Neutral citation [2006] CAT 29

IN THE COMPETITION APPEAL TRIBUNAL
Victoria House
Bloomsbury Place
London WC1A 2EB

Case No: 1060/5/7/06

15 November 2006

Before:

Marion Simmons QC (Chairman)
Professor Andrew Bain
Graham Mather

Sitting as a Tribunal in England and Wales

BETWEEN:

HEALTHCARE AT HOME LIMITED

Claimant

-v-

GENZYME LIMITED

Defendant

Mr. Mark Brealey QC (instructed by Ashurst) appeared for the Claimant.

Mr. Christoper Vajda QC and Mr. Michael Bowsher (instructed by Manches LLP) appeared for the Defendant.

Heard at Victoria House on 4 September 2006

JUDGMENT (Interim Relief)

I INTRODUCTION

1. By decision no. CA 98/3/03 ("the Decision") taken on 27 March 2003 by the Director General of Fair Trading under section 18 of the Competition Act 1998 ("the 1998 Act"),[1] the OFT found that Genzyme Limited ("the Defendant") had a dominant position in the "upstream" market for the supply of drugs for the treatment of Gaucher disease (paragraph 286 of the decision). The OFT further found that the Defendant had abused that dominant position by, in effect, pricing its drug, Cerezyme, in a way which excludes other delivery/homecare services providers from the "downstream" market for the supply of home delivery and homecare services to Gaucher patients being treated with Cerezyme at home (paragraphs 364 to 386 of the Decision).

2. As from May 2001 Genzyme supplied Cerezyme to Healthcare at Home Limited ("the Claimant") only at the NHS list price (£2.975 per unit), which is the price it itself charges the NHS for the bundle which includes the drug and the supply of Homecare Services for Gaucher patients. The OFT concluded that this pricing practice meant that any third party delivery/homecare service provider, wishing to compete with Genzyme Homecare in supplying Cerezyme and associated homecare services to Gaucher patients, has had no margin with which to do so, thus effectively attempting to secure a monopoly in respect of Homecare Services for Gaucher patients, in favour of Genzyme Homecare. The OFT found the margin squeeze abuse to have lasted from May 2001 to 27 March 2003, the date of the OFT decision.

3. The OFT concluded at paragraph 386 of its Decision that:

> "The OFT considers that Genzyme has abused its dominant position in the upstream market by, without objective justification

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[1] On 1 April 2003 the functions of the Director General of Fair Trading ("the Director") were transferred to the Office of Fair Trading ("the OFT") pursuant to section 2(1) of the Enterprise Act 2002. Similarly, as from 1 April 2003 references to the Director in the 1998 Act are replaced by references to the OFT, pursuant to section 2(3) of the 2002 Act.

(i)…
(ii) adopting a pricing policy following the launch of Genzyme Homecare which results in a margin squeeze
With the effect of
(i) foreclosing the Homecare Services segment of the downstream market
(ii) raising barriers to entry to the upstream market."

4. The OFT made a direction requiring the Defendant to cease the prohibited conduct. That direction is as follows:

"1. Genzyme shall

1.1. within fifteen working days from the date of this Decision bring to an end the infringement referred to at paragraph 386 above;

1.2. thereafter, refrain from repeating the infringement referred to at paragraph 386 above and

1.3. with effect from the date of this Decision, refrain from adopting any measures having an equivalent effect

2. In particular, within fifteen working days from the date of this Decision

2.1. the price at which Genzyme supplies Cerezyme and Ceredase to the National Health Service shall be, in respect of each drug, a stand-alone price for the drug only that is exclusive of any Homecare Services that may be provided; and

2.2. the price at which Genzyme supplies Cerezyme and Ceredase to third parties shall be, in respect of each drug, no higher than the stand-alone price for the drug only as agreed between Genzyme and the Department of Health.

3. The term 'Homecare Services' in paragraph 2.1 means, in respect of each of Cerezyme and Ceredase, the delivery of the drug to a patient's home and the provision of homecare services (including, but not limited to, basic stock check, supply of and monitoring of the need for accessories such as fridges and syringes, waste removal, dispensing the drug, training on how to infuse the drug, infusing the drug, providing an emergency helpline, respite care and full nursing support)."

5. The Defendant appealed the Decision of the OFT to the Competition Appeal Tribunal ("the Tribunal") under section 46 of the 1998 Act. That appeal was heard between 25 September and 6 October 2003 and the judgment of the Tribunal was handed down on 11 March 2004 – see *Genzyme Limited v The Office of Fair Trading* [2004] CAT 4 ("the First Judgment").

6. The Margin Squeeze abuse is considered in paragraphs 549 to 575 of the First Judgment. The Tribunal's conclusions are set out in paragraphs 640 to 642. The Relevant passages are as follows:

> " 549. The situation which prevailed in the downstream supply of Homecare Services to Gaucher patients between May 2001 and March 2003 may be summarised thus:
>
> - Genzyme Homecare supplied Cerezyme to the NHS for the treatment of Gaucher patients at home at a price of £2.975 per unit
>
> - Genzyme Homecare supplied Cerezyme to Healthcare at Home, and was prepared to supply other homecare service providers, for the treatment of Gaucher patients at home at the same price of £2.975 per unit
>
> - The price of £2.975 per unit at which Genzyme Homecare sold Cerezyme both to the NHS and to other homecare service providers during this period included the supply of Homecare Services
>
> - Genzyme Homecare, as a division of Genzyme Limited, acquired Cerezyme from Genzyme Corporation at a transfer price of £2.50 per unit (paragraph 371 of the decision)
>
> - It follows that Genzyme Homecare was in a position to earn a margin of some £0.475 per unit on sales of Cerezyme including Homecare Services to the NHS
>
> - Healthcare at Home, having acquired Cerezyme from Genzyme Homecare at £2.975 per unit, resold Cerezyme and provided Homecare Services to the NHS at the same price of £2.975 per unit
>
> - It follows that Healthcare at Home, unlike Genzyme Homecare, was not in a position to earn any margin on the supply of Homecare Services to the NHS
>
> …

550. We also accept the OFT's view that in order to compete with Genzyme Homecare, it would be very difficult for other homecare providers to charge the NHS more than £2.975 per unit.

…

552. In our view, in those circumstances it is likely to be wholly uneconomic for Healthcare at Home to provide homecare services at no effective margin between its buying and selling price of Cerezyme. We therefore accept that Genzyme's pricing policy constitutes a margin squeeze, the effect of which is to force Healthcare at Home to sustain a loss in the provision of Homecare Services to Gaucher patients. We also accept that no undertaking, regardless of how efficient it may be, could trade profitably in these circumstances in the downstream supply of homecare services, as the OFT found at paragraphs 376 and 377 of the decision.

553. We also accept that if Genzyme's pricing policy since May 2001 continues unaltered, it is likely that Healthcare at Home will exit the market, as the OFT finds at paragraph 377 of the decision (see also paragraphs 52 and 118 above).

554. In those circumstances we share the OFT's conclusion that the effect of Genzyme's margin squeeze is to monopolise the supply of Homecare Services to Gaucher patients in favour of Genzyme, and to eliminate any competition in the supply of such services to Gaucher patients, as the OFT also found at paragraph 377 of the decision.

555. Furthermore, in our view Genzyme's pricing policy has, since May 2001, been intended to achieve the result of monopolising the supply of Homecare Services to Gaucher patients in favour of Genzyme Homecare, as the OFT found at paragraph 378 of the decision. Genzyme must have appreciated that the inevitable result of its pricing policy would be to force Healthcare at Home to exit the market and to make it virtually impossible for any other homecare services provider to provide homecare services for Gaucher patients in competition with Genzyme Homecare: see also paragraph 119 above, and the correspondence there cited.

556. Looking at the matter from the point of view of the NHS, to obtain homecare services from anyone other than Genzyme Homecare since May 2001 would have involved the NHS in paying a price above £2.975 per unit, in order to remunerate the homecare services provider in question. That in our view would be extremely difficult to justify. In any event, since Genzyme's price of £2.975 per unit already includes the cost of Homecare Services, the NHS would be, in these circumstances, be paying for Homecare Services which it was not receiving, and then paying again for a homecare services provider to supply the services already included in the price of the drug.

…

558. In the light of the foregoing it is abundantly clear to us that Genzyme's pricing policy since May 2001 has been adopted with the intention of reserving to Genzyme Homecare the supply of Homecare Services to Gaucher patients, in the expectation of eliminating all competition from Healthcare at Home and other homecare services providers in the supply of such services. Had it not been for the willingness of Healthcare at Home to remain in the market pending the determination of these proceedings, Genzyme would in our view have already succeeded in establishing Genzyme Homecare as the monopoly supplier of Homecare Services to Gaucher patients.

559. Subject to the issue of objective justification, which we consider below, such conduct seems to us to fall plainly within the concept of an abuse of the kind established by the Court of Justice at paragraph 27 of its judgment in Télémarketing, namely that

> "… an abuse within the meaning of Article [82] is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.."

560. As to the particular nature of the abuse here in question, in our view the facts that (a) Genzyme sells Cerezyme to the NHS at a list price which includes Homecare Services and (b) sells Cerezyme to other homecare providers at that same list price, give rise to an abusive margin squeeze within the principles of Napier Brown/British Sugar and National Carbonising, cited above at paragraphs 491 and 492. As already indicated (paragraph 534 above) we do not accept Genzyme's argument that those cases are distinguishable on the grounds that, in those cases, British Sugar and the National CoalBoard respectively were dominant in both the upstream and downstream markets.

…

562. We entirely reject Genzyme's argument that there is no relevant "elimination of competition" in this case because Healthcare at Home and other providers are not eliminated from the wider homecare services market. The effect of Genzyme's conduct is potentially to eliminate Healthcare at Home and other providers from the supply of Homecare Services to Gaucher patients. In our view, Gaucher patients, as consumers, although small in number, are fully entitled to the protection of the Chapter II prohibition, entirely dependent, as they are, on Cerezyme. In our opinion, Genzyme's "special responsibility" as a dominant firm extends to such patients, even though they constitute only a small sub-market within a wider homecare services market.

…

> 575. In all the circumstances we conclude that, since May 2001 Genzyme has adopted a pricing policy which results in a margin squeeze with the effect, or potential effect, of foreclosing the supply of Homecare Services to Gaucher patients. In our view, that conduct constitutes an abuse by Genzyme of its dominant position, subject to the question of objective justification now discussed in Section E.
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> …
>
> 654. We have found that Genzyme has abused its dominant position by imposing a margin squeeze abuse in the period from May 2001 to March 2003. We have not found Genzyme's practice of "bundling" the supply of Homecare Services within the list price of Cerezyme to be an abuse in and of itself, but we have found that that practice facilitated the margin squeeze abuse in the period from May 2001 onwards.
>
> 655. In accordance with the Act, the margin squeeze must now be terminated."

7. The Tribunal then went on to state that it is for the Defendant to bring the margin squeeze to an end and it went on to consider the ways in which the margin squeeze may be terminated. It stated in paragraph 668 as follows:

> " 668. First, it is in our view primarily Genzyme's responsibility, and that of its parent company, to find the means to bring the margin squeeze abuse to an end. A direction is necessary only if Genzyme is unwilling or unable to find a solution. We find it hard to accept that Genzyme, advised as it is by a distinguished team, would be unable to find a solution if it had the will to do so."

The Tribunal continued by stating:

> "679. In the above circumstances the Tribunal proposes to make no order at this stage as to the Direction, but to adjourn that issue for six weeks to allow negotiations to take place. Following those negotiations the matter will be restored before the Tribunal for argument as to whether the matter of the Direction should be remitted to the OFT or decided by the Tribunal, if no agreement is reached. We trust that an agreement can be reached."

8. The Direction was contained in a subsequent judgment of the Tribunal in *Genzyme Limited v The Office of Fair Trading* [2005] CAT 32 ("Judgment: Remedy").

9. Although the Claimant took no part in the proceedings leading up to the First Judgment, it was granted permission to intervene on 15 September 2004 in the

adjourned hearing and made submissions to the Tribunal as recorded in the Judgment: Remedy.

10. The Judgment: Remedy was handed down on 29 September 2005. The delay between 11 March 2004 and 29 September 2005 is explained in that judgment as follows:

> " 8. Since the handing down of our judgment in March 2004 we have, however, been provided with extensive further submissions on remedy from all parties running to hundreds of pages. We express our regret that, notwithstanding indications on the part of Genzyme that it felt it would be possible to reach an agreed solution, for a prolonged period Genzyme adopted a position which, in our view, precluded any reasonable negotiated settlement. That approach involved the OFT in many hours of extra work.
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> 9. While this judgment was being prepared, the Tribunal was informed by letter of 8 July 2005 that Genzyme Homecare (now renamed Careology) had been sold by Genzyme by means of a management buy-out. With effect from 1 July 2005, Cerezyme was to be supplied by Genzyme to all healthcare providers, including Healthcare at Home, at a discount of 6.5 per cent from the new NHS List Price of £2.767 per unit. In a letter to Healthcare at Home dated 4 July 2005 Genzyme said that:
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> > "The discount of 6.5% on Cerezyme is a voluntary unbundling offer made in the interim until a final direction has been given by the CAT".
>
> 10. The OFT was informed by Genzyme by letter of 8 July 2005 that: "the former homecare division of Genzyme [Careology] will now be trading on an arms length basis and on the same discount/credit terms as its competitors in the homecare services markets".
>
> 11. The more significant steps in the procedure since March 2004 are summarised below and, where necessary, considered in more detail later in this judgment. The recent developments mentioned above have reduced the scope of the matters the Tribunal has to decide. Nonetheless, it is important to set the matter in context.
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> …
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> 212. The margin squeeze abuse in this case began in May 2001. Subsequently, when the OFT intervened, Genzyme contested every aspect of the case, both in the proceedings before the OFT which led to the decision of 27 March 2003, and in the proceedings before the Tribunal, which led to the Tribunal's judgment on the merits of 11 March 2004. When, following that judgment, the Tribunal adjourned the issue of remedy for six weeks to enable sensible negotiations to take place, we did not expect the turn of events which in fact transpired.

213. Instead of negotiating, Genzyme continued, for a long period, the adversarial posture which it has maintained throughout this case by instructing experts, who arrived at the conclusion that the margin needed by a reasonably efficient provider of Homecare Services to Gaucher patients could be accommodated by a discount of some 1 to 2 per cent of the then NHS list price. That conclusion was contrary to the historical evidence then before the Tribunal.

214. As a result of lengthy interchanges and submissions, the OFT then prepared its Costs Report of 23 July 2004, followed by its Supplementary Report of 13 September 2004, which were extensively commented on by Genzyme and Healthcare at Home. The Tribunal held case management conferences on 27 May 2004, 21 July 2004 and 17 September 2004. The Tribunal finally fixed a remedies hearing for 13 October 2004 on the basis that no negotiated solution was in sight, contrary to earlier assurances by Genzyme that a settlement could be anticipated.

215. At the hearing of 13 October 2004 Genzyme, while pursuing an application for disclosure against the OFT and Healthcare at Home, announced without prior warning to the OFT that it proposed to "unbundle" the NHS list price so as to separate the Homecare Services element. Genzyme proposed that further negotiations should then take place with NHS representatives and hospital pharmacies as to the implementation of this proposal. At this stage Genzyme, through its experts, was strongly maintaining that an appropriate margin was some 1 to 2 per cent.

216. Negotiations and consultations on "unbundling" then took place up to the end of 2004. However, on 28 January 2005 Genzyme told the OFT that it did not, after all, propose to "unbundle", but proposed instead to offer a discounted "bulk pharmacy" price. We share the OFT's view that little, if anything, was achieved during the autumn of 2004 and early 2005, other than further delay.

217. Meanwhile, at a meeting with the OFT on 13 December 2004 Genzyme told the OFT that it proposed to close its homecare operations, on the basis that these operations needed a profit margin of at least some 5 to 6 per cent, which Genzyme did not think was achievable in competitive conditions.

218. That statement by Genzyme management to the effect that Genzyme needed a margin on Homecare Services of some 5 to 6 per cent is in our view inconsistent with Genzyme's expert evidence that a margin of 1 to 2 per cent would suffice. Indeed Genzyme's statement to the OFT in December 2004 was more consistent with other evidence that Genzyme had relied on earlier before the Tribunal, such as Genzyme's internal proposal at the end of 2000, the Dixon Wilson Report and Mr Williams' evidence, than with Genzyme's more recent expert evidence.

219. With effect from the beginning of 2005, the NHS list price for Cerezyme was itself reduced by 7 per cent in the context of the PPRS negotiations

affecting the pharmaceutical industry as a whole. On 19 January 2005 Genzyme made an offer to the OFT to reduce the new NHS list price of £2.767 by 6.5 per cent (18p per unit). It later transpired that that was the level at which Genzyme proposed to set the new "bulk pharmacy" price. In the OFT's February 2005 Progress Report the OFT maintained that a discount was required off the new list price towards the top end of the range of 5.3 per cent to 7.7 per cent, as against Genzyme's offer of 6.5 per cent. Although the gap between the parties has thus narrowed, it is regrettable in our view that Genzyme was able to delay matters for so long after the Tribunal's judgment of 11 March 2004.

220. The OFT at that stage – February 2005 – was still under the impression that Genzyme proposed to close its Homecare Services operation. However, in March 2005 Genzyme informed the OFT that such was not the case, and that there was to be a management buy-out instead. This was originally to have been completed by the end of May 2005.

221. The Tribunal is informed that completion of the management buy-out took place on 8 July 2005, and that the former Homecare Services Division of Genzyme is now a new company, Careology Limited. We are told that, as from 1 July 2005, Genzyme has made supplies of Cerezyme available to Careology and Healthcare at Home at a discount of 6.5 per cent off the new NHS list price. It is said that Genzyme's dealings with Careology are at arm's length, and that that company will operate independently. Careology appears to be being run by the same operating management and from the same premises as it did when it was part of Genzyme.

222. Looking at the matter broadly, and despite some recent progress, this case has in general been characterised by determined opposition by Genzyme to the OFT's position. Genzyme's approach has, in our view, delayed the resolution of this case. Genzyme has also made a number of statements that turned out to be incorrect, e.g. to the effect that there were good prospects of a settlement in 2004, that the NHS list price was to be unbundled, and that Genzyme Homecare was to be closed, none of which transpired. We are also of the view that Genzyme's management must have known all along that, in commercial terms, Genzyme Homecare required a margin substantially above what its experts said was appropriate.

223. As we pointed out in our judgment on the merits, there is no doubt that both the patients represented through the Gaucher Association, and the hospital pharmacists, wished to see a choice of homecare providers and, in particular, the survival of Healthcare at Home. However, the whole thrust of Genzyme's position had the effect of making it as difficult as possible for Healthcare at Home to remain in the market, contrary to the wishes of many Gaucher sufferers and those who are responsible for their care. See paragraphs 108 to 119, 254 and 555 to 558 of our judgment on the merits.

224. From March 2001 until the President's interim order of 6 May 2003, Healthcare at Home received no margin at all out of which to fund Homecare Services and remained in the market only in the hope that these proceedings

would be favourably resolved. The interim margin ordered by the President in May 2003 was well below the margin of 5 to 6 per cent which Genzyme indicated to the OFT in December 2004 was the minimum commercial margin which it required, and well below the margin of 6.5 per cent which is the basis of the "bulk pharmacy" price that has apparently been offered by Genzyme since 1 July 2005. In these circumstances the effects of a serious infringement of the Chapter II prohibition in fact continued for over 4 years, since March 2001."

11. In all those circumstances the Tribunal concluded that a direction was called for.

12. Schedule 8 to the 1998 Act sets out the jurisdiction of the Tribunal on an appeal under section 46. Paragraph 3(2)(d) provides that the Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it and may – give such directions, or take such other steps, as the OFT could itself have made. Pursuant to this provision the Tribunal held that having confirmed the decision of the OFT as to margin squeeze it had jurisdiction in respect of the terms of the Direction that had been made by the OFT.

13. The Tribunal stated:

" 233. ... Moreover, in our view, the power "to bring the infringement to an end" covers conduct closely linked to, or to the like effect as, the infringement found, otherwise section 33 would be ineffective. Similarly, the Tribunal's powers to give such directions or make any decision the OFT could have given or made must, it seems to us, be construed as a power to give a direction that is adapted to the developments that have taken place in the course of the proceedings, provided that the underlying problem to be addressed remains the same or similar. Otherwise, a kind of "catch as catch can" situation could arise in which a dominant undertaking could, by constantly changing its arrangements, keep the competition authorities at bay indefinitely.

…

235. The underlying vice to which these proceedings are directed is that Genzyme, the dominant supplier of drugs for the treatment of Gaucher disease, has failed or refused to supply such drugs (i.e. Cerezyme) to independent Homecare Services providers at a price such as to enable the latter to operate competitively in the downstream market for Homecare Services, for which there is a separate demand. The remedy for that abuse is to establish a price for Cerezyme for supply to Homecare Services providers which will enable the latter viably to supply Homecare Services.

…

238. We are therefore of the view that we have jurisdiction to make a direction with a view to ensuring that Genzyme's infringement of the Chapter II prohibition is terminated, and to prevent that infringement, or any similar infringement, from arising in the future. Indeed, all parties invite the Tribunal to rule on the outstanding issues between them."

14. In the Judgment: Remedy the Tribunal concluded:

" 246. We are therefore of the view that, at present, Genzyme's existing NHS price, in the conventional sense, of £2.767 should remain, but that a discounted "bulk pharmacy" price should be introduced. Such a price would introduce transparency, while leaving the NHS free to develop purchasing procedures as it sees fit. There would, however, be nothing to prevent the OFT from modifying the direction at some later date if it were satisfied that changes in NHS funding arrangements and procedures were such as to obviate the need to maintain an NHS list price for Cerezyme in the sense traditionally understood.

…

248. Genzyme's latest proposal, of a discount of 6.5 per cent off the new list price of £2.767 per unit, although still contested by the OFT and by Healthcare at Home, is in our view much more realistic and constructive than its earlier proposals.

249. In assessing the margin that is required in this case the Tribunal has attempted, on the basis of the information now before it, to consider what ex-manufacturer price for Cerezyme would enable a reasonably efficient homecare services provider to supply its services to Gaucher patients and in so doing earn a competitive return.

250. In dealing with that question the Tribunal now has ample information from three different sources, namely: (a) historical information; (b) indicative estimates by other potential providers, Clinovia and Central Homecare; and (c) detailed information about Healthcare at Home's costs. We consider that this mass of detail is sufficient to enable the Tribunal to make a determination.

251. Genzyme has, however, urged us to obtain further information about allegedly comparable situations involving homecare treatment for other diseases such as haemophilia, thalassaemia, HIV, multiple sclerosis and other treatments. Genzyme seeks disclosure of tenders submitted in the past by Healthcare at Home in relation to these other treatments. Despite Genzyme's arguments, set out earlier in this judgment, and repeated in further submissions dated 14 September 2005, which we have carefully considered, we are not persuaded that that approach is either necessary or desirable. Moreover, a mass of information has already been disclosed to Genzyme who have had every opportunity to comment on the matters taken into account in this judgment.

252. In our opinion, the gap between the parties' position is now relatively slight, and the Tribunal in our view has sufficient material on which to resolve the remaining dispute. The detailed investigation of allegedly comparable situations was suggested at a time when Genzyme was contending for a margin of 1 to 2 per cent, but matters have since moved on. Genzyme has now acknowledged, de facto, that a margin of at least 6.5 per cent is appropriate.

…

279. The actual margin to be set is not a matter of precise mathematics. In our view we should set the initial margin at or near the top of the OFT's range for several reasons: (i) erring on the low side may affect the quality of service to Gaucher patients; (ii) we need to ensure that there is a sufficient margin to enable the envisaged new tendering system to work effectively; (iii) in our view the lower end of the OFT's range does not take sufficiently into account the special features of the delivery services for Cerezyme; (iv) the OFT's estimation of full-time equivalent nurses required is likely, on the evidence, to be too low at the lower end and possibly conservative at the upper end; (v) the OFT's lower range assumes a lower profit margin than we consider to be reasonable whereas in that regard, Central Homecare's figure, approximately at the mid-point between Clinovia and Healthcare at Home, seems to us the more appropriate to adopt; and (vi) a figure towards the top of the OFT's range is more consistent with the historical evidence.

280. Taking all these considerations into account we consider that the discount off the existing NHS list price at which a bulk pharmacy price should be offered by Genzyme to *bona fide* healthcare providers should be not less than 20 pence per unit. That is equivalent to 7.2 per cent of the current NHS list price and gives an ex-manufacturer bulk pharmacy price of £2.567 per unit. We propose to set that margin.

281. We note that the above level of margin is considerably less than the level of margin enjoyed by Healthcare at Home in 2001 (28.4 pence per unit). Nonetheless, the evidence is that the margin we propose to set should enable a reasonably efficient provider of Homecare Services to remain in the market. If Genzyme's submission, to the effect that such a margin would significantly over-compensate providers of Homecare Services, were correct, which we do not consider it to be, it can be expected that the tender process now envisaged will quickly result in the elimination of any such over-compensation. On the other hand, the margin we envisage leaves considerably more of the "value chain" associated with Cerezyme in the hands of Genzyme than was historically the case up to 2001."

15. The Claimant has commenced follow on proceedings in the Tribunal pursuant to section 47A of the 1998 Act.

16. The relevant provisions of section 47A are as follows:

"(1) This section applies to—

(a) any claim for damages, or 3

(b) any other claim for a sum of money,

which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom.

(2) In this section "relevant prohibition" means any of the following—

…

(b) the Chapter II prohibition.

…

(3) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules that would apply in such proceedings are to be disregarded.

(4) A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal.

(5) But no claim may be made in such proceedings—

(a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed; and

(b) otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to that decision.

(6) The decisions which may be relied on for the purposes of proceedings under this section are—

…

(c) a decision of the Tribunal (on an appeal from a decision of the OFT) that the Chapter I prohibition, the Chapter II prohibition or the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed.

…

(8) The periods during which proceedings in respect of a claim made in reliance on a decision or finding of the European Commission may not be brought without permission are—

(a) the period during which proceedings against the decision or finding may be instituted in the European Court; and

(b) if any such proceedings are instituted, the period before those proceedings are determined.

(9) In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed…"

17. At the case management conference on 20 July 2006 the Tribunal ordered that a further case management conference be listed for the 4 September 2006 at which the Tribunal would hear submissions relating to the construction of section 47A of the 1998 Act including the effect of the Tribunal's Judgment: Remedy. These issues are relevant to an application for an interim payment under Head 1 of the claim by the Claimant.

18. On 25 August 2006 the Claimant applied for an order for an interim payment under Rule 46 of the Competition Appeal Tribunal Rules SI 2003, No. 1372 ("the Tribunal's Rules") on account of the damages which the Tribunal may hold the Defendant to pay. The basis of this application is that on 27 June 2006 the Defendant, at paragraph 6 of its defence, admitted that the Tribunal had found that it had abused its dominant position in the period from 7 May 2001 to the end of March 2003 which had resulted in a margin squeeze. The defendant admitted at paragraph 20 of its defence that the Claimant is entitled to rely upon that finding. In these circumstances, the Claimant seeks early payment of the amount claimed under Head 1 of its claim, being £3,300,602 together with interest at such rate as the Tribunal shall determine, or such other amount as the Tribunal is in a position to direct following the hearing on 4 September 2006.

19. Head 1 of the Claimant's claim is as follows:

> " 9. From 6 May 2001 to 16 May 2003, the Defendant supplied the Claimant with Cerezyme at the NHS list price of 297.5 ppu and did not grant any discount in respect of such purchases. On 17 May 2003 following the Defendant's application for suspension of the Decision, the Defendant granted the Claimant a discount of 3 per cent off the prevailing NHS price. This resulted in a reduction in price of 8.925 ppu. The 3 per cent margin remained until 30 June 2005 when the Defendant notified the Claimant that it would supply Cerezyme at a 6.5 per cent discount off the new NHS list price of 276.7 ppu, a saving of approximately 18 ppu.
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> 10. In the Remedy Judgment, the Tribunal determined that the discount necessary to eliminate the Defendant's margin squeeze was not less than 20 ppu, a discount equivalent to 7.2 per cent off the prevailing NHS list price of 276.7 ppu. On a retrospective basis, the Defendant subsequently agreed to backdate the minimum margin of 20 ppu found by the Tribunal to purchases of Cerezyme made since 1st July 2005.
>
> 11. For the purposes of the damages calculation under this head, the Claimant deducts 20 ppu from the actual NHS price paid by the Claimant in respect of the total number of units purchased by it in the period 19 May 2001 to 30 July 2005. Damages are calculated from 19 May 2001 to take account of any delay after the commencement of the margin squeeze on 6 May 2001 whilst existing stocks held after that date, purchased by the Claimant under the terms of the pre-existing arrangements, were exhausted. Credit is given for the 3 per cent discount available from 17 May 2003. Losses under this head are deemed to have ended on 1 July 2005.

12. Detailed particulars of the Claimant's losses will be provided in the witness statements […]. In summary:

- The Claimant purchased 9,860,600 units between 19 May 2001 – 16 May 2003. The Claimant is entitled to a 20 ppu discount off the NHS price of 297.5 ppu. The shortfall is therefore £1,972,120 (exclusive of interest).

- The Claimant purchased 9,047,000 units from 17 May 2003 – 31 December 2004. Taking due account of the (inadequate) discount granted, following the Decision, of 8.925 ppu the Claimant is entitled to a further discount of 11.075 ppu off the NHS price of 297.5 ppu. The shortfall is therefore £1,001,955 (exclusive of interest).

- The Claimant purchased 2,798,000 units between 1 January 2005 and 1 July 2005. Taking due account of the (inadequate) discount granted following the Defendant's discount of 8.330 ppu, the Claimant is entitled to a further discount of 11.670 off the NHS price of 276.7 ppu. The shortfall is therefore £326,527.

- Consequently the total claim under this head is £3,300,602.

Period	**Margin paid (ppu)**	**Tribunal's Minimum margin**	**Margin still owed (ppu)**	**Units of Cerezyme supplied**	**Total sum due (£)**
19 May 2001 to 16 May 2003	0.000	20.000	20.000	9,860,600	1,972,120
17 May 2003 to 31 December 2004	8.925	20.000	11.075	9,047,000	1,001,955
1 January 2005 to 30 June 2005	8.330	20.000	11.670	2,798,000	326,527
Total				21,705,600	3,300,602

…"

20. The Claimant seeks to rely on the Judgment: Remedy to determine:

a. the period during which sales are said to have been made without the requisite margin; and

b. the amount of margin said to have been lost on each of these sales.

II THE PARTIES' SUBMISSIONS

(i) The Claimant's Submissions

21. The Claimant submits that section 47A permits a claim for damages to be brought before the Tribunal and applies to any claim for damages or other money claim "which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings" (section 47A(1)). The Claimant submits that the precondition, namely that "no claim may be made in such proceedings … until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed" (section 47A(5)(a)) – has been satisfied in this case by both the OFT's infringement decision and the Tribunal's decision upholding that decision upon appeal.

22. According to the Claimant, an interpretation which restricts the Tribunal's jurisdiction to a period ending with the date of the OFT decision for the purposes of the scheme of the 1998 Act would render section 47A nugatory and effectively deny the Tribunal's role in determining damages actions; precluding the Tribunal from determining any damages claim where the infringing party did not cease its conduct immediately at the date of the OFT's decision.

23. The Claimant further submits that applying such a narrow interpretation upon the Tribunal's jurisdiction will in all likelihood result in elements of a claim that should have been lodged with the Tribunal being filed with the High Court, only to be transferred back to the Tribunal so that claims arising from the same facts may be disposed of efficiently and by the specialist Tribunal, as Parliament intended.

24. The Claimant submits that the Direction given in the Judgment: Remedy is binding generally upon the Defendant. As such the Claimant submits that the Defendant is required to make Cerezyme available for a wholesale price permitting at least a wholesale margin of 20 ppu. The Claimant submits that the Defendant is bound for the purposes of the present proceedings by the finding that, in the Tribunal's

determination, a margin of at least 20 ppu is required lest the margin squeeze would arise and so to seek to re-litigate that issue would be improper.

25. The Claimant submits that the Defendant's assertion that the Tribunal is not bound by the Tribunal's findings in the First Judgment or Judgment: Remedy save for the conclusion set out at paragraph 640 of the First Judgment is ill-conceived for three principal reasons:

    a. It is inconsistent with ordinary procedural and policy concepts of English law falling under the broad term of the doctrine of *res judicata* which prevents a party from seeking to re-litigate key findings of fact and law which have been determined in previous proceedings: see Phipson on Evidence at page 1342. This applies to the decision on particular issues of fact and law that underpin the "conclusion" of the previous court. Such findings are to be distinguished from matters that are *obiter* or purely collateral.

    b. It is inconsistent with the way in which the English courts have applied these principles in the context of competition law (see in particular *Iberian).* The Claimant submitted that the principles applied by the High Court in *Iberian* apply with even greater force to the circumstances of the present case since the Defendant has not only participated fully in the administrative process of the OFT (including an oral hearing), but also intervened before the Tribunal, submitted written submissions and evidence and was represented before the Tribunal in the Remedies proceedings. The Claimant submits that it would be an abuse of process on the principles established in *Iberian* for the Defendant to have a second bite of the cherry by re-arguing issues already determined by the Tribunal. The Tribunal itself commented at paragraph 212 of the Judgment: Remedy at the comprehensive nature in which the Defendant "contested every aspect of this case".

c. It would frustrate the scheme of the 1998 Act and the specialist function of the Tribunal to facilitate competition law claims being determined efficiently and with the benefit of a tribunal with specialist expertise. In that regard, the Claimant submits that the Defendant's approach will seek to encourage and perpetuate litigation generally, a matter which section 47A(6) seeks to avoid on its face. The Claimant further submits that the approach suggested by the Defendant will reduce the currency of regulatory and Tribunal decisions (where their underlying findings of fact will cease to have application). In the Claimant's submission, this would be particularly egregious in circumstances where the courts and Parliament have recognised the important and distinct expertise the OFT and the Tribunal bring to such investigations and determinations.

d. The Claimant submits that denying the binding application of findings of fact not just of the Tribunal and the OFT, but also arising from a decision of the European Commission (section 47A(7)(d)) would contravene the High Court's analysis *in Iberian* and run counter to the principles found in Council Regulation 1/2003/EC[2] generally.

e. According to the Claimant, the Defendant's approach is also inconsistent with section 58 of the 1998 Act, which provides that, save where (for the purposes of England) the High Court directs otherwise, underlying findings of fact made by the OFT (or the Tribunal on appeal) bind the addressee in subsequent "Part I proceedings" before the High Court. Whilst section 58 predated section 47A, there is, in the Claimant's submission no sensible basis to distinguish between the High Court and the Tribunal by interpreting section 47A of the 1998 Act in such a manner so as to render findings of fact by the Tribunal non-binding in a follow-on damages action before the Tribunal, but where in an equivalent action before the High Court they would bind the High Court. Again, such an approach would encourage follow on

[2] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

claims to be brought in the High Court rather than the specialist/expert Tribunal, plainly contrary to the intention of Parliament when it introduced section 47A.

26. The Claimant submits that the mere fact that the Tribunal chose to deliver its conclusions in two separate judgments is no reason in itself to distinguish between the Judgment: Remedy and the First Judgment as both form part of a decision of the Tribunal finding that an infringement of the 1998 Act had occurred. It is artificial to distinguish the two judgments. The Claimant submits that the Tribunal continued to explore the nature of the Defendant's infringement in the course of the Remedy proceedings which, in turn bore upon the nature of the direction the Tribunal gave. Conversely the nature of the Tribunal's direction in the Judgment: Remedy was determined, in part, by the Tribunal's findings in the First Judgment. Findings of fact in respect of both the Judgment: Remedy and the First Judgment qualify as valid parts of the Tribunal's overall "decision" that the 1998 Act had been infringed for the purpose of section 47A notwithstanding the Tribunal was required, largely as a result of the Defendant's actions, to produce two judgments.

27. The Claimant submits that the Tribunal found as a question of fact and law, that the pricing arrangements giving rise to the margin squeeze and, what the Tribunal described as a serious infringement of the Chapter II prohibition, persisted until at least 1 July 2005.

28. The Claimant submits that even in the absence of a binding finding of infringement the Tribunal has jurisdiction in these proceedings to find that the Defendant had infringed for the period 2003 until 2005. The Claimant submits that in determining this issue, the Defendant will be bound by findings of fact and law made as a consequence of the substantive/remedies proceedings. The Claimant submits that the arrangements which initially comprised the infringement admitted by the Defendant endured until at least 1 July 2005.

29. The Claimant submits that the Defendant's submissions as to causation, which state that:

> "16.The Claimant's claim for compensatory damages is brought in tort and it can only, therefore, recover damages by reference to a tortious measure to compensate it for losses suffered by reason of the Defendant's breaches of obligation (as already found by the Tribunal and defined above as "the Infringement").
>
> 17. It is the Defendant's contention that in determining what loss has been suffered by reason of the Infringement, the Defendant is entitled to rely upon the principle that where the Defendant had a choice as to whether or how to comply with an obligation, damages for breach of that obligation are to be assessed on the assumption that the Defendant would have performed its obligation in the manner most beneficial or least burdensome to itself . The Claimant is entitled only to compensation in respect of its minimum lawful entitlement.
>
> 18. Thus, damages are to be quantified by reference to the losses that the Claimant would have suffered if the Defendant had chosen to undertake the course of action alternative to the Infringement which was the least costly or most beneficial to the Defendant. On that basis it is to be assumed that the Defendant would have acted in the manner that was both lawful and least costly or most beneficial to itself. The Claimant is entitled only to such sum as would have put it in the position that it would have been in had the Defendant acted in this manner.
>
> 19. If the Defendant had not committed the Infringement, it would have been open to it to adopt any one of the following courses of action, or where applicable a combination thereof.
>
> a. The Defendant could have sold Cerezyme direct to the NHS without any associated service and left the procurement of that service to be dealt with by the relevant hospitals or trusts. The Defendant may have contributed to the cost of the provision of homecare services by community nurses.
>
> b. The Defendant could have taken steps to reduce substantially the price it paid the Claimant in negotiation with the Claimant.
>
> c. The Defendant could have invited potential homecare providers to participate in a competitive tender process to identify the provider or providers prepared to provide that service to the Defendant for the lowest price. The Defendant would thereby have secured a very substantial reduction to the sums paid for homecare services."

make no sense and should be given no weight: that they would give "a charter, a utopia for defendants".

(ii) The Defendant's Submissions

30. The Defendant accepts that the finding in the Judgment: Remedy that the Defendant had infringed the Chapter II prohibition by carrying out a margin squeeze from 7

May 2001 to the end of March 2003 is binding on the Tribunal in these proceedings, pursuant to section 47A(9) of the 1998 Act. The Defendant submits that the effect of that judgment is to preclude the Defendant from seeking to argue in these proceedings that its conduct during that period did not constitute an infringement of Chapter II.

31. The Defendant submits that the Tribunal has firstly to determine the extent of its jurisdiction under s 47A of the 1998 Act.

32. The Defendant submits that the Judgment: Remedy is not a decision of the Tribunal that the Chapter II prohibition has been infringed within the meaning of section 47A(6)(c); alternatively if it is such a decision it does not provide the basis for an interim award of damages at a rate of 20 ppu.

33. The Defendant submits that someone who suffers damages as a result of a competition infringement that has been found by the OFT and/or the Tribunal has a choice of deciding whether to lodge a claim for damages in the High Court or the Tribunal. A claim can only be lodged with the Tribunal if the Tribunal has jurisdiction to hear it. Both the Tribunal and the Chancery Division are specialist tribunals. The crucial difference between the position of the High Court and the Tribunal is that the High Court's jurisdiction is not circumscribed by section 47A or section 58A.

34. The Defendant submits that there is no presumption that damages claims are to be brought in the Tribunal and that the Tribunal has a more limited jurisdiction in damages matters than does the court.

35. The Defendant submits that there is a fundamental distinction between the OFT's power to take decisions establishing infringements of the Chapter I or II prohibitions (section 31 of the 1998 Act) and directions that can be taken consequentially on an infringement decision (sections 32 and 33). The Defendant submits that it is only the former that constitute relevant OFT decisions within the meaning of section 47A(6)(a) and which are accordingly binding by reason of

section 47A(9). The Defendant submits that no reliance can be placed on the Direction made under section 33 of the 1998 Act.

36. The Defendant submits that the Judgment: Remedy is a direction and not an infringement decision for the purposes of section 47A(6) and (9) and accordingly can no more be relied on for the purposes of section 47A(6) than the OFT's original decision. The Defendant submits that the Judgment: Remedy does not determine the question of causation or quantum of damages in this case.

37. According to the Defendant, the question of the appropriateness of any remedy to bring an infringement to an end is fundamentally different to the question whether any loss or damage has been caused to a private party by reason of that infringement.

38. As to causation, the Defendant has put in issue the question whether it would have even dealt with the Claimant at all in the absence of the margin squeeze (Defence paragraphs 16 – 19) and refers to the Judgment: Remedy at paragraph 239 in which the Tribunal contemplated the possibility of other kinds of remedy, such as maintaining the NHS list price as a drug only price.

39. As to the issue of quantum, the Defendant refers to paragraph 281 of the Judgment: Remedy and submits that the Tribunal considered the position across the relevant market as a whole and was concerned to set what might be termed a "market opening price". In doing so, the Defendant submits that the Tribunal was aware that it might be over-compensating home care providers but considered that any such risk would be rapidly eliminated by the forthcoming competitive tender process.

40. The Defendant submits that the question that the Judgment: Remedy considered was a different question to the one now before the Tribunal, namely what remedy was necessary to bring the infringement to an end.

41. The Defendant submits that neither the Judgment: Remedy nor the First Judgment determined the question that is raised by Head 1. The Defendant submits that this

question is, namely what damages, by way of lost margin, is the Claimant entitled to. What margin would the claimant have earned had the Defendant not committed the margin squeeze? What profit has this particular Claimant lost by reason of the margin squeeze, if any? The Defendant submits that what the Tribunal has to determine is the position the Claimant would have found itself in, had the margin squeeze not occurred and that is a different question to the issue addressed in the Judgment: Remedy.

42. The Defendant submits that the damages claim under Head (1) is to be quantified by reference to the amount that the Claimant would have earned if the Defendant had not infringed the 1998 Act. According to the Defendant, the Claimant must satisfy the Tribunal by reference to evidence and disclosure that the parties would have entered into a further agreement. The Defendant submits that the Tribunal should determine, on the basis of evidence, what the financial terms of the agreement would have been. The Defendant submits that this was open to alternative possibilities and that the Claimant (if it had wished to continue) would have been open to negotiate a substantially lower margin that that reflected in the Judgment: Remedy. According to the Defendant, the Tribunal should determine such matters in a manner akin to the principles applicable to loss of a chance claims.

43. The Defendant further submits that the level of margin that it might be expected to recover is linked to the level of credit and this must be borne in mind when considering whether the Claimant can recover damages for loss of credit terms which it says was caused by the infringement: one cannot determine the level of margin without also looking at the credit terms. According to the Defendant, neither of the judgments of the Tribunal on which the Claimant relies deals with the level of credit. The simple reason being that it was not an issue before the Tribunal.

44. The Defendant submits that the Tribunal made an express finding in the First Judgment that the infringement took place between 7 May 2001 and the end of March 2003 (paragraph 640) and that there is no other finding of infringement. The defendant submits that since the OFT's decision is dated 23 March 2003 and since the First Judgment was an appeal from that decision, the Tribunal has no

jurisdiction to find an infringement outside the period 7 May 2001 and the end of March 2003.

45. The Defendant submits that *Iberian UK Ltd v BPB Industries Plc* [1997] I.C.R. 164, [1996] 2 C.M.L.R 601 does not give the Tribunal a wider jurisdiction than it possesses under section 47A of the 1998 Act. The Defendant accepts the authority of the High Court decision in *Iberian* for the following propositions:

    a. Proceedings in front of an administrative body (the Commission) which were subsequently appealed to a court (CFI and ECJ) did not give rise to an issue of estoppel between the investigatee/appellant and the complainant/intervener. Put shortly, the fact that the "victim" of the abuse intervened in the appeal brought by an investigatee to a court did not mean that the victim and investigatee were parties to a *lis* before a court for the purposes of issue estoppel.

    b. It would be an abuse of process for the investigatee to re-open the question that had been determined by the Commission, the CFI, and the ECJ, namely that it had infringed Article 82 EC.

    c. The investigatee was bound by the decision of the Commission which it had unsuccessfully appealed to the CFI and the ECJ.

46. According to the Defendant, *Iberian* cannot confer jurisdiction on the Tribunal if jurisdiction is not conferred by section 47A of the 1998 Act. The Tribunal's jurisdiction is a statutory one: it is limited to dealing with damages that are caused by an infringement decision that falls within the scope of section 47A. The Defendant submits that *Iberian* relates to the evidential effect of previous decisions, or the ability of parties to challenge findings in such decisions: it cannot affect the substantive statutory jurisdiction of the Tribunal.

47. The Defendant further submits that *Iberian* does not assist the Claimant in seeking to argue that the Judgment: Remedy is binding and conclusive so far as the loss of margin under Head 1 is concerned.

48. The Defendant contends that the passage from Phipson at paragraph 44-14, at page 1341 to 1342, quoted by the Claimant is taken out of context. The passage states:

> "…[A] domestic judgment of a court of competent jurisdiction may have the following effects in subsequent proceedings (other than an appeal or new trial, which may be regarded as being part of the same proceedings) between the same parties or their privies:
> …A judgment which includes a decision on a particular issue forming a necessary ingredient in the cause of action being litigated will be binding as to that issue in subsequent proceedings where that issue is relevant."

The Defendant submits that this passage is concerned with narrow issue estoppel because it is limited to issues tried twice as between the same parties.

49. The Defendant further submits that there can be no reliance on the "broader approach" in *Iberian* because the present claim for damages involves a different question to that determined in the Judgment: Remedy. According to the Defendant, the Claimant's argument that the Defendant has already lost "the relevant issues before the CAT" is unfounded because the Claimant has failed to specify what is meant by "the relevant issues".

50. The Defendant submits that the jurisdictional problem that the Claimant faces under section 47A would not have arisen had the Claimant brought proceedings in the Chancery Division of the High Court.

III THE TRIBUNAL'S ANALYSIS

51. This application is made by the Claimant for an interim payment under Rule 46 of the Tribunal's Rules on account of the damages which the Tribunal may hold the Defendant to pay.

52. The Claimant in its application relies on the Defendant's admission that the Tribunal found that the Defendant had abused its dominant position in the period

from 7 May 2001 to the end of March 2003 which had resulted in a margin squeeze. The Defendant admits that the Claimant is entitled to rely on that finding.

53. The Claimant seeks early payment of the amount claimed under Head 1 of its claim, being £3,300,602 together with interest at such rate as the Tribunal shall determine, or such other amount as the Tribunal is in a position to direct.

54. This application by the Claimant relates to a period post the end of March 2003 as well as the earlier period from 7 May 2001 and relies on the Tribunal's finding in its Judgment: Remedy that "the discount off the existing NHS list price at which a bulk pharmacy price should be offered by Genzyme to *bona fide* healthcare providers should be not less than 20 pence per unit. That is equivalent to 7.2 per cent of the current NHS list price and gives an ex-manufacturer bulk pharmacy price of £2.567 per unit." The Tribunal set that margin.

55. According to the Defendant, the Tribunal has no jurisdiction to award damages in respect of a period after the end of 2003 and that in awarding damages (and *a fortiori* – in making an interim award) the Tribunal is not bound by the margin which it set in its Judgment: Remedy.

56. The starting point is section 18 of the 1998 Act:

> **"18 Abuse of dominant position**
>
> (1) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
>
> (2) Conduct may, in particular, constitute such an abuse if it consists in—
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage…"

57. Section 33 of the 1998 Act provides that:

"(1) If the [OFT] has made a decision that conduct infringes the Chapter II prohibition [or that it infringes the prohibition in Article 82], [it] may give to such person or persons as [it] considers appropriate such directions as [it] considers appropriate to bring the infringement to an end.
(2) . . .
(3) A direction under this section may, in particular, include provision—
(a) requiring the person concerned to modify the conduct in question; or
(b) requiring him to cease that conduct.
(4) A direction under this section must be given in writing."

58. Section 47A of the 1998 Act provides that a claim can be made in proceedings before this Tribunal if:

a. there is an infringement of a prohibition including the Chapter II prohibition;
b. the person bringing the claim has suffered loss or damage as a result of the infringement of a relevant prohibition; and
c. that the relevant prohibition in question has been infringed has been established in a decision of the Tribunal (on an appeal from a decision of the OFT).

59. The Tribunal considers that on a true construction of section 47A, section 47A does not restrict the claim that can be made in proceedings before the Tribunal to the period during which the OFT or the Tribunal have held that the prohibition has been infringed. The Tribunal considers that on its true construction section 47A permits a person who has suffered loss or damage as a result of an infringement of a relevant prohibition to bring proceedings in the Tribunal. The period during which such loss or damage is suffered is not prescribed. The infringement persists while the conduct in question is not modified. Accordingly if the infringer fails to cease the infringement notwithstanding the OFT's Decision then the person may suffer loss or damage as a result of the infringement both up to and subsequent to the OFT Decision. Accordingly, the Tribunal considers that on the true construction of section 47A that person can bring proceedings before the Tribunal to recover such loss.

60. The reference in the First Judgment to the 27 March 2003 as the date to which the infringement occurred, relates to the date of the OFT Decision. That decision

included the Direction that the infringement must cease. There was no finding of fact in the OFT Decision or in the First Judgment that the infringement had ceased on that date, in fact the reverse was found, hence the imposition of the Direction. The Defendant continued the infringement of the relevant prohibition into 2005 and the Claimant is accordingly a person who has suffered loss or damage as a result of that infringement (see the Judgment: Remedy, paragraphs 224 and 238).

61. In the circumstances set out above the Tribunal does not accept the submissions of the Defendant that the claim before this Tribunal is restricted to the period up to 27 March 2003. Such submissions do not accord with the proper construction of the statutory provision either on a strict or on a purposive construction.

62. We now turn to the second limb of the Defendant's opposition to the application. Is the Tribunal bound by the findings in relation to the margin squeeze set out in the Judgment: Remedy?

63. Section 47A(9) provides that:

> "In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed."

64. The OFT Decision and the First Judgment established that the prohibition had been infringed because of the imposition of a margin squeeze in the nature of a zero margin. Neither that decision nor the First Judgment nor the Judgment: Remedy unequivocally decided the precise amount of the margin squeeze or the amount of the loss or damage which the Claimant has suffered. In those circumstances the Tribunal cannot be bound by any such finding in the Decision because there was no such finding.

65. Rule 46 of the Tribunal Rules provides:

> "**Interim payments on claims for damages**
>
> **46.** - (1) An interim payment is an order for payment by the defendant on account of any damages (except costs) which the Tribunal may hold the defendant liable to pay.

(2) The claimant may not request an order for an interim payment before the end of the period for filing a defence by the defendant against whom the claim is made.

(3) The claimant may make more than one request for an order for an interim payment.

(4) The Tribunal may make an interim payment order if –

(a) the defendant against whom the order is sought has admitted liability to pay damages to the claimant;

(b) it is satisfied that, if the claim were to be heard the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking damages.

(5) The Tribunal must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

(6) A request for an interim payment shall include -

(a) the grounds on which an interim payment is sought;

(b) any directions necessary in the opinion of the claimant for the determination of the request.

(7) On receiving a request for an interim payment the Registrar shall send a copy to all the other parties to the proceedings and shall inform them of the date by which they may submit written or oral observations to the Tribunal."

66. The Tribunal may make an interim payment order if it is satisfied that if the claim were to be heard the Claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking damages. In those circumstances the Tribunal may order an interim payment of no more than a reasonable proportion of the likely amount of the final judgment.

67. When considering an interim payment it is pertinent to take account of the matters set out in the Judgment: Remedy and in particular the following:

(a) The Defendant acknowledged in the proceedings leading to the Judgment: Remedy that a margin of at least 6.5 per cent was appropriate in July 2005. (paragraph 252)

(b) That the Tribunal directed that as from 1 July 2005 the discount off the existing NHS list price at which a bulk pharmacy price should be offered by the Defendant to *bona fide* healthcare providers should be not less than 20 pence per unit. This was equivalent to

some 7.2 per cent of the then current NHS list price. (paragraph 280)

(c) That in Judgment: Remedy the Tribunal recorded that "the evidence is that the margin we propose to set should enable a reasonably efficient provider … to remain in the market". (paragraph 281)

(d) That the level of margin set by the Tribunal is considerably less than the level of margin enjoyed by the Claimant in 2001 (28.4 pence per unit). This was prior to the infringement of the prohibition by the Defendant. (paragraph 281)

(e) That in its 2005 Progress Report the OFT maintained that a discount was required towards the top end of the range of 5.3 per cent to 7.7 per cent. (paragraph 219)

68. The Defendant has submitted that it is not certain that the Claimant will recover any damages and relies on the matters pleaded in its defence. In particular the Defendant states:

> "16.The Claimant's claim for compensatory damages is brought in tort and it can only, therefore, recover damages by reference to a tortious measure to compensate it for losses suffered by reason of the Defendant's breaches of obligation (as already found by the Tribunal and defined above as "the Infringement").
>
> 17. It is the Defendant's contention that in determining what loss has been suffered by reason of the Infringement, the Defendant is entitled to rely upon the principle that where the Defendant had a choice as to whether or how to comply with an obligation, damages for breach of that obligation are to be assessed on the assumption that the Defendant would have performed its obligation in the manner most beneficial or least burdensome to itself. The Claimant is entitled only to compensation in respect of its minimum lawful entitlement.
>
> 18. Thus, damages are to be quantified by reference to the losses that the Claimant would have suffered if the Defendant had chosen to undertake the course of action alternative to the Infringement which was the least costly or most beneficial to the Defendant. On that basis it is to be assumed that the Defendant would have acted in the manner that was both lawful and least costly or most beneficial to itself. The Claimant is entitled only to such sum as would have put it in the position that it would have been in had the Defendant acted in this manner.

19. If the Defendant had not committed the Infringement, it would have been open to it to adopt any one of the following courses of action, or where applicable a combination thereof.

a. The Defendant could have sold Cerezyme direct to the NHS without any associated service and left the procurement of that service to be dealt with by the relevant hospitals or trusts. The Defendant may have contributed to the cost of the provision of homecare services by community nurses.

b. The Defendant could have taken steps to reduce substantially the price it paid the Claimant in negotiation with the Claimant.

c. The Defendant could have invited potential homecare providers to participate in a competitive tender process to identify the provider or providers prepared to provide that service to the Defendant for the lowest price. The Defendant would thereby have secured a very substantial reduction to the sums paid for homecare services."

69. The Defendant's submissions would require a court totally to re-write the transaction between the Claimant and the Defendant and to ignore the historical relationship between them and to ignore the Defendant's infringement. It would require the court to substitute for what actually happened an entirely different hypothetical scenario and to award damages on that different basis. It would mean that the court should not treat the Defendant as a tortfeasor. No authority was cited by the Defendant in support of the submissions it is making. The Claimant relies on common sense to show that these submissions are nonsense. The Tribunal has sympathy with this submission of the Claimant. Since the Defendant has not produced any authority to support its submissions, the Tribunal cannot be satisfied, at present, that they have any basis in law.

70. Having regard to the above matters and to the matters set out in the Judgment: Remedy we do not accept the submissions of the Defendant that it will defeat the Claimant's damages claim on the grounds set out in its defence. We are satisfied on the material before us at present that if the claim was to be heard the Claimant would obtain judgment for a substantial amount of money. We consider that the amount eventually awarded to the Claimant under Head 1 is unlikely to be below the 6.5% (18ppu) that the Defendant has acknowledged, de facto, as the least margin that was appropriate in July 2005 (Judgment: Remedy paragraph 252) or above the 7.2 per cent that the Tribunal deemed sufficient to allow a reasonably efficient provider to remain in the market (Judgment: Remedy 281). Taking the

lower of these figures as the basis for calculation in the context of an interim payment, and using the Claimant's figures for the units of Cerezyme supplied, the implied loss of revenue is £2,866,490. Recognising the very substantial costs incurred by the Claimant in supplying homecare services to Gaucher patients between May 2001 and July 2005 we consider that it is reasonable to award some 70 per cent, or £2million, as an interim payment. We note that 70 per cent of 6.5 per cent is 4.6 per cent, which is well below the lower limit of the range identified by the OFT in its February 2005 Progress Report. We do not think it necessary to include an allowance for interest in this interim award.

Marion Simmons Andrew Bain Graham Mather

Charles Dhanowa 15 November 2006
Registrar