Neutral citation [2018] CAT 12

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1275-1276/1/12/17

Victoria House
Bloomsbury Place
London WC1A 2EB

25 July 2018

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) FLYNN PHARMA LIMITED
(2) FLYNN PHARMA (HOLDINGS) LIMITED

Appellants in Case No: 1275/1/12/17
Interveners in Case No: 1276/1/12/17

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

AND BETWEEN:

(1) PFIZER INC.
(2) PFIZER LIMITED

Appellants in Case No: 1276/1/12/17
Interveners in Case No: 1275/1/12/17

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING (REMITTAL AND PERMISSION TO APPEAL)

BACKGROUND

1. On 7 June 2018, the Tribunal handed down its judgment in these proceedings ([[2018] CAT 11) (the "Judgment"). This Ruling adopts the same defined terms as are set out in the Judgment.

2. In the Judgment, the Tribunal set aside the part of the Decision under appeal that related to abuse (and any consequential findings, including penalties), and indicated its provisional view that it would remit the matter, insofar as it deals with abuse, to the CMA for further consideration as it saw fit.

3. On 28 June 2018, each of Pfizer, Flynn and the CMA applied for permission to appeal in respect of the Judgment (the "Application(s)"). The parties filed written submissions on the same day on whether the matter should be remitted to the CMA (the "Remittal Issue"), having been invited to do so by the Tribunal. We have read and carefully considered the Applications and the submissions on the Remittal Issue, as well as the observations in response filed by the parties on 6 July 2018.

4. The CMA said that no oral hearing was necessary. Pfizer and Flynn each asked for an oral hearing. In the light of the helpful submissions we have received from each of the parties, and the need to proceed without further delay, the Tribunal considers it is able to deal with the matters before it on the papers**.**

5. We consider first the Remittal Issue before determining the Applications.

THE REMITTAL ISSUE

The parties' submissions

6. The CMA agreed with the Tribunal's provisional view that the matter should be remitted in part to the CMA and submitted that an order under para 3(2)(a) of Schedule 8 CA98 in the following terms would be appropriate:

> *"The issue of abuse and any consequential matters, including penalties and directions, are remitted to the CMA for reconsideration in accordance with the Tribunal's Judgment"*.

7. This was on the grounds, first, that the proceedings should continue in the interests of justice as there was an important public interest in respecting Chapter II CA98 (or, indeed, Article 102 TFEU) and the pharmaceutical industry's interests similarly required that the scope of the prohibition in cases such as this should be fully explored; second, that there was no manifest unfairness or oppression against Pfizer or Flynn if this course were adopted; and finally that the proposed form of order was consistent with the Tribunal's practice.

8. The CMA said it would conduct the remittal in parallel with the pursuit of its proposed appeal. Alternatively, if the Tribunal was so minded, the remittal should be stayed pending resolution of any appeals, but it was important that the point of principle as to whether or not to remit be decided now.

9. Pfizer's primary submission was that if the CMA appealed the Tribunal's conclusion on abuse, there should be no remittal. Pfizer submitted that it was logically inconsistent for the CMA to accept the remittal and at the same time pursue an appeal. This could lead to its adopting a decision on a legal basis that might later be shown to be wrong; that if its appeal were successful, the Decision would be re-instated and the remittal work wasted; and that the Court of Appeal might impose its own views, requiring yet a further approach. Pfizer said that remittal would be unfair to it, in particular as the CMA's case had failed by reference to various arguments that Pfizer had urged the CMA to consider throughout the investigation; and the remittal would be burdensome and costly.

10. Pfizer contended in the alternative that there should be no remittal in any event. The Decision should be set aside in full, as had been done in *Aberdeen Journals (No 1)*[1] so that no remittal was required. This was because of (1) the already long duration of this case (the original complaint having been lodged in 2012), and the likely further extensive delays involved in a remitted procedure[2]; (2) the lack of any public interest in taking the case further; and (3) the irrelevance of historic pricing to the present situation in which the DH now had relevant price control powers and Pfizer's prices

[1] [2002] CAT 4.
[2] Pfizer referred to five decisions of the European Court of Human Rights showing that delays of this magnitude could violate the right to a fair trial under Art 6(1) of the Convention.

were reduced in compliance with the Decision and had not been increased. Pfizer said there was no precedent for a remittal in these circumstances.

11. Flynn's primary submission was that the Tribunal should defer any decision on the Remittal Issue until any appeals process had been exhausted. Flynn emphasised that the Tribunal should only order remittal if it was satisfied that the proceedings should continue in the interests of justice. It pointed in particular to the risk of Flynn, as a small company, having to incur substantial costs and to expend management time on a process that might turn out to be wrongly based in law. Flynn also pointed to the current level of Pfizer-Flynn Capsule prices not requiring further action by the CMA.

12. Flynn submitted, in the alternative, that the Tribunal should refuse to remit the Decision altogether, or, if it was minded to order remittal, stay the effect of that remittal until the final determination of any appeals. In particular, not only would remittal involve the CMA reconsidering arguments which it had already had ample opportunity to consider, but any further investigation would place an undue burden on Flynn. The issue was now an historic one, as current prices were subject to control by the DH, and the competitive landscape had changed.

Our conclusions

13. In our view, it is appropriate to determine the Remittal Issue now rather than defer a decision on whether or not to remit pending the outcome of any appeals. We consider first whether remittal is in principle appropriate in this case before addressing how this may interact with the question of appeals.

14. The CMA supports remittal of that part of the Decision that relates to abuse. Pfizer and Flynn oppose it, for similar though not identical reasons. Flynn points to the cost and time burden of further administrative proceedings for a small company, Pfizer emphasises more the historic nature of the conduct in question and the lack of any further public interest in pursuing this case. Both point to the need to avoid parallel processes (which we discuss below) and to their strong preference that there should be no remittal.

15. We agree with the CMA on this matter and do not accept Flynn's and Pfizer's contentions that there should be no remittal. We are satisfied that the proceedings

should continue in the interests of justice. It is not appropriate in this case to set aside the Decision as a whole. We have upheld the CMA's findings on market definition and dominance but found fault with its approach to the law of abuse. Putting right the errors which we have highlighted requires further investigation and analysis which the CMA is well able to carry out. We see no reason why the further time this will take need be unduly lengthy, having regard to the duration of the proceedings so far, and we see a clear public interest in the legality or otherwise of the Appellants' pricing behaviour over some four years being established.

16. Accordingly, we are satisfied that remittal is in principle appropriate in this case. However, we need to consider whether the timing of the remittal may be affected by our decision on the Applications, to which we now turn.

PERMISSION TO APPEAL

17. A judgment of the Tribunal in a case such as this can be challenged under section 49 CA 98, which provides for appeals to the Court of Appeal. Any such appeal requires the permission of this Tribunal or the Court of Appeal and must either be as to the amount of any penalty, or be on a point of law.

18. In considering whether to grant permission to appeal to the Court of Appeal in England and Wales, the Tribunal applies the test in what is now CPR rule 52.6(1): such that permission may only be granted where (a) the Tribunal considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason for the appeal to be heard.

The parties' submissions

19. As might be expected in a case of this kind, each party requests permission to appeal against those parts of the Judgment that adversely affect its interests, whilst by implication supporting the remainder: No party objects to all of the Judgment; but each objects to some of it. In the light of the substantive conclusions that we reach below, we do not need to consider the theoretical questions that might arise as to the extent to which any particular party is entitled to appeal any particular part of the Judgment or whether that should be contingent on any other appeal.

20. On matters of law, the CMA's Application is directed entirely at the Judgment's treatment of abuse and relies on the ground that the Tribunal did not correctly apply the legal test for finding that prices were unfairly high contrary to the Chapter II prohibition and Article 102 TFEU as set out in *United Brands* and thus erred in law in its consideration of abuse (at [280]-[444] of the Judgment). The CMA submits, first, that under the Excessive Limb the Tribunal was wrong to find that the CMA's Cost Plus methodology was not a sufficient or appropriate basis for a finding of excessiveness; second, that under the Unfair Limb, the Tribunal misapplied its own test for the consideration of comparators, in particular by not acknowledging the CMA's margin of appreciation; and finally, that the Tribunal was wrong to find that the CMA should have attributed further economic value to Pfizer-Flynn Capsules based on demand-side factors, in particular because of the Advocate General's Opinion in *Tournier* and by virtue of the CMA's margin of appreciation.

21. The CMA further submitted that there was a compelling reason for an appeal to be heard, namely the public interest in obtaining guidance from the Court of Appeal on an important point of law; the adverse effect of the price increases on the NHS; and the need to proceed with other, similar cases on a correct legal basis, which without an appeal, would be "seriously delayed".

22. Pfizer confined its Application to two short grounds on market definition and dominance. On the former issue, Pfizer objected to the Tribunal's rejection of the notion of dividing the market in phenytoin sodium capsules temporally. On the latter, it questioned the Tribunal's findings on the nature and impact of the DH's power to regulate, directly or indirectly, the price of phenytoin capsules and submitted that the presence of that power was sufficient to negate dominance and that this, and the relative weight to be attached to various relevant factors, were important questions of law on which guidance was needed following appeal. Pfizer further submitted that if the CMA was refused permission to appeal, the time for Pfizer to appeal other aspects of the Judgment should be extended generally until such time as the CMA had completed its investigation on abuse.

23. Flynn, by contrast, and in a somewhat lengthy submission, sought permission to appeal on three grounds relating to market definition/dominance, the CMA's ROS benchmark,

and cost allocation. The latter two issues were considered in the Judgment in the context of abuse, on which issue Flynn succeeded.

24. On market definition/dominance, Flynn did not dispute the Tribunal's analysis of the general principles to be applied but contended that, in reaching the conclusions it did in relation to Continuity of Supply (at [150] and [196]) and NRIM's commercial strategy (at [184]-[188]), the Tribunal had erred in law. Flynn further submitted that there were features of phenytoin capsule supply that raised wider issues of pharmaceutical market definition that in themselves were a compelling reason for an appeal to be heard.

25. On the CMA's ROS benchmark, Flynn objected to what it saw as an unjustified degree of weight attributed by the Tribunal to the 6% ROS figure derived from the PPRS. On cost allocation, Flynn objected to the Tribunal's findings that the CMA's approach was reasonable. The Tribunal had also failed to deal with Flynn's claim on the so called 'cost pool' and its effect on the allocation of costs; these issues were also of general application.

Our conclusions

26. We consider first the CMA's Application. On the Cost Plus point, the CMA has submitted that Cost Plus is a methodology approved in the case law (citing *Albion Water II;* and *Attheraces*) and decisional practice of the Commission (citing *Scandlines*) and that it was within the CMA's margin of appreciation to rely on it. These authorities were fully considered by the Tribunal, in addition to, amongst others, *United Brands* itself and *Latvian Copyright* (to which latter authority the CMA makes no reference in its Application). The Tribunal gave its reasons for finding that the Cost Plus approach adopted by the CMA in this case was not, alone, a sufficient basis for the findings that the CMA made under the Excessive Limb. We reject the submission that the Tribunal erred in law in this context.

27. In relation to the Unfair Limb, the CMA has, indeed, a certain margin of appreciation as to how it makes its assessment, but this is not an unlimited margin. In particular it does not extend to allowing the CMA to make an unfettered choice between the two alternative tests of the Unfair Limb.

28. On economic value and demand-side factors, the Judgment directly addresses why the CMA had drawn the wrong conclusion from the Advocate General's observations in *Tournier* (see [413] to [417]). We do not see this as a question of the CMA's margin of appreciation as the CMA now contends. To the extent that the CMA has submitted, in the alternative, that any additional economic value would be insufficient to render Pfizer's and Flynn's prices fair, this point was addressed in the Judgment at [418].

29. We therefore do not consider that this ground has a real prospect of success.

30. We must also consider, however, the CMA's more general ground, namely the public interest, for this and for other cases, in establishing the extent to which it is lawful for pharmaceutical companies to charge high prices in cases such as this, having regard to the financial pressures on the NHS and the effect on overall resources and patient welfare. We note Flynn's support for this proposition.

31. We do not disagree with the general proposition that high prices charged for one drug adversely affect the public health service both in relation to the direct cost of the drug in question and by the diversion of finite resources from other needs. However, it is not clear that this proposition in itself creates any compelling reason for an appeal to be heard in this case. The question that matters is at what point high prices charged by dominant firms become illegal.

32. The Judgment sets out a clear path through a difficult economic and legal area which should assist the CMA in determining whether, on a correct legal basis and on a sound analysis of the evidence, pricing decisions cross the threshold of illegality. We do not therefore see that a claimed need for further guidance on how to conduct this exercise is a compelling reason for an appeal to be heard, in this case, given that we have concluded that the appeal has no real prospect of success. Accordingly, the CMA is refused permission to appeal.

33. Turning to Pfizer's Application, we do not consider that either of the grounds it puts forward has any real prospect of success. Given that Pfizer accepts, as it must, the Tribunal's findings of fact both in relation to the temporal market definition and the significance or otherwise of the DH's price regulation powers, we do not see any substantive point of law on either aspect to justify granting permission. The matters

were fully aired before us and are given careful consideration in the Judgment. Pfizer appears, in reality, to be seeking to re-open the Tribunal's factual findings.

34. We do not consider that there is any other compelling reason for granting permission to appeal on these grounds and Pfizer has not identified any such reason. Accordingly, Pfizer is refused permission to appeal.

35. As to Pfizer's request for an extension of time to appeal other aspects of the Judgment if the CMA is refused permission to appeal, Pfizer has not provided any basis for this request and, accordingly, we refuse it.

36. In relation to Flynn's Application, we again do not see any substantive point of law that would justify granting permission to appeal. Flynn does not quarrel with the general principles on market definition and dominance set out in the Judgment, nor does it appear to question the Tribunal's findings of fact. Instead it takes issue with the Tribunal's application of the law to the facts as found. We see this as an attempt to contest the Tribunal's factual assessment rather than an appeal on points of law.

37. In relation to the strategy and objectives of NRIM, Flynn appears to be arguing that this should be considered as part of dominance rather than market definition, and that a market with two competitors where prices remain high is consistent with neither company holding a dominant position. Again, this is taking issue with our factual assessment rather than with the relevant law, which Flynn accepts is correctly stated in the Judgment. Further, in light of the fact-specific, and therefore case-specific, nature of market definition, we disagree with Flynn that there is an important point of principle at stake and do not consider that there is a compelling reason to grant permission to appeal on this ground.

38. Flynn's grounds on the CMA's ROS and cost allocation method, and the significance of the size of the cost pool to be considered, may similarly be regarded as an attempt to re-argue on appeal points which have failed to gain acceptance before the Tribunal, but which are part of the Tribunal's factual assessment rather than matters of law. It should also be recalled that the Tribunal made it clear that its findings on these detailed aspects were all subject to its overall finding that the CMA's approach to calculating excessiveness was incorrect.

39. Flynn submitted that these grounds were of sufficient general application to constitute in themselves a compelling reason why an appeal should be allowed. We do not agree; they are highly specific to the particular features of the case in hand.

40. We therefore do not consider that any of Flynn's grounds have a real prospect of success or that there is any other compelling reason for the appeal to be heard. Accordingly, Flynn is refused permission to appeal.

TIMING OF THE REMITTAL

41. Whilst the decision whether or not to grant permission to appeal is clearly separate from the Remittal Issue, both Pfizer and Flynn have pointed to a practical connection between the two matters, arising from the extra burden placed upon them in the event of parallel processes, and the illogicality, and the possibly confusing results, of the CMA conducting a remittal process on the basis of the Tribunal's Judgment whilst at the same time contesting a major aspect of it on appeal.

42. We agree that, from a practical point of view, it would appear somewhat unsatisfactory for the CMA to be resuming the case on remittal whilst it, or any other party, is contesting aspects of the Judgment on appeal. Our strong preference therefore would be for parallel proceedings to be avoided.

43. We have refused all the Applications. Of course, however, any of the parties would be entirely within its rights to apply directly to the Court of Appeal for permission to appeal. Should this occur, it is possible, depending on what the Court of Appeal decided, that there could be issues as to parallel processes. No doubt the CMA would wish to consider the possibility of any appeal process conflicting with, or adding confusion to, its conduct of the remittal, and the other parties may have similar considerations in mind.

44. We have already said that it is not appropriate to set aside the Decision in its entirety. One way of reducing the risk of parallel process arising would be for us to stay the remittal until the final determination of any appeal. Flynn has asked for this and the CMA has indicated it would agree to this course if the Tribunal had concerns as to the matter being remitted while appeals were ongoing.

45. Attractive though this option may seem, we have decided against it. In our view the public interest is best served by the CMA proceeding swiftly to reconsider the issue of abuse in accordance with the principles set out in the Judgment. Staying the remittal would prolong the proceedings even more than has already occurred and remove the period of possible infringement even further away in time from the time of investigation. If any party were to seek permission from the Court of Appeal, the Court of Appeal could itself consider whether it was appropriate to make any order relating to those parallel processes.

46. We think the same considerations apply to the CMA's stated need to proceed with other, similar, cases. We see no reason why these should not also proceed and we do not consider that they need to be delayed pending the outcome of any appeal in this case.

DISPOSITION

47. We therefore order that:

(1) The Applications are refused.

(2) The issue of abuse and any consequential matters, including penalties and directions, are remitted to the CMA for reconsideration in accordance with the Judgment.

(3) Costs are reserved, pending written submissions from the parties.

Peter Freeman CBE QC (Hon) Paul Lomas Prof. Michael Waterson
Chairman

Charles Dhanowa OBE QC (Hon) Date: 25 July 2018
Registrar