Neutral citation [2006] CAT 30

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 (Split-Trial)

I BACKGROUND

1. At a case management conference held on 20 July 2006 the Competition Appeal Tribunal ("the Tribunal") indicated that the parties should consider whether there would be a benefit in holding the trial of this matter in two stages, the first dealing with the question of liability in principle for damages ("Stage 1"), the second dealing with the quantification of any head of damages for which liability is established ("Stage 2"). In particular the Tribunal questioned whether certain issues in the appeal, such as exemplary damages, could be decided as a preliminary issue/at stage 1.

2. The Tribunal was mindful that such a course of action "needs to be thought about properly" and noted that "preliminary points can be more expensive". In those circumstances, the Tribunal reserved the consideration of these matters for a further case management conference to be held on 4 September 2006. The Tribunal invited submissions from the parties on the point in advance of the case management conference.

3. Genzyme Limited ("the Defendant") applies to have a split trial in respect of the exemplary damage issue. Healthcare at Home Limited ("the Claimant") resists the application.

4. The Claimant submits that the basis of an award of exemplary damages should be an account of profits. In that regard, the Claimant's Draft Amended Claim form states as follows:

> "**Head (7:) Exemplary damages**
>
> 53. ~~48~~ The Defendant's wrongful actions have been carried out in the knowledge of and in wilful disregard of the Claimant's rights in a calculating fashion and/or with the expectation of profiting there from by amounts exceeding the amounts payable by the Defendant to the Claimant as a result of such wrongful actions. Consequently, the Defendant is liable to pay the Claimant a sum by way of exemplary damage and/or to account for unjust profits.

Head (7(a))

54. ~~49~~ In particular, under the terms of the February 2000 Contract, the price of Homecare Services payable to the Claimant and negotiated in the market was 28.44 ppu. Through the implementation of the margin squeeze and the identification by the Tribunal of a minimum viable margin of 20 ppu, the Defendant would profit, by 8.44 ppu in the period from 19 May 2001 to 31 December 2004 and 7.92 ppu in the period from 1 January to 30 June 2005, by implementing the margin squeeze against the Claimant if the claim for loss of actual sales were to proceed by way of Head (1) only. Accordingly, the Tribunal is requested to require the Defendant to account to the Claimant for the difference between the margin set in accordance with the terms of the February 2000 Contract and the 20 ppu set by the Tribunal, in order that the Defendant shall not benefit improperly from the profit maximising strategy implemented against the Claimant through the margin squeeze. On the basis that, as calculated above, the Claimant supplied some 21,705,600 units of Cerezyme from 19 May 2001 to 30 June 2005, the amount identified and called to account at this stage and pending further disclosure is £1,817,402 .

Head (7(b))

55. ~~50~~ Further to the compensation payable to the Claimant under Heads (1) to (7(a)) above, the Defendant has still made a profit from its unlawful actions. Details of this further profit will be sought through disclosure. The Claimant reserves its right to claim for a reasonable sum in respect of that profit once such disclosure is obtained, for the harm suffered by the Claimant's business generally and/or as the Tribunal should otherwise see fit (i) by way of exemplary damages or (ii) by way of a declaration that it is entitled to an account of profits unjustly gained by the Defendant through its abusive conduct."

II THE PARTIES' SUBMISSIONS

5. The Defendant submits that the liability aspects of the exemplary damage issue should be dealt with at the main hearing now fixed for March 2007 but that the issues regarding an account of profit should not be dealt with at that hearing but should be reserved to be heard if the issue of liability for exemplary damages is established in favour of the Claimant. The Defendant submits that the account of profit issue is a self contained issue. The Defendant indicates that the work entailed to prepare the account of profits including disclosure of documents relating thereto, will take two to three weeks of a solicitor's time and that in the event that the claim for exemplary

damages is unsuccessful, this expense could be saved by splitting the trial on this issue.

6. The Claimant resists the application on the following grounds:

    a. It will cause unnecessary delay to the finality of the proceedings;
    b. That the liability and quantum issue in respect of exemplary damages should be dealt with together so that any appeal can deal with both the liability for and the quantification of exemplary damages;
    c. That it is unfair to the Claimant if successful on liability on the exemplary damages issue, to have to have a separate hearing on the quantum and accordingly to suffer a delay in being fully recompensed for its loss and damage under this head of claim;
    d. That the quantum issue is not a distinct issue: there is an overlap between the evidence relevant to the quantification of head 2 damages and the quantification of any exemplary damage.

7. The Claimant submits that the data relevant to Head 2 of its claim for damages, "Loss of margin on lost sales caused by (a) existing Gaucher patients switching to Genzyme Homecare and (b) new Gaucher patients subscribing to Genzyme Homecare rather than the Claimant", and head 6(c), "Lost sales of Fabrazyme homecare services" are also relevant to the exemplary damages claim. In that regard, the Claimant submits that there are underlying facts, for example the number of patients that switched and the lost sales in respect of Fabrazyme homecare services, which are relevant both to the claim under Head 2 and 6(c) and will also be relevant to the quantification of any exemplary damages which may be awarded.

8. Moreover, the Claimant submits that there is an overlap between Heads 1 and 7(a) in relation to the margin squeeze claim. Under Head 1 the claim is calculated on the basis of 20ppu. Under Head 7(a) an additional sum is claimed to compensate the Claimant for the additional profit above 20ppu which the Defendant achieved as a result of the margin squeeze.

III REASONING/ANALYSIS

9. At the case management conference held on 4 September 2006, the Tribunal dismissed the Defendant's application for there to be a split-trial in this case. The Defendant requested that the Tribunal produce a reasoned decision on this point.

10. This application has been made at an early stage of the proceedings. The pleadings are not closed and the issues have not been fully defined between the parties. At the present stage it is unclear to us whether the features of liability and of quantification of damage as they relate to the exemplary damage issue are entirely separate or whether they are inter-related and whether there may be an overlap between these features. The Claimant submits that the quantum issue on exemplary damages overlaps with the issues which are to be heard in any event at the March 2007 hearing. The Defendant has not explained to our satisfaction why this is not so and we must proceed on the basis that there is an overlap. In these circumstances to order a split trial now may prove in any event to be entirely inappropriate and may result in unnecessary duplication of costs. In addition any settlement of these proceedings will be assisted by disclosure of documents relevant to the quantification of the exemplary damages issue so that postponing disclosure of these documents may make settlement of this action more difficult.

11. What the Defendant is asking us to do in this application is to separate out the quantum aspect of exemplary damages and to delay the hearing of it until after all the liability and other quantum issues in the case have been determined. It seems to us important in our consideration of this application to remind ourselves that an infringement has already been established in this case and that the outstanding issues between the parties relate to the assessment and quantification of loss and damage. Accordingly this case must be distinguished from cases where the issues relating to whether or not there has been an infringement are split from damages.

12. It also seems to us that a split between the liability for exemplary damages and their quantification would involve additional costs in re-educating the Tribunal as to the background and detail of the case which could be avoided if all issues are heard at the same hearing. There has been no suggestion that there is insufficient time between now and March to prepare all the issues.

13. For the reasons set out above the Tribunal has decided that there should not be a split trial on this issue.

Marion Simmons Andrew Bain Graham Mather

Charles Dhanowa 15 November 2006
Registrar