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IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)

NO:C/2002/0705

Royal Courts of Justice
Strand
London WC2

Wednesday, 8th May 2002

B e f o r e:

LORD JUSTICE BROOKE

and

LORD JUSTICE BUXTON

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NAPP PHARMACEUTICAL HOLDINGS LIMITED

(claimant)

-v-

DIRECTOR GENERAL OF FAIR TRADING

(defendant)

- - - - - -

Computer-Aided Transcript of the stenograph notes of
Smith Bernal Reporting Limited,
190 Fleet Street, London EC4A 2AG
Telephone No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

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Mr Christopher Carr QC appeared on behalf of the Claimant
The Defendant did not appear and was not represented.

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J U D G M E N T
(As Approved by the Court)

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LORD JUSTICE BUXTON:

Background

1. The facts of and relating to this case are set out in the submissions of the two parties to the Director, in the Director's decision, and again in the judgement of the Tribunal. I am not going to set them out again for a fourth or fifth time, and I will indicate only as much as is necessary for a broad understanding of the judgement on the part of somebody who has not been a direct party to the proceedings: although such a person can if he wishes have access both to the decision and to the Tribunal judgement in a new series of reports dedicated to that field. Although the applicant ("Napp") makes certain complaints about the Tribunal's handling of some factual issues, a matter to which I shall in due course return, there appears to have been a high level of agreement as to the underlying facts of the case, and I trust that what I now set out will not be seen as unduly controversial.

2. The market in question is that for the sale of sustained release morphine [SRM] tablets and capsules in the United Kingdom. SRM is a prescription drug, used for the relief of severe pain, including but not limited to that of cancer patients. The innovative element in the drug is the element of sustained release, enabling the drug to operate over a period of time, and thus to give relief in cases where the constant alleviation is required of otherwise unsustainable pain. Napp was the first company to introduce an SRM product into the United Kingdom, producing MST in 1980. Napp held a patent on the sustained release element in MST between 1980 and 1992. No competing SRM product entered the United Kingdom market until 1991.

3. There are two segments of the SRM market. The majority, some 86 to 90 per cent of supply, is to community pharmacies, for patients in community or primary care. The remainder is supplied to hospital pharmacies, for use in secondary care. There are different pricing and purchasing structures in these two segments. Sales to the community segment are not significantly price-sensitive. That is because although General Practitioners, whose prescription authorises the purchase, are subject to overall budget constraints, SRM drugs make up a small part of their total drug usage, and they are in any event likely not to be influenced by pricing considerations when dealing with the degree of acute suffering that SRM drugs seek to address.

4. NHS prices generally are, however, constrained by the voluntary Pharmaceutical Price Regulation Scheme [PPRS], agreed between the pharmaceutical industry and the Ministry of Health. PPRS, however, operates on a "portfolio" basis; that is, the scheme controls the overall profits of participating companies (which include Napp), rather than by placing price limits on particular drugs. By contrast, the hospital segment is highly price-sensitive, with hospital boards, as bulk purchasers, expecting substantial discounts off a supplier's NHS list price. Such discounts have increased substantially since the launch of a product competing with MST in 1991.

5. However, despite their different primary characteristics, as just set out, there is a substantial economic linkage between the two segments. A very great deal of effort has been expended in these proceedings in disputes about the detail of that link, but I

would respectfully agree with the observation of Mr Carr Q.C. in this court that the exact nature of the linkage is not of primary importance. It suffices here to say that Napp agrees, and indeed strongly asserts, that hospital sales are an important, or even indispensable, "gateway" to community sales.

6. That link operates in two ways. First, in specific cases, the hospital doctor may require the patient to remain, or the community doctor think it advisable he should remain, under the same drug regime when he leaves hospital. This is not just on grounds of familiarity or because of inertia, but also because release patterns of different drugs do or may differ.

7. Second, the Tribunal found at paragraph 238 of its decision that in the conduct of its business Napp also laid weight on the effect of referral letters by specialists, even in cases where the patient had not been treated with an SRM drug in hospital, and on the enhancement of the reputation of the brand through its use in hospitals. The Tribunal found that it would be futile to seek to enter the community segment without a presence in the hospital segment.

8. Napp has a dominant position in both segments of the market. In the community segment, its market share has for many years exceeded 90 per cent and that dominance is buttressed, in the Director's contention, by significant barriers to entry into that segment of the market, including MST's reputation as what Napp described as "the gold standard for the treatment of severe chronic pain"; caution on the part of general practitioners in prescribing new strong opioid products; lack of price sensitivity amongst general practitioners; and the need for very considerable promotional expenditure in order to dislodge Napp's position.

9. In the hospital segment, Napp's market share is now also over 90 per cent, having grown in recent years with the reduction in share, and eventual withdrawal from the market, of the then only significant competitor, Oaramorph SR, manufactured by Boehringer Ingelheim Limited [BIL]. A recent entry is Zomorph, supplied by Link Pharmaceuticals Limited, which has some 7 per cent of the hospital market and some 3 per cent of the community market.

10. Napp makes a gross margin of in excess of 80 per cent of its sales in the community segment. By contrast, in the general climate of discounting to hospitals referred to above, Napp offers discounts of in excess of 90 per cent off its NHS list prices to the hospital segment. In the period from March to May 2000, Napp's prices to hospitals were below its total delivered costs on all tablets except those of 15 mg and 200 mg, and below direct costs of material and labour on all tablets except 5 mg, 15 mg and 200 mg. The latter cases, in which the discounts were below 85 per cent, were the only categories of the product in relation to which Napp did not face a directly competing product from BIL. The price to the community is very significantly greater than the price charged to hospitals, in the case of some higher strength tablets the community wholesale price being in excess of 1,000 per cent higher than the average hospital price.

11. The Director concluded that Napp had abused its dominant position in the terms of section 18 of the Competition Act 1998 in the following terms:

"(a) while charging high prices to customers in the community segment of the market, supplied sustained release morphine tablets and capsules to hospitals at discounts which have the object and effect of hindering competition in the market for the supply of sustained release morphine tablets and capsules in the UK. The pricing behaviour of Napp has to be considered as a whole, but the particular aspects in which, in the circumstances of the present case, its discounting behaviour is abusive under section 18 of the Act, are as follows:

"(i) selectively supplying sustained release morphine tablets and capsules to customers in the hospital segment at lower prices than to customers in the community segment;

(ii) more particularly, targeting competitors, both by supplying at higher discounts to hospitals where it faced (or anticipated) competition, and by supplying at higher discounts on those strengths of sustained release morphine tablets and capsules where it faced competition; and

"(iii) supplying sustained release morphine tablets and capsules to hospitals at excessively low prices.

"Moreover, Napp has engaged in the above conduct with the intention of eliminating competition.

"(b) charged excessive prices to customers in the community segment of the market for the supply of sustained release morphine tablets and capsules in the UK.

In doing so, Napp has abused its dominant position in the market for the supply of sustained release morphine tablets and capsules in the UK."

12. The Director ordered various regulatory measures and imposed a penalty of £3.21 million. The Tribunal upheld that decision, with the omission of sub-paragraph (i) of paragraph (a), but reduced the penalty to one of £2.2 million. Napp seeks permission to appeal to this court against both the findings of the Tribunal as to abuse and the fact and amount of the penalty.

The jurisdiction of this Court

13. Appeals to this court from the Tribunal, apart from appeals as to the amount of the penalty, are on points of law only. That has two particular implications.

14. First, by reason of section 60 of the Competition Act the Tribunal is required, as is this court, to secure that there is no inconsistency between its decisions and the principles laid down by the Treaty establishing the European Union and any principles laid down by or any relevant decision of the Court of Justice. That means that the "law" that will be applied is likely to be largely or entirely the law of the European Union, and that means in its turn that both the courts and those appearing

before them have a particular responsibility to identify clearly what in the jurisprudence of the European Union is truly a principle or decision, in the terms of section 60, and what is not such.

15. Second, it is important that parties seeking to appeal to this court should isolate within the criticised decision what is an issue of law, and what is merely a determination, by a specialist Tribunal, of a matter of fact or judgement. In order to clarify the question that this court has to decide, and to facilitate its task, it will be desirable in future if an applicant, in his Grounds or in Grounds supplemented by a short skeleton, sets out his case as follows:

> 1. Identify in precise terms the rule of law said to have been infringed;
>
> 2. Demonstrate where in the European jurisprudence that rule is to be found, by specific reference to the European authorities;
>
> 3. Demonstrate briefly from the Tribunal's judgement the nature of the error, by reference to the Tribunal's handling of the issue in question.

16. If that is done, two benefits will accrue. First, it should swiftly become apparent what complaints are truly points of law, and what are attempts to reargue issues of fact or judgement. Second, it should not be necessary for the court, at least at the permission stage, and probably not thereafter, to read more than the Tribunal's judgement, the Grounds and skeleton, and the relevant parts of the authorities relied on.

17. This approach has not been adopted in this case. The Grounds makes widespread complaints that the Tribunal "erred in law", without identifying or verifying the precise rules relied on or their provenance. The latter task is left to the skeleton, but even there we have often had to construe the rules out of a general discussion of, or criticism of, the Tribunal's reasoning or approach. A further skeleton or document was presented to us yesterday, setting out the main issues that Napp now relied on, which was supplemented by submissions by Mr Carr this morning, but that document also, I have to say, did not achieve the objectives that I have just set out.

18. This reluctance to specify the basis or source of the appeal in the documents before the court has meant that the appearance, at least, is that no proper thought has been given to the nature of the material that should be put before the court. We have been presented on this application with 1,123 pages of documents, of which we were told that over 500 pages were required reading, and with a bundle of 60 authorities. As to the latter, as Lord Justice Brooke pointed out in his initial guidance to the applicant, the bundle still does not contain certain material relied on in the proceedings below. Perhaps even worse, it contains very many cases that are not relied on or referred to at all in the proceedings before us, either in the skeletons or in the oral submissions. The Tribunal gave the applicant a timely and proper warning as to its obligation to comply with the Lord Chief Justice's Practice Direction [2001] 1 WLR 1001, that warning and guidance to be found in paragraph 76 of the Tribunal's decision. We are very sorry to have to record that that Direction continues to be completely ignored in the proceedings before us.

19. These complaints are not merely formal in nature. The way in which the appeal has

been presented has made it genuinely difficult to identify the questions that we were asked to decide, and whether we can properly decide those questions. I shall not take time in this judgement in setting out examples of that difficulty, but many examples there are. The members of this court, faced with this massive documentation and extensive argument, have spent very many hours in advance of this hearing seeking to extract the questions that the court can properly answer. The pre-submission material is completely fruitless if it does not assist the court in the way that has been indicated. While we recognise that this is the first occasion on which there has been an appeal to this court, and that the requirements of and the procedure in this court may not therefore have been properly appreciated, it is necessary to put firmly on record that future applicants should not expect the indulgence that has been extended in this case.

20. All that said, we turn to the issues of law that we are satisfied the applicant does rely upon.

The implications of the claim that Napp's conduct in the hospital segment was "normal"

21. It appears to be central to Napp's complaint in relation to the findings of abuse in the hospital segment that there is a "general rule that a firm will infringe the Chapter II prohibition only if it resorts to methods of competition which are abnormal". That is a quotation from paragraph 1(d) of the Grounds. Napp's conduct was asserted to be normal in the sense for the reasons summarised in paragraph 88 of the skeleton.

22. For a principle as widely stated as that in paragraph 1(d) of the Grounds, Napp appears to rely on three authorities: Case 322/81 [1983] ECR page 3461[70] (**Michelin**) cited at paragraph 59(iv) of the Skeleton; Case 62/86 [1991] ECR 3359[71]-[72] (**Akzo**), cited at paragraph 67(i) of the Skeleton; and **Hoffman-La Roche** [1979] ECR 461, the quotation from that authority being effectively repeated in the two cases I have mentioned.

23. All of those sources indicate that the concept of abuse is an "objective" concept, and that conduct by an undertaking in a dominant position will be an abuse if:

> (i) it influences the structure of the market; and
>
> (ii) in the market where competition is already weakened by the presence of the dominant firm, "by recourse to methods different from those which condition normal competition in products or services on the basis of transactions of commercial operators [the conduct] has the effect of hindering the maintenance of the degree of competition still existing in the market".

24. It seems clear from the language of methods "which condition normal competition on the basis of transactions of commercial operators" that the Court of Justice had in mind, in connection with its task of assessing abuse as an objective concept, that it was necessary to scrutinise the methods adopted by the dominant firm by the test of what would be normal competitive conduct on the part of commercial operators generally. That the court looks at the matter in that way is demonstrated by its remarks in **Akzo** in relation to predatory pricing as a category of behaviour, a matter

to which I return later in this judgement. To illustrate that approach from the present case, the offering of discounts at levels described by Napp itself as ludicrous would plainly not be normal competition.

25. Napp, however, argues that its conduct was normal, and therefore not abusive, because it was normal in, or typical of, the conduct that was current **in the hospital segment market**. That is said to be demonstrated by the facts that Napp only matched, but did not undercut, the discounts offered by competitors, effectively BIL, when they sought to enter the market, and that although the hospital prices were below cost, they were profitable on a wider view, in that they opened the door to profitable community sales: an opportunity, Napp says, that would have been equally open to its competitors.

26. I cannot accept that argument. The whole premise of the Court of Justice's analysis is that it looks at the conduct in question on the basis that it takes place in a market in which competition has already been distorted by the presence of the dominant firm. The latter's conduct then has to be looked at objectively, that is to say, according to practices in a normal and not an abnormal market. In the case of the hospital market, there was until 1991 no competition at all, owing to Napp's protected patent position. To hope to enter that market, competitors who were already at a disadvantage, through their need to catch up with the dominant firm in terms of reputation and promotional expenditure, were obliged to offer substantial discounts. Because of its dominant position, Napp had only to match, and not to exceed, those discounts in order to foreclose from its competitor the only means of competition open to it: see the observations of the Court of Justice in cases C-395/96P and 396/96P [2000] ECR I-1442 [117] (**Compagnie Maritime Belge**). It is really impossible to think that the Court of Justice could have taken that view if Napp are right, and the matching of a competitor's discounts by a dominant firm is to be regarded as incapable of being an abuse if it is a reaction to conditions in the market that were created at least in substantial part by the presence of the dominant firm itself.

27. Further, it should be remembered that the complaint in the present case is not merely of price-matching, but of predatory pricing, an aspect of the case to which I shall return shortly. Predatory pricing falls without doubt into the category of "methods different from those which condition normal competition". I find it impossible to think that the Court of Justice, when assessing the concept of abuse in a market distorted by the presence of the dominant firm, would have regarded predatory pricing as rendered non-abusive just because it was adopted by the dominant firm in response to pricing at the same level by a would-be competitor seeking to enter by overcoming the market distortions.

28. I have gone into this matter in some detail because of the importance attached to it in Napp's submissions. In the event, however, all of this is irrelevant to the court's present task. It is irrelevant to that task because of three findings made by the Tribunal. First, the Tribunal found that Napp's pricing policy hindered competition and raised barriers to entry, to the significant disadvantage of its competitors. That finding is summarised in paragraph 307 of the Tribunal's decision, but it is amply verified in other of the preceding paragraphs. For instance, the Tribunal said this at paragraph 275:

> "We accept the Director's argument that Napp's policy of matching competitors' prices in the hospital segment significantly hinders competition by adding an additional strategic barrier to the already high barriers to entry".

29. And, at paragraph 287, at the end of that paragraph, the Tribunal said this:

> "The overwhelming inference from the totality of the evidence is that Napp's prices in the community segments, and its market shares in both the hospital and community segments, have been protected, at least in part, by the foreclosure effects of Napp's hospital discount policy. Nor do we doubt that that was Napp's intention".

30. Secondly, in paragraph 340, the Tribunal made a specific finding that Napp's conduct had not been normal, and said this:

> "It follows from the above that we reject Napp's argument that it has not 'had recourse to methods different from normal competition' (**Hoffman-La Roche**, paragraph 91). We accept that in the pharmaceutical sector, discounts granted to hospitals by pharmaceutical companies may be substantial. However, nothing in the evidence before us leads us to doubt: (i) that discounts of up to in excess of 90 per cent are not normal in hospital tenders; (ii) that such discounts have been granted selectively only where Napp has been faced by a competitor; and (iii) that the resulting difference between what the hospital pays and the normal NHS list price is exceptional. Perhaps more significantly, we do not regard it as 'normal' for prices to hospitals to remain below direct costs for many years. For the reasons already given, we find that the below-cost pricing in question was not a 'normal' commercial response but the response of a super-dominant undertaking aiming to eliminate competition. Nothing in the structure of the NHS compelled Napp to act as it did".

31. Mr Carr said that the Tribunal was to be criticised because it had ignored or blinded itself to the specific factors in the hospital market. I cannot agree. If one reads the Tribunal's judgement as a whole, it seems to me absolutely clear it was looking at this matter very much in the context of the market as it is operated, and not at all by simple a priori assumptions based upon the fact, striking though it is, that discounts in the hospital segment, looked at alone, are remarkably high. This was all a matter of judgement on the part of the Tribunal, to which it brings its specialist and expert understanding of the way in which markets work. I see no way in which this court could go behind that finding, involving, as it does, no arguable error of law on the part of the Tribunal.

32. Third, the Tribunal found that it had been Napp's intention to exclude competitors from the hospital market. It found this at paragraph 327 of the Tribunal judgement:

> "In our judgement, there is no credible evidence that Napp ever saw any justification for its hospital discount policy, other than the need to exclude competitors from the hospital segment, and thus prevent them

from gaining hospital influence which would, in turn, threaten Napp's market share in the community segment".

33. I shall have to return to criticisms made of that third finding, but so far as the first two of the findings that I have just set out are concerned, the first of them confirms the abusive nature of Napp's conduct. Contrary to Napp's contentions, its pricing policy was not merely a response to competition, but a foreclosure of competition by the use of barriers to entry. The second of these findings as to normality destroys Napp's case as a matter of judgement, even if Napp were correct in the legal analysis it has put forward.

34. These findings do not and could not involve points of law, at least unless it were to be contended that the conclusions had been arrived at on the basis of no evidence at all: something that is not and could not possibly be said. They cannot therefore be reviewed in this court. But even if we did have authority to review such findings, as the conclusion of an expert and specialist tribunal, specifically constituted by Parliament to make judgements in an area in which judges have no expertise, they fall exactly into the category identified by Hale LJ in **Cooke v Secretary of State for Social Security** [2001] EWCA Civ 734, as an area which this court would be very slow indeed to enter.

35. In that connection, I should also refer to paragraph 1(c) of the Grounds, which said that the Tribunal "should have concluded" on the basis of the primary facts that barriers to entry into the hospital segment are attributable to inefficiencies created by the NHS purchasing arrangements or "independently existing barriers to entry". There is no point of law involved or even purported to be involved in that submission. Like many of the other complaints, it relates to a question of market analysis, which is uniquely a matter for the Tribunal.

Predatory Pricing

36. I turn then more specifically to the question of predatory pricing which, it is fair to say, has dominated Mr Carr's submissions to us today.

37. In paragraph 71 of its judgement in **Azko**, the Court of Justice said that prices below average variable costs "... by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive". In Case 333/94P [1996] ECR I-5951 [41]-[43] (**Tetrapak II**) the Court went further and held that such pricing would always be abusive, without demonstrating an intention to eliminate competition, at least if there was a risk that the predatory pricing would produce that outcome. There was some discussion, or appears to have been, before the Tribunal as to whether that interpretation of the view in **Azko** in fact carried the authority of the Court, and reference was made in that connection to the opinion of the Advocate General Fennelly in **Compagnie Maritime Belge**. I would have to reserve the issue of whether observations by an Advocate General, important and authoritative although of course they are, and respectfully viewed by this court as they are, in fact fall within the rubric laid down by section 60 of the Competition Act. However, it does not appear to be necessary to develop that point, which was not referred to in the argument before us.

38. At the same time, however, I for my part had difficulty in determining what precisely is Napp's position with regard to the observations of the court in **Tetrapak II**, observations that were of course relied on by the Tribunal in this case. At one point in his argument, Mr Carr, at least as I understood him, said that any suggestion that intention to exclude competition was no longer the touchstone was incorrect, despite what the court appears to have said on that point in **Tetrapak II**. More generally, however, he argued that the matter must be looked at in the context of the market. Pricing would not be predatory if it was normal conduct in the market. Because it was normal market conduct, it could not therefore be said to manifest an intention of eliminating competition.

39. Further, and as to the normality of its conduct, Napp argued before the Tribunal that its prices were not predatory because of the linkage between the hospital segment and the community segment. Hospital prices did not generate a loss because of the profits to be made on the community sales to which they were the doorway.

40. The Tribunal rejected all of those arguments, not only on grounds of logic, but also on grounds of practicality and market analysis, as set out in detail in paragraphs 258-306 of its judgement. The short point, which by no means does justice to the depth of the Tribunal's analysis, is that Napp's argument carries within it the seeds of its own destruction. The level of hospital prices is said to be justified because of the profits that will flow from the after-market. But the effect of the level of hospital prices was found to create another form of abuse, by foreclosing competitors from the hospital segment, and thus from the profitable after-market.

41. Mr Carr sought to meet the Tribunal's findings by saying that they had misunderstood the link between levels of pricing in the hospital market and sales to the community. What was complained of in the hospital segment was the pricing policy. But it was not the price at which one sold to the hospital that generated community sales, but rather presence in that market, and the fact of sales in the hospital market at whatever price, that led to community sales.

42. That no doubt is correct, but in the terms of the structure of this market, as analysed by the Tribunal, it omits an essential intermediate fact. The complaint about pricing in the hospitals segment is not directly linked to the availability of community sales. The complaint is that, as found by the Tribunal, the effect of pricing in the hospital segment is to exclude competition from that segment: and therefore, because of the structure of these two markets linked together, to facilitate the task of the dominant party in the community market by removing competitors from that market also.

43. I have to say that I found the Tribunal's argument entirely persuasive. However, again, what I think of it is neither here nor there. Napp were wholly unable to demonstrate at any stage of the proceedings that any point of law arose from the Tribunal's account. It is, again, classically an expert analysis of market behaviour and effects, into which this court is not only reluctant to enter, but is also precluded by its powers from entering at all.

Intention

44. The Tribunal entered into an assessment of Napp's intentions in two respects. First, in

relation to predatory pricing, the Tribunal decided that, if it were wrong in its legal analysis discussed above, it should consider whether, in the terms originally adopted in **Akzo**, the predatory pricing had sought to eliminate a competitor. Second, in connection with penalty, the Tribunal had to consider whether the conduct found had been intentional or negligent.

45. In relation to the first of these issues, the Tribunal held at paragraphs 327 and 336 of its decision that:

> "There is no credible evidence that Napp ever saw any justification for its hospital discount policy, other than the need to exclude competitors from the hospital segment, and thus prevent them from gaining hospital influence which would, in turn, threaten Napp's market share in the community segment ... The evidence establishes that Napp's pricing policy was intended to eliminate competition".

46. That conclusion was reached after an analysis of Napp's internal documents and after hearing oral evidence from Napp's Managing Director.

47. Mr Carr made two criticisms. First, he said that, so far as the conclusion rested upon assessment of Napp's actual intention, that assessment was misplaced, and the documents did not support what was suggested. The Tribunal should have looked at them in a more sceptical way, bearing in mind the way businessmen write and talk to each other.

48. Having looked, admittedly only at the extracts quoted in the Tribunal's decision and not at the documents themselves, I am, I have to say, unpersuaded by that criticism. But, again, that is not the point. This was a matter for the Tribunal to look at. It was for the Tribunal, after looking carefully at what was done and said and hearing actual evidence, to reach a conclusion: a conclusion that this court will not go behind, unless it can be shown to be based upon a wholly mistaken or irrational approach to the facts, neither of which started to be suggested.

49. Secondly, Mr Carr said that the finding of intent was in any event suspect because it was based upon two pillars: one was the analysis of intention that I have already dealt with; the second was what the Tribunal purported to have deduced from the mere fact of predatory pricing.

50. I say two things about that. Firstly, I do not think it is right to say that the Tribunal purported to deduce an intention to exclude competition from the mere fact of Napp's market behaviour. That goes back to the Tribunal's handling of the observation of the Court of Justice in paragraph 42 of **Tetrapak II**, where it thought that, on the basis of that ruling, it was not necessary to establish intention to exclude competition if the reduction of exclusion was a likely consequence of predatory pricing behaviour. So that part of the judgement, as I read it, is not put forward as a supporting limb of the pillar of intentionality; and indeed the Tribunal was quite clear as to the two stages of its task, because it said in paragraph 307:

> "Since we have found that Napp's policy of pricing below direct costs hindered competition and raised barriers to entry, to the significant

> disadvantage of its competitors, it is, strictly speaking, unnecessary to examine Napp's intentions in order to establish an abuse. See **Tetrapak II** in the judgement of the Court of Justice at paragraph 42. We do so for completeness".

51. Therefore, having dealt with the effect of the pricing policy, it went on to what it understood to be a separate and distinct question, the intention of Napp; and it is quite apparent that whatever criticism, if any, might be made of the first of the Tribunal's analyses, its findings of Napp's intention to exclude competition are, on any view of the jurisprudence of the European Court, fatal to Napp's case.

52. I should add that in the skeleton argument, although not in the oral submissions, an attempt was made to suggest that the Tribunal had in some way erred in law in that it had not applied to its findings on intention the analysis of the Court of Appeal in **Ghosh** [1982] QB 1053. I do not know whether that argument has been abandoned. It is wholly misconceived. **Ghosh** was dealing with the question of dishonesty in theft and not of any question of intention. If recourse is sought to the criminal law, in my view wholly inappropriately, the more relevant authority is the case of **Nedrick** [1986] 1 WLR 1027D-F, at which Lord Lane does give guidance to the questions of intention, and says:

> "What then does a jury have to decide so far as the mental element in murder is concerned? It simply has to decide whether the defendant intended to kill or do serious bodily harm. In order to reach that decision, the jury must pay regard to all the relevant circumstances, including what the defendant himself said and did. In the great majority of cases, a direction to that effect will be enough. Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen. The decision is one for the jury to be reached upon a consideration of all the evidence".

53. One should look at what the party in question said about what he was doing. That is absolutely what the Tribunal did in this case.

Abuse in the community segment

54. The Tribunal held, at paragraph 402, that Napp had made use of its dominant position to reap trading benefits that would not have been available to it in conditions of normal competition, thus fulfilling the test for abuse of market power. We did not understand Napp to disagree with that as a test, but to argue that:

> 1. No value had been placed on Napp's legitimate brand premium;
>
> 2. A pharmaceutical company's prices should be judged according to its profits on its portfolio, in order to encourage R&D;
>
> 3. Prices could not be abusive if they complied with the PPRS.

55. The first of these points is obscure. It is far from clear that the Tribunal did acknowledge the legitimacy of any price-increase for brand premium, not least when it was the strength of the brand that was found to be one of the serious barriers to entry into the market.

56. As to the two other points, the Tribunal convincingly demonstrated that the PPRS outcome, precisely because of its "portfolio" base, is irrelevant in the case of over-pricing of any particular product. The need to support R&D is, as far as I understand it, not denied by the Tribunal, but is not accepted by it as a reason for justifying pricing above the competitive level. No authority was put before us that suggested that that view was wrong in law. The Tribunal in its judgement put forward a series of bases and comparisons to demonstrate that prices were seriously above those that would obtain in a properly competitive market. That was a matter for them. No error of law in their process has been demonstrated.

Penalty

57. Napp's argument that no penalty at all should be imposed, which I understood to be part of the argument, really could not stand up. Once it is found, as the Tribunal found, that Napp intended to exclude competition from a market in which it had a market share of over 90 per cent, it would, to put it at its lowest, need very cogent evidence indeed for a company marketing an international product in European markets in the 1990s to demonstrate that it had no idea that that might at least raise questions under competition law. No such evidence was forthcoming. To point to its absence is not to place a burden of proof on Napp, but to show that Napp failed to dislodge an inference that was almost inevitable from its demonstrated acts and intentions. This again was a matter for the Tribunal. Its judgement on it was not only unchallengeable, but also plainly right.

58. As to amount, that figure is not at large, but is subject to some detailed considerations and calculations. The Tribunal went into these in considerable depth, in a way that cannot be criticised. I will allow myself the liberty of saying that I am far from certain that, had I been undertaking the task myself, I would have been as persuaded as was the Tribunal of the mitigating factors set out in paragraph 533 of its decision. That was, however, a matter for the Tribunal.

59. I can see no way in which any point of law suitable for the consideration of this court arises out of the Tribunal's determination. I would not grant permission.

60. **LORD JUSTICE BROOKE:** I agree. Because Buxton LJ's judgement sets out important guidance on practice, it is not subject to the limitation of citation contained in paragraph 6.1 of Practice Direction (Citation of Authorities) [2001] 1 WLR 1001.

61. I add only two matters, because this is the first attempt at appeal to this court from a very specialist field. The first is to emphasise the importance of the practice in relation to skeleton arguments, which was set out in paragraph 5.10 and 5.11 of the Practice Direction to CPR, part 52, and which is accurately described in the notes to CPR 52.4 in the current edition of the White Book.

62. The second is to express the hope that those who are responsible for giving guidance

on practice in volumes such as the White Book should draw the attention of practitioners to the judgement of Hale LJ in **Cooke v Secretary of State for Social Security**, to which Buxton LJ has referred.

63. I have no doubt that this proposed appeal is from a highly expert and specialist body of the type to which Hale LJ referred in that judgement.