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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1275/1/12/17
1276/1/12/17

Victoria House,
Bloomsbury Place,
London WC1A 2EB

9th November 2017

Before:

PETER FREEMAN CBE QC (Hon)
(Chairman)
PAUL LOMAS
PROFESSOR MICHAEL WATERSON

(Sitting as a Tribunal in England and Wales)

BETWEEN:

FLYNN PHARMA LTD AND FLYNN PHARMA (HOLDINGS) LTD Appellant

- and -

COMPETITION AND MARKETS AUTHORITY Respondent

- and -

PFIZER INC. AND PFIZER LIMITED Appellant

- and -

COMPETITION AND MARKETS AUTHORITY Respondent

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HEARING – Day 7 - Redacted

A P P E A R A N C E S

Kelyn Bacon QC, Ronit Kreisberger and Tom Pascoe (instructed by Macfarlanes LLP)

Mark Brealey QC, Robert O'Donoghue QC and Tim Johnston (instructed by Clifford Chance LLP)

Mark Hoskins QC, David Bailey, Hugo Leith and Jennifer MacLeod (instructed by CMA)

Thursday, 9 November 2017

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(10.30 am)

THE CHAIRMAN: Good morning.

MR HOSKINS: Good morning, sir. Before Mr de Coninck is called, I am going to take him to quite a few figures that are all in the evidence and I thought it would be -- the easy way to do it rather than trawling through spreadsheets while he is in the box, was to produce a cribsheet, which tells you where the particular figures I am going to put to him come from. I have given that to Ms Bacon and if there is any problem, they can shout after the event. It's just to save time whilst Mr de Coninck is in the box.

THE CHAIRMAN: Mr de Coninck is giving evidence about Flynn?

MR HOSKINS: Yes.

THE CHAIRMAN: How are we on confidentiality?

MR HOSKINS: We are going to do about the first third open and then we will have to go closed because I will be referring to figures.

MS BACON: I do not have an objection to this in principle, my only concern is that one can extract any number of figures from a spreadsheet and just looking at individual figures in isolation might not give one a full picture if there are other figures in the spreadsheet that also need to be looked at. I would

1 just suggest that if Mr de Coninck needs to or thinks it
2 appropriate, we could go to the original spreadsheet.

3 THE CHAIRMAN: Yes. Yes.

4 MS BACON: Other than that, I obviously have no objection.

5 THE CHAIRMAN: Mr de Coninck must give the evidence that he
6 feels he needs he has to give. This is, as I understand
7 it, an aid as much to us as anybody else.

8 MR HOSKINS: And to Flynn's team so they are not searching
9 around trying to find where the figures come from. It
10 is intended to help.

11 THE CHAIRMAN: I am sure they would rather search around and
12 get the right answer than not search around. Okay. So
13 we begin in open court.

14 MS BACON: Sir, so I call Mr de Coninck.

15 MR RAPHAEL DE CONINCK (affirmed)

16 Examination-in-chief by MS BACON

17 THE CHAIRMAN: Welcome to the tribunal, Mr de Coninck.

18 A. Thank you.

19 THE CHAIRMAN: Sit down, make yourself comfortable. Your
20 counsel will put some questions to you and then,
21 I suspect, Mr Hoskins.

22 MS BACON: Yes. Mr de Coninck, could you look at bundle D,
23 please, and could you turn up tab 1. Is that your first
24 report?

25 A. Yes, that is right.

- 1 Q. And could you go to tab 2. Is that your second report?
- 2 A. Yes, that is right.
- 3 Q. Can you look at page 2 of that tab? Is that your
- 4 signature?
- 5 A. Yes, it is.
- 6 Q. Can you go to tab 3. Is that your third report?
- 7 A. Yes.
- 8 Q. And again can you look at page (iii).
- 9 A. Yes.
- 10 Q. Is that your signature?
- 11 A. Yes, it is.
- 12 Q. Could you go to tab 4. Is that your fourth report?
- 13 A. Yes.
- 14 Q. Could you go to page (iii) again. Is that your
- 15 signature?
- 16 A. Yes, it is.
- 17 Q. One more. Could you take bundle N and could you turn up
- 18 tab 10. The first couple of pages of that tab are
- 19 a letter to the tribunal. Can you go to the third page
- 20 of the tab and onwards and you will see a set of bar
- 21 charts. Can you confirm that those are prepared by you?
- 22 A. Yes and my team.
- 23 Q. And can you confirm that the content of your reports, as
- 24 well as these bar charts that you have submitted to the
- 25 tribunal, represent your true and complete professional

1 opinions on the matters to which they refer?

2 A. Yes, I do.

3 Q. Thank you. Mr Hoskins will have some questions for you.

4 Cross-examination by MR HOSKINS

5 MR HOSKINS: Were you in the tribunal when Ms Bacon was

6 making her opening submissions to the tribunal?

7 A. No.

8 Q. Have you read the transcript of those opening

9 submissions?

10 A. I have, yes.

11 Q. You have. So you may remember that Ms Bacon

12 submitted -- she said:

13 "In our event, our submission -- and I think the CMA

14 also says this at various points in its skeleton ..."

15 So Flynn's submission:

16 "... is that a more accurate view is gained from
17 looking at the evolution of the market over the entire
18 period so trend lines is more instructive than looking
19 at individual peaks or troughs."

20 I should have said she is talking obviously about
21 defining the relevant product market. So Flynn's
22 submission from its counsel was a more accurate view is
23 gained from looking at the evolution of the market over
24 the entire period so trend lines are more instructive
25 than looking at individual peaks or troughs. Do you

1 agree with what Ms Bacon said about more accurate
2 approach?

3 A. So I think that if you are referring to data on shares,
4 when we look at it on a monthly basis, we do see a lot
5 of variation. So I think that indeed one should not
6 focus on specific points where you have a spike or
7 a decrease because there is a lot of volatility from one
8 month to another and in that sense I do think it makes
9 more sense to look at what happens over time rather than
10 consider a specific point in time.

11 Q. Are you restricting that point to volumes or is that for
12 volumes and prices?

13 A. So I was making the point here with respect to shares
14 but the point with respect to prices is also correct,
15 that one should not look at price only at one point in
16 time but rather think about the evolution of price over
17 a longer period.

18 Q. You are obviously aware that the duration of the
19 infringement we are dealing with here is from 24
20 September 2012 until December 2016?

21 A. Yes.

22 Q. Can I go to your third report. That is bundle D, tab 3,
23 at paragraph 9. I will pick it up at the bottom of
24 page 2. So paragraph 9 begins:

25 "We disagree ..."

1 But I will pick it up with:

2 "On the contrary, we consider that the observed
3 price movements provide compelling evidence that at
4 least in respect of certain strengths of Phenytoin,
5 NRIM's capsules constrained Flynn's prices."

6 Then you go on to say:

7 "In particular, the graph below clearly shows a
8 material price response by Flynn in April 2014 in
9 respect of its 100 milligrammes but also 300
10 milligrammes capsules to the price reduction introduced
11 by NRIM."

12 Moving on a little bit to the penultimate sentence:

13 "This evidence strongly suggests that Flynn
14 considered NRIM to be a competitive threat not only in
15 respect of its 100 milligramme capsules but also its 300
16 milligramme capsules."

17 Your report does not consider any factual evidence
18 as to why Flynn reduced its prices in 2014, does it?

19 A. That is correct.

20 Q. So in your analysis you are assuming that Flynn drops
21 its prices in April 2014 as a competitive response to
22 NRIM?

23 A. So here I think the point is made very much in relation
24 to a point that was raised by the CMA that looking at
25 price -- differences in price level as such is

1 informative about whether two products should be in the
2 same market and the point that was made here was that
3 one should not look at just a difference in price level
4 but one should think about the competitive pressure and
5 what is the price evolution that is seen following
6 entry of a generic. So how has Flynn responded to
7 potential entry by NRIM rather than just focusing on
8 a price difference.

9 Q. I think the answer to my question from what you've just
10 said is yes because you accepted that you had not looked
11 at any factual evidence as to why Flynn reduced its
12 prices in 2014 and the question I asked was: does that
13 then follow that you are assuming that Flynn drops its
14 price in April 2014 as a competitive response to NRIM?

15 A. So what I am doing is looking at the data, looking at
16 what the evolution of the data is. What I do see there
17 is that you have entry by NRIM, that you have
18 a reduction in price by Flynn following this entry by
19 NRIM. If the question is have I considered every
20 potential possibility of why there may be a decrease in
21 price by NRIM. The answer is no. What I am doing here
22 is just describing the data, seeing what happens to the
23 price of Flynn following NRIM's entry.

24 Q. In your analysis here you specifically mention the price
25 reduction by Flynn in April 2014. But you do not appear

1 to take any account, at least on the face of the report,
2 of the dramatic increase in the selling prices of
3 Phenytoin sodium capsules that took place on
4 24 September 2012, do you?

5 A. That is not the question I am addressing here. I am
6 just answering the question about whether one should
7 define different market when there is a difference in
8 price with time and I conclude that that is not the
9 right approach.

10 Q. So you do not take account of the dramatic price
11 increase that took place on 24 September 2012?

12 A. That is not the question I am addressing.

13 Q. So you do not take account?

14 A. I am not looking at this question because that is not
15 the question I am addressing here.

16 Q. And you do not take account of the guidance published by
17 the MHRA in November 2013. We do not see a reference to
18 that, do we?

19 A. So the question that is -- of course I am aware of this
20 guidance and this is something that we think about, of
21 course, when looking at evolutions of the -- of the
22 volumes and maybe we will come back to that later. But
23 here what we are looking at is really what is the evolution
24 of prices, as in pure descriptive analysis.

25 Q. You do not take account of the fact that Flynn's price

1 reduction in April 2014 came 12 months after NRIIM had
2 entered the market, do you?

3 A. I do not think it is a question of taking into account
4 or not taking into account. I am just describing the
5 data and showing the evolution of prices and of course
6 there are a number of facts that happened through the
7 periods.

8 Q. (inaudible) basing your analysis of the relevant product
9 market on one event, which is the price reduction
10 in April 2014. Looking at that, to define a market over
11 a four-year period simply is not robust, is it? This is
12 an afterthought. It came in your fourth report --
13 sorry, your third report. This is just an afterthought,
14 is it not? It is not a robust analysis?

15 A. Okay, so I think we should repute this in context so that
16 the court understands this, that the point I am making
17 here is obviously not the focus of my analysis but it is
18 a response to an argument that is made by the CMA and
19 that, I think, is flawed, and I show this here. In
20 a very simple way, not -- you know, this is a very short
21 section of a report, just to address a particular point
22 and this is not the main analysis that has been
23 conducted (inaudible).

24 Q. Does it follow from that you accept this is not
25 a sufficient basis upon which to draw a conclusion about

1 product market. It is not an attempt to produce
2 a complete analysis, is it?

3 A. It is a response to a flawed argument in the CMA. And
4 it is useful evidence in this respect for a definition
5 of a market that I think should be taken into account.

6 Q. But you have not attempted a complete analysis of market
7 definition, have you?

8 A. Well, you know, market definition can be a very --
9 a very complex exercise but I think this is relevant
10 information that informs market definition.

11 Q. But is it complete in your view to lead to a robust
12 decision. If this was the only evidence that was before
13 the tribunal, would it be sufficient to draw
14 a conclusion on market?

15 A. I think that is the -- I would say that is the best
16 evidence that I have seen in this case.

17 Q. Move on to another topic. Can you be given the
18 decision, please.

19 THE CHAIRMAN: Just before we move on, while we are on this
20 topic --

21 MR HOSKINS: I am going to come back to market definition in
22 closed -- there is some closed material I need to take
23 you to --

24 THE CHAIRMAN: You are going to come back to it? And NRIM
25 and Flynn's price -- comparative price behaviour?

1 MR HOSKINS: I am going to come back to that but we need to
2 do that in closed.

3 THE CHAIRMAN: Then I will not interrupt your flow.

4 MR HOSKINS: If we could turn to paragraph 5.210, please.

5 You see from paragraph 5.210 the decision finds that --
6 what it finds is that a rate of return actually well
7 below 6 per cent return on sales would be appropriate
8 for Flynn's capsules. Do you see that? Yes?

9 A. Where are you?

10 Q. Paragraph 5.210 on page 340. Would you like to re-read
11 that?

12 A. Ah, yes. (Pause)

13 Q. While you are reading that, if you could also read
14 5.212; at the bottom of page 340. Sorry, you have got
15 different pages, have you?

16 A. I do not know, which ...?

17 Q. I have just asked you to read 5.210, which is under the
18 heading "Conclusion on reasonable rate of return."

19 A. Yes.

20 Q. Do you have it? So 5.210 and if you could also read
21 5.212. (Pause)

22 You seem to be struggling a little bit.

23 A. Yes, 5.210.

24 Q. And 5.212. It is just at the bottom of the same page.

25 A. Yes, it is 340 for me. (Pause) Yes.

1 Q. So hopefully we can agree this, that first of all the
2 decision finds that a rate of return well below
3 a 6 per cent ROS would be appropriate for Flynn's
4 Phenytoin sodium capsules; yes? We see that in
5 paragraph 5.210?

6 A. Yes.

7 Q. And then in 5.212 the decision makes it clear that it is
8 not saying that a 6 per cent ROS would be suitable for
9 all generic medicines or even for Flynn's products other
10 than Phenytoin. Do you agree with that? Do you see
11 that in the decision?

12 A. Mm-hm.

13 Q. You need to say yes, sorry.

14 A. Yes.

15 THE CHAIRMAN: Sorry, are you agreeing with the conclusion
16 or are you agreeing that is what the decision says?

17 A. No, that's what the decision says.

18 THE CHAIRMAN: Keep that distinction in mind.

19 MR HOSKINS: That was the basis of my question: does the
20 decision -- do you see what the decision says --

21 THE CHAIRMAN: Can Mr de Coninck read, was the question.

22 MR HOSKINS: Absolutely. I wanted to set the scene.

23 We have heard a lot of evidence in the last few days
24 about the different factors that may affect the ROS of
25 pharmaceutical products. Let me give you one example.

1 If you stay in bundle D, where your reports are, and go
2 to tab 11, this is the first report of Mr Williams, who
3 was also an expert witness for Flynn. Have you read
4 this before?

5 A. Yes.

6 Q. And if we could turn through to page 8.

7 A. Mm-hm.

8 Q. You will see the heading, "Rates of return". Then you
9 might want to refresh your memory just by looking at
10 32(a) and 32(b).

11 A. Mm-hm.

12 Q. So Mr Williams identifies quite a large number of
13 factors that might affect the ROS of pharmaceutical
14 products. Do you agree that when you were seeking to
15 determine a reasonable return on sales, as we are in
16 this case, it is appropriate to consider the
17 characteristics and circumstances of a particular drug?

18 A. So, I would first mention to you that the question of
19 what is a reasonable rate of return is a difficult one
20 but also one that introduces a lot of confusion in the
21 analysis, which is what I have tried to mention in the
22 report because the way it has been used by the CMA is,
23 of course, very different from thinking about what is
24 excessive and the use and the contribution of thinking
25 about what is the reasonable rate of return is quite

1 limited, especially if it is based on some arbitrary
2 threshold and not based on comparators. So I think that
3 it does -- of course, if one wants to consider what is
4 reasonable, one has to look at other comparators, what
5 other products rate of returns are and when one does that,
6 one may, of course, want to consider the specific
7 characteristics of the products.

8 Q. Mr de Coninck, I do not want to stop you saying what you
9 want to say but it is really important that you answer
10 the question and then if you want to add to it, you add
11 to it. So if I ask you a question, please focus on what
12 I am asking you, answer it, preferably if you can with
13 yes or no, and then you can say whatever you want --

14 A. Can you repeat.

15 Q. I will, absolutely.

16 THE CHAIRMAN: I do not think there should be any pressure
17 on Mr de Coninck to answer yes or no. If he wants to
18 answer your question with a longer statement, he is
19 entirely free to do so provided he answers it.

20 MR HOSKINS: I am perfectly happy with that. I think --
21 I will not say anything. You are right.

22 THE CHAIRMAN: I think we are on the same page, Mr Hoskins.

23 MR HOSKINS: Absolutely, we are. Do you agree that when you
24 are seeking to determine a reasonable ROS, it is
25 appropriate to consider the characteristics and

1 circumstances of a particular drug?

2 A. So the answer is yes, if one considers returns on sales
3 one has to -- that is reasonable but again one has to be
4 careful about what we mean by that but one has to look
5 at comparator products and comparator products to the
6 extent that they can be found should be as close as
7 possible in terms of characteristics.

8 Q. And in your reports you conduct a number of
9 profitability analyses of the products in Flynn's
10 portfolio in order to show that the profitability of
11 Phenytoin is not out of step with the profitability of
12 other -- Flynn's other products. That is what you do in
13 your report, is it not?

14 A. That is right.

15 Q. Can we look in your second report. That is bundle D,
16 tab 2. Could you turn to page 18 and the figures in
17 this table are confidential so we must not say them out
18 loud at the moment because we are still in open court.
19 Do you understand?

20 A. Yes, I do.

21 Q. This is one of your updated analyses and your pool of
22 comparators, ie Flynn's products, is between 12 and 14
23 products in total, depending on the year and that is
24 including Phenytoin. That is correct, is it not?

25 A. That is correct.

1 Q. Do you agree that is not a very large pool for
2 comparison?

3 A. No, I do not. I think that this is a reasonable pool
4 for comparison. I think there is always -- there is
5 always a trade-off. You can have -- you can have
6 a larger pool with very, you know, different products or
7 you can have a smaller pool, which is here the ones that
8 are in Flynn's portfolio, so in that respect, you know,
9 it is all of the products in Flynn's portfolio
10 I consider that to be, you know, an appropriate pool and
11 I would not be concerned that this is a particularly
12 small pool or a pool that would prevent from reaching
13 a conclusion on the analysis.

14 Q. Are you familiar with the expression quality not
15 quantity?

16 A. Yes.

17 Q. Are you saying that even though this is on its face
18 a relatively small pool, if the quality of the
19 comparisons that it provides are good enough, then that
20 is sufficient? Is that a fair way of summarising what
21 you are saying?

22 A. First, I did not say it was a particularly small pool
23 but I think that, given that they are in -- the other
24 products in Flynn's portfolio, they are an appropriate
25 pool for comparison.

1 Q. Let us go to tab 3 in your third report, paragraph 50,
2 on page 14. You say:

3 "In response to these criticisms we note that from
4 a practical perspective one has to accept that it is
5 very difficult to find companies whose product portfolio
6 exactly resembles Flynn's Phenytoin or any other
7 individual product for that matter."

8 Can you just explain why it is very difficult to do
9 that?

10 A. Well, first one has to have access to data and clearly
11 when one works for a -- as an economist for a company,
12 one can have access to the data that is available to
13 that company, which is the easiest way to think about
14 those questions, so the data that we have access to was
15 this data from Flynn.

16 Q. That is not the point you are actually making here, is
17 it, because you have to say it is very difficult to find
18 companies whose product portfolio exactly resembles
19 Flynn's Phenytoin or any other individual products. You
20 are not making a point about access to data. You are
21 making a point, which we have already touched on, which
22 is that generic companies have very varied portfolios.
23 It is hard to find two that are similar. That is the
24 point you are making here, is it not?

25 A. If you want to have an exact portfolio, of course, you

1 are never going to get the exact same portfolio.

2 Q. And your reports do not contain any analyses of other
3 companies' portfolios. You have not attempted that,
4 have you?

5 A. No, I have not.

6 Q. Your analysis of the products in Flynn's portfolio does
7 not look at the degree of competition faced by each of
8 those products, does it?

9 A. No, it does not.

10 Q. And it does not consider the extent to which any of
11 those drugs might be considered innovative or at the end
12 of their life, does it?

13 A. It does not.

14 Q. Your analysis does not assess which pricing regime each
15 of Flynn's products is subject to?

16 A. No, it does not.

17 Q. Do you know if any of the drugs in Flynn's portfolio
18 are protected by patent?

19 A. I suppose they are not but I have not conducted that
20 analysis.

21 Q. And you are obviously aware that Phenytoin is subject to
22 continuity of supply, are you not?

23 A. Yes, I am.

24 Q. You have not in your reports analysed the prescribing
25 regime applicable to each of Flynn's products, have you?

1 A. No, I have not.

2 Q. Sir, we are at the stage where we need to go into
3 private so I can refer to confidential materials.

4 THE CHAIRMAN: Right. Can those outside the confidentiality
5 ring other than Flynn, please leave.

6 (10.55 am)

7 (In private)

8 (12.01 pm)

9 (In further private session, confidentiality ring only)

10 (12.38 pm)

11 (The court adjourned until 10.30 am on Monday,

12 12 November 2017)

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