



IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1419/1/12/21
1421/1/12/21
1422/1/12/21

BETWEEN:

HG CAPITAL LLP

(The Hg Appellant)

CINVEN (LUXCO 1) SARL & OTHERS

(The Cinven Appellants)

MERCURY PHARMACEUTICALS LIMITED & OTHERS

(The Advanz Pharma Appellants)

Appellants

– v –

COMPETITION AND MARKETS AUTHORITY

Respondent

REASONED ORDER

UPON the Tribunal handing down judgment in these proceedings on 8 August 2023 ([2023] CAT 52)

AND UPON the Tribunal reading the Appellants' respective applications for permission to appeal dated 25 September 2023 and the CMA's submissions in response to the Appellants' applications for permission to appeal dated 5 October 2023

AND UPON the Hg Appellant subsequently withdrawing its application for permission to appeal

AND UPON the Tribunal determining that the Cinven Appellants and the Advanz Pharma Appellants had identified no appealable error of law in the Tribunal’s judgment in [2023] CAT 52 and no other reason to grant permission to appeal

AND HAVING REGARD TO the power of the Tribunal under Rule 107 of the Competition Appeal Tribunal Rules 2015 (‘Tribunal Rules 2015’)

IT IS ORDERED THAT:

1. The Appellants’ grounds of appeal on liability are dismissed.
2. The Advanz Pharma Appellants’ appeal against penalty is dismissed.
3. The Hg Appellant and Cinven Appellants’ appeals against penalty are allowed to the extent that the Tribunal substitutes the following penalties:
 - a. On Cinven: £37.1 million.
 - b. On Hg: £6.2 million.
4. The application of the Cinven Appellants and the Advanz Pharma Appellants for permission to appeal is refused for the reasons set out below.

REASONS

1. Under section 49 of the Competition Act 1998, an appeal lies to the Court of Appeal either as to a point of law or as to the amount of a penalty. In deciding whether to grant permission to appeal, the Tribunal’s practice is to apply the test in CPR 52.6(1), namely that permission may only be granted where: (a) the Tribunal considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason for the appeal to be heard.

The Cinven Appellants’ application

2. The main thrust of the Cinven Appellants’ application is that Tribunal erred in its application of the concept of workable competition. The assessment of what is workable competition is essentially a matter of fact and expert assessment, not a question of law. The Tribunal does not consider that the Cinven Appellants have identified any point of law in relation to which an appeal would have a real prospect of success or any other compelling reason why an appeal should be heard. The Tribunal does not consider that there is any inconsistency between its judgment and the judgment of the Tribunal in *Hydrocortisone (Abuse)* [2023] CAT 56.

The Advanz Pharma Appellants' application

3. The Advanz Pharma Appellants' proposed appeal against the Tribunal's conclusion that entry-incentivising prices were not a useful comparator (Ground 1), a conclusion based on the exceptionally high barriers to entry in the market in question and the fact that entry-incentivising prices depend on the subjective intentions and circumstances of third parties, does not raise any point of law which would have a real prospect of success and or any other compelling reason why an appeal should be heard.
4. The Advanz Pharma Appellants' proposed appeal against the Tribunal's findings as to countervailing buyer power (Ground 2) challenges the Tribunal's assessment of the evidence but does not identify any point of law in relation to which an appeal would have any real prospect of success or raise any other compelling reason why an appeal should be heard.
5. The Advanz Pharma Appellants' proposed appeal against the Tribunal's rejection of the principle of acquiescence (Ground 3) does not identify any point of law in relation to which an appeal would have any real prospect of success or raise any other compelling reason why an appeal should be heard.
6. The Tribunal's rejection of arguments concerning portfolio pricing against which the Advanz Pharma Appellants seeks to appeal (Ground 4) was based on its finding of fact that there was no evidence that Advanz was actually setting the price of Liothyronine on a portfolio basis and did not turn on any issue of law in relation to which an appeal would have any real prospect of success or any other compelling reason why an appeal should be heard.
7. The Advanz Pharma Appellants' proposed appeal regarding the penalty would seek to persuade the Court of Appeal to disagree with the Tribunal's findings on the facts and has no real prospect of success.

Andrew Lenon K.C.
Chair

Tim Frazer

Professor Michael
Waterson

Made: 16 November 2023
Drawn: 16 November 2023