmaceutical company under investigation by the CMA for alleged pricing infringements and cannot in itself create a sufficient interest for the purposes of Rule 16. Concordia is already in the position where it can preserve its procedural rights by putting its case to the CMA during the ongoing investigation. If the CMA investigation involving Concordia proceeds to an adverse finding, and if Concordia decides to bring an appeal against any such finding to this Tribunal, then there will be another opportunity for its case to be heard on the merits at that point. It is not necessary for it to be permitted to intervene in the present Appeals for its rights to be protected.

16. Insofar as Concordia advanced a more general ground for intervening, namely that the Appeals raise issues of profound importance for generic pharmaceutical producers in general as well as having the potential to affect Concordia's business significantly, this does not, in my view, establish a sufficient interest in relation to Concordia but would, if anything, tend to support the BGMA's case for intervention, as accepted by Ms Stratford.

17. As Concordia has not established a sufficient interest in the outcome of the Appeals, the question of the Tribunal exercising its discretion to permit the

intervention does not arise. I merely note that it was not clear to me that Concordia would have been able to add anything significant to the proceedings over and above that which can already be submitted by the Appellants. Ms Love mentioned a potential witness on behalf of Concordia who was also a former Chairman of the BGMA and had been involved in the negotiations with the Department of Health in relation to Scheme M. As I understand it, that individual, a Mr Beighton, has already provided a witness statement in the Flynn Appeal.

18. Turning to the BGMA Application, the BGMA's position as an industry-wide association would potentially enable it to provide assistance to the Tribunal about the way in which pharmaceutical prices are arrived at across the generic medicines industry, and I take Flynn's views in this regard into account. The BGMA's case for establishing a sufficient interest is, in my view, stronger than that of Concordia insofar as the BGMA also seeks to make submissions in the Appeals on matters of industry principle.

19. However, the fact that the Decision contains findings on costs and relevant rates of return for Pfizer and Flynn is not, in my view, enough to create a sufficient interest in the outcome for a group of other "competing" generic companies. I am not convinced that the fundamental issues that are said by Ms Stratford to be raised by the Decision can easily be divorced from the particular facts and circumstances of the present cases. However, I leave open the question of whether the BGMA can establish a sufficient interest in the outcome of the Appeals as, even if I were so to decide, I do not consider that the circumstances support the exercise of the Tribunal's discretion to permit the intervention.

20. This is for the following reasons:-

    (1) I have emphasised in my judgment on the interim relief application the need for expedition in the Appeals, particularly in circumstances where Flynn was denied the interim relief it sought. I have no doubt that an

intervention by the BGMA would be inconsistent with the just, expeditious and economical conduct of proceedings.

(i) The BGMA did not itself appear to have come to a firm view on what its intervention would consist of. The position taken in the press release issued by its Director General is in contrast to the neutral position currently being advocated by the BGMA and suggests a measure of confusion as to its position. Nor does the possibility of the BGMA deciding at a later stage that it wished to support a particular party in the proceedings seem to me to be desirable. The risk of duplicative evidence or submissions appears to me to be a high one.

(ii) It is not clear to me how the BGMA is constituted or how its decision-making process operates. I am not satisfied that the BGMA is in a position efficiently to assimilate the views of 31 members without causing any disruption to the timetable for the substantive hearing. For example, the confidentiality issues between its members, and between the BGMA and Flynn, are likely to be significant and whilst this was said by Ms Stratford to be an internal problem for the BGMA itself, it was not clear to me that the practical implications had been considered.

(2) In any event, Mr Brealey pointed to paragraph 2.47 of the Decision which lists the third parties from which the CMA had requested information and includes at least two BGMA members. Whilst he suggested that this tended to support BGMA's intervention request, I am inclined to agree with Mr Hoskins that this could equally well suggest that sufficient information is already available in the proceedings. The Appellants are likely to be well-placed to make all relevant submissions.

21. In view of my decision to refuse both Applications to intervene, I do not need to consider the alternative proposal put forward by Mr Hoskins.

22. I accordingly decide that both the Applications to intervene are refused.

Peter Freeman C.B.E., Q.C. *(Hon)*
Chairman

Charles Dhanowa O.B.E., Q.C. (*Hon*) Date: 9 March 2017
Registrar