IN THE COMPETITION COMMISSION

APPEAL TRIBUNAL

Case No. 1001/1/1/01

New Court
Carey Street
London WC2A 2JT

06 February 2002

Before:

SIR CHRISTOPHER BELLAMY
(President)
MR BARRY COLGATE
PROFESSOR PETER GRINYER

BETWEEN:

NAPP PHARMACEUTICAL HOLDINGS LIMITED AND SUBSIDIARIES

Applicant

and

DIRECTOR GENERAL OF FAIR TRADING

Respondent

Mr Nicholas Green QC (instructed by Messrs Herbert Smith) appeared for the Applicant

Mr Peter Roth QC and Mr Jon Turner (instructed by The Director of Legal Services, Office of Fair Trading) appeared for the Respondent

JUDGMENT (interest and costs)

JUDGMENT ON INTEREST AND COSTS

1. We handed down judgment in this matter on 15 January 2002. In that judgment we dismissed Napp's appeal against the Director's decision of 30 March 2001 ("the Decision"), which was to the effect that Napp had abused a dominant position in the market for the supply of sustained release morphine tablets and capsules in the United Kingdom, contrary to the Chapter II prohibition under the Competition Act 1998 ("the Act"). We also dismissed Napp's appeal against the directions adopted by the Director on 4 May 2001 with a view to terminating Napp's infringement ("the Directions"). The infringement found by the Director and confirmed by the Tribunal was that Napp had abused its dominant position by charging predatory prices in the hospital segment of the market for sustained release morphine tablets and capsules, while maintaining excessively high prices in the community segment of that market. However, we found various mitigating factors and reduced the fine on Napp imposed by the Director from £3.21 million to £2.2 million.

2. At the handing down of the judgment the Director made two submissions. The first submission was made in response to the Tribunal's request to hear argument as to the proper rate at which Napp should be ordered to pay interest on the reduced penalty, pursuant to Rule 27 of the Competition Commission Appeal Tribunal Rules 2000, SI 2000 no.261 ("the Tribunal Rules") in respect of the period since the date when, but for the appeal, Napp would have been obliged to pay the penalty to the Director. The second submission made by the Director was that Napp should be ordered to pay the Director 50 per cent of the costs of the appeal, pursuant to Rule 26 of the Tribunal Rules on the basis that two of Napp's executives had not told the whole story in their evidence to the Tribunal on the issue of Napp's intentions in the matter of hospital pricing. We gave Napp seven days to submit written submissions on both those issues, which Napp duly did on 22 January 2002.

The rate of interest on the penalty

3. Paragraph 10 of Schedule 8 of the Act provides:

> "10.–(1) Rules may make provision–
>
> (a) as to the circumstances in which the tribunal may order that interest is payable;
>
> (b) for the manner in which and the periods by reference to which interest is to be calculated and paid.
>
> (2) The rules may, in particular, provide that compound interest is to be payable if the tribunal–
>
> (a) upholds a decision of the Director to impose a penalty, or

(b) does not reduce a penalty so imposed by more than a specified percentage.

But in such a case the rules may not provide that interest is to be payable in respect of any period before the date on which the appeal was brought."

4. Rule 27 of the Tribunal Rules provides:

> "If it imposes confirms or varies any penalty, the tribunal may, in addition, order that interest is to be payable on the amount of any such penalty from such date, not being a date earlier than the date upon which the application was made in accordance with rule 6 above, and at such rate, as the tribunal considers appropriate. Unless the tribunal otherwise directs, the rate of interest shall not exceed the rate specified in any Order made pursuant to section 44 of the Administration of Justice Act 1970. Such interest is to form part of the penalty and be recoverable as a civil debt in addition to the amount payable on any outstanding penalty notice issued in accordance with section 36 of the Act."

5. The Tribunal has already decided in paragraph 543 of its judgment of 15 January 2002 that this is a case in which it should exercise its power under Rule 27 and order interest to be payable at a commercial rate. It is common ground that interest should run from 30 June 2001, which is the date by which Napp was required to pay the penalty pursuant to section 36(6) and (7) of the Act, in accordance with the Decision. By virtue of section 46(4) of the Act, the making of the appeal suspended Napp's obligation to pay the penalty by that date.

6. The appeal having been decided, the only live issue as regards interest now is at what rate interest should be payable. The maximum rate that the Tribunal could order in accordance with Rule 27 is 8 per cent, which is currently the rate payable on judgment debts under section 44 of the Administration of Justice Act 1970: see Judgment Debts (Rate of Interest) Order 1993 (SI 1993 No. 564).

7. According to the Director, since the penalty, together with any interest due on it, is recoverable as a civil debt (section 36 of the Act and Rule 27) it is appropriate to have regard to the practice followed by the civil courts when awarding interest in debt claims. The practice of the Commercial Court is to award interest at Bank base rate plus 1 per cent although that is a presumption which can be displaced: see the White Book 2001 Vol 1, paragraph 7.0.15(a). However, submits the Director, the underlying justification for the rule in civil cases, namely that the claimant should be compensated for being kept out of his money, is not applicable in the present context. In the present context, submits the Director, the basic principle that the Tribunal should take into account, when setting, in the exercise of its discretion, the appropriate rate of interest under Rule 27, is that an undertaking which has been subjected to a penalty under the Act should not obtain any benefit from the delay inherent in the appeal process.

8. The Director further submits that, during the period of the appeal, Napp has wrongfully gained the benefit of additional sums earned through the excessively high prices it has charged in the community segment of the market for oral sustained release morphine and gained a further benefit from the fact that during the period of the appeal its hospital pricing policy has continued to protect its monopoly profits earned in the community segment. The Director considers that in those circumstances the appropriate rate of interest on the penalty should be somewhat higher than the ordinary commercial rate, and nearer to the judgment rate of 8 per cent. The Director suggests the rate should be Bank base rate plus 2 per cent. On that basis, the rate applicable in the relevant period would start at 7.25 per cent, and fall progressively to 6 per cent, commercial interest rates having fallen in the course of the appeal.

9. The Director also draws attention to the practice of the European Commission in its decisions under Articles 81 and 82 of the EC Treaty, where, in equivalent circumstances, the rate of interest fixed in the event of non-payment of the penalty is usually 3½ per cent over the rate which the European Central Bank applies to its main re-financing operations on the first working day of the month in which the relevant decision is adopted. Applied in the present case, that rate would be just over 8 per cent.

10. Napp submits that the Director (or more particularly the Consolidated Fund: see section 36(9) of the Act) should be awarded interest to compensate him from being kept out of the penalty money in accordance with the normal principle applicable in civil cases. The commercial rate of interest applicable to the Consolidated Fund would be less than Bank base rate plus 1 per cent, since HM Government is able to borrow at a risk-free rate.

11. Alternatively, submits Napp, if it is considered that it is appropriate to have regard instead to the benefit derived by Napp from the suspension of the obligation to make the penalty payment during the course of the appeal, then the appropriate interest rate to apply would be no more than Bank base rate plus 1 per cent, which approximates to Napp's actual borrowing costs.

12. There would, according to Napp, be no basis for awarding a higher rate of interest since (i) that would amount to the imposition of an additional penalty; (ii) there are practical difficulties in calculating any "gain" allegedly made by Napp; (iii) the suspension of the penalty did not contribute to the perpetuation of the infringement, which is a separate matter which was dealt with by Napp's application for the interim suspension of the Directions and the President's Order of 22 May 2001; (iv) there is no suggestion here that Napp has utilised the unpaid penalty monies to fund an infringement of the Act; (v) the setting of the rate of interest on the penalty should not be confused with issues that could arise in civil actions for compensation.

13. In our view, the basic principle applicable under Rule 27 of the Tribunal Rules is that an undertaking which has been subject to a penalty for an infringement of the Act, which by virtue of section 46(4) of the Act obtains the automatic suspension of the obligation to pay the penalty by appealing to this Tribunal, should not obtain any benefit from the delay inherent in the appeal process. The provision as to interest on penalties to be found in that Rule is mainly there to prevent appeals being introduced merely to delay payment. It follows that the rate of interest should reflect the benefit derived by the appellant from the suspension of the obligation to make the penalty payment. A convenient measure of that benefit will normally be the appellant's cost of borrowing. In the Commercial Court, as we understand it, the normal rate applicable is Bank base rate plus 1 per cent, although that presumption can be displaced. That seems to us, absent any evidence to the contrary, a reasonable yardstick to apply in most cases. In the present case we have no reason to doubt that Bank base rate plus 1 per cent reflects Napp's actual cost of borrowing.

14. We do not accept the Director's submission that the rate of interest in this case should be set in some way to reflect the fact that Napp's infringement continued during the period of the appeal. As regards the excessive prices charged by Napp in the community segment, Napp has given an undertaking to the Department of Health dated 23 May 2001 to reimburse the Department any excess costs incurred by the Department by virtue of the fact that the President, in his interim order of 22 May 2001, suspended, for the duration of the appeal, the Directions that required Napp to reduce its NHS List Price. That undertaking also provides for interest to be payable on the sums due to the Department of Health, so the matter is fully covered. As regards the fact that Napp's hospital pricing policy continued during the period of the infringement, thereby giving rise to some unquantifiable "gain", that aspect was not raised by the Director at the time of Napp's interim measures application in May 2001. More importantly, in our view, the power in Rule 27 to order that interest should be applicable to the penalty is not there as a further sanction in respect of a possible continuation of the infringement, or as an indirect means of securing some kind of counterbalancing compensation. The interest rate mechanism under Rule 27 is there primarily to deal with the fact that the penalty has not been paid, which is a quite different issue from the question whether the underlying infringement is continuing during the period of the appeal. The latter problem will have to be addressed by other means in the context of the Tribunal's power to grant interim relief under Rule 32 of the Tribunal Rules.

15. On the other hand, we do not accept Napp's submission that the rate of interest should be, in effect, no higher than Bank base rate, on the basis that the Consolidated Fund (to which accrue the penalties imposed by the Director) can borrow virtually risk-free. It is not a question here of the Consolidated Fund borrowing the monies in question, but of the appellant's obligation to

pay. For the reasons that we have already given, the relevant criterion is the cost of borrowing to the appellant. The underlying basis of the principle may be conceptually different from that applicable in civil litigation, but the end result is identical in practice.

16. Accordingly the rate of interest we award on the penalty of £2.2 million imposed on Napp is 1 per cent above Bank base rate for the period from 30 June 2001, such interest to run until payment of the penalty or judgment obtained by the Director under section 37 of the Act.

17. We observe that that result compares favourably with the rate applicable in proceedings on appeal before the Court of First Instance which is 3½ per cent above the European Central Bank refinancing rate prevailing on the date of the relevant decision. In addition, appellants before the Court of First Instance have to fund the cost of a bank guarantee. Nor does the rate we have ordered involve compound interest which is permitted under paragraph 10 of Schedule 8 of the Act. Depending on experience, the Tribunal might take a different view in future cases.

The costs of the appeal

18. According to the Director, in appeals to this Tribunal a losing party should not be liable to costs, unless that party has behaved unreasonably. The Director made a similar submission in the case of *The Institute of Independent Insurance Brokers* and *The Association of British Travel Agents v Director General of Fair Trading* [2001] CompAR 62, ("the GISC case") in which the Tribunal gave judgment on the issue of costs on 29 January 2002 (the *GISC (costs)* case). In the present case, the Director draws attention to the fact that the Tribunal found, at paragraphs 329 to 332 of its judgment, that two senior executives of Napp had not given the Tribunal a full account, in their evidence, of Napp's intentions in respect of its hospital pricing policy, in view in particular of the documents that came to light in the course of the appeal. On that basis the Director submits that Napp has behaved unreasonably. Napp's conduct, says the Director, prompted him to request the cross-examination of one of the witnesses in question, Mr Brogden, and 50 per cent is a reasonable estimate of the proportion of the Director's costs that should be fairly paid by Napp to the Director.

19. Napp does not dispute the principle advanced by the Director but submits that both parties should pay their own costs. Napp submits (i) that it has been successful in achieving a £1 million reduction in the penalty; (ii) Napp's conduct could not be regarded as so unreasonable as to justify an award of costs against it; (iii) in the present case the Director's conduct also added to the costs of the proceedings; (iv) there are additional exceptional

circumstances which militate against any award of costs against Napp; (v) in any event, it would be excessive to require Napp to meet 50 per cent of the Director's costs.

20. Napp states that it deeply regrets that the evidence of the executives in question was regarded by the Tribunal as having provided a less than full account of Napp's reasons for offering discounts on MST and submits that both witnesses genuinely believed that their witness statements provided a fair account of their beliefs. In any event, only a small part of the case was devoted to Napp's intentions as regards hospital pricing. As regards the Director's conduct of his case, the way the matter was put against Napp on the issue of excess pricing, on the issue of the alleged "gain", and in relation to the "follow-on effect", caused difficulties and Napp incurred additional costs. Napp also incurred additional costs by virtue of the fact that it had to argue a number of issues under the Act that had not been addressed before, including the scope of the appeal proceedings, the standard of proof, the treatment of additional documents and evidence, the meaning of "intentional" and "negligent", and how the setting of penalties should be approached. The case had many novel aspects and was complex. In those circumstances, says Napp, it should not be required to pay any of the Director's costs, in addition to the penalty which it has already suffered.

21. Rule 26(2) of the Tribunal Rules provides:

> "The Tribunal may at its discretion, at any stage of the proceedings, make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and, in determining how much the party is required to pay, the tribunal may take account of the conduct of all parties in relation to the proceedings."

22. That Rule gives the Tribunal a wide discretion on the question of costs, to be exercised in the particular circumstances of the case. There is no explicit rule before the Tribunal that costs follow the event, but nor is there any rule that costs are payable only when a party has behaved unreasonably. All will depend on the particular circumstances of the case.

23. In general, we would lean against costs orders against unsuccessful appellants in cases involving penalties unless there were particular exceptional circumstances justifying such orders. The appellant, in such cases, has already suffered the penalty, and possibly further directions, as well as having to bear its own costs. To make a further order for costs in the Director's favour may well be excessive in many cases.

24. We accept that the giving of untrue or misleading evidence is, in principle, a circumstance justifying the award of costs. In the present case, the evidence criticised in our judgment was misleading because in our view it was incomplete.

25. On the other hand, in this case some aspects of the Director's case led to extra costs being incurred, namely in establishing what his position really was as regarding "the follow-on effect", the relationship between the PPRS and the Chapter II prohibition and the calculation of "the gain". In addition, we recognised that there were substantial mitigating circumstances on the excess pricing part of the case, and we reduced Napp's penalty accordingly. Since it was the first appeal under the Act, Napp incurred extra costs in arguing a number of points of principle which future appellants will not necessarily have to argue.

26. In all those circumstances we have unanimously come to the conclusion – not without some hesitation because we see the importance of the point the Director is making – that the right order in this case is that both sides should bear their own costs.

27. There will be orders accordingly on the two issues that we have decided.

Christopher Bellamy Barry Colgate Peter Grinyer

Charles Dhanowa
Registrar

February 2002