

New Court,
48 Carey Street,
London WC2

Tuesday, 10th July, 2001

Before:
SIR CHRISTOPHER BELLAMY QC
(The President)

B E T W E E N:

NAPP PHARMACEUTICAL HOLDINGS LIMITED
AND SUBSIDIARIES

(Applicant)

and

THE DIRECTOR GENERAL OF FAIR TRADING

(Respondent)

MR NICHOLAS GREEN QC (instructed by Messrs Herbert Smith) appeared for the Appellant.

MR PETER ROTH QC (instructed by the Director General of Fair Trading) appeared for the Respondent.

JUDGMENT

Tuesday, 10th July, 2001

THE PRESIDENT: This is an application by the respondent Director for an extension of time for serving his defence which is due tomorrow, 11th July, 2001. The extension sought is a short one (two and a half days) until 1 o'clock on Monday, 16th July, next.

The application is not seriously opposed by the applicant, Napp, although Napp signals strongly its fears that the basis advanced for the extension sought may, in due course, prejudice Napp if it results in many new matters having to be canvassed in this appeal.

Leaving that last point aside for the moment, the application does raise a question of principle about the tribunal's attitude to requests for extension of time upon which it is useful to take this opportunity to give some guidance.

Under Rule 2 of the Competition Appeal Tribunal Rules 2000 ("the Rules") an applicant to this tribunal has two months in which to challenge a decision taken by the Director under Section 47 or Section 48 of the Act. Rule 6(3) provides that the time limit of two months may not be extended unless the circumstances are exceptional. Rule 12(1) provides that the Respondent Director must serve his defence within six weeks of receiving a copy of the application or such further time as the tribunal may allow.

The Guide to Appeals under the Competition Act, 1998 ("the Guide") published by the Tribunal, and available on the website (www.Competition-Commission.org.uk) sets out five main principles that the tribunal intends to follow in regulating its procedures.

The third principle, which is at paragraph 2.6 on page 2, reads as follows:

"Strict Timetables. The tribunal will indicate, as early as possible, a target date by which the tribunal's decision on the appeal is to be given, together with the date for the main hearing. The main stages of the case, and the internal planning of the tribunal's work, will be geared to meeting this timetable. **In general, the tribunal will aim to complete straightforward cases in less than six months.** This target will be reviewed in the light of experience."

A major means for ensuring that the timetable for the case is adhered to is the first case conference which normally takes place within four weeks of the appeal being lodged. As paragraph 7.5 of the Guide puts it, that first case management conference will normally take place no later than four weeks after the appeal has been lodged. Indeed a major purpose of the first case conference is to indicate the timetable for the case including notably the date for service of the defence, if not already served, the timing of the main hearing and the target date for the tribunal's decision (see para.7.6(v) of the Guide).

Paragraph 8 of the Guide deals with service of the defence. Paragraph 8.2 provides:

"The form of the defence will vary with the nature of the case. In general the Director's position in fact and law will have already been set out in the decision and the documents referred to therein, and there may be little need to

elaborate on that position in the defence. If, for example, the application consists largely of arguments already dealt with in the decision, it is sufficient to make brief reference to the passages in the decision which deal with the arguments advanced rather than rehearsing the contents of the decision all over again.”

That paragraph explains the slight asymmetry between the time for lodging the application (2 months) and the time for lodging the defence (6 weeks). In most, if not all, cases the Director has already “set out his stall” in the challenged decision and should not in general need a prolonged period to add to the reasons already given in the decision to justify the action he has taken. It is not normally necessary for the Director to “rehash” in the defence the decision that he has already taken, or to rebut anew arguments already rebutted in the decision.

The Director may, of course, need to respond to new arguments or more developed arguments, or new evidence put forward in the application for the first time. Whether or not this is the case in the present matter cannot be determined in the context of this particular application in advance of seeing the defence that the Director proposes to serve.

In the present case the decision under challenge was made against Napp on 30th March, 2001. It is a fairly fully argued decision, and was followed on 4th May, 2001 by a further directions’ decision. The appeal is against both the decision of 30th March, 2001 and the directions of 4th May, 2001.

In the meantime, an application for interim relief was made by Napp on 11th May and disposed of by consent by the tribunal on 25th May. Napp’s appeal was lodged on 30th May, 2001 at the end of the two month period.

The first case conference was held in accordance with paragraph 7 of the Guide on 25th June, 2001. At that conference there was a discussion about service of the defence. The Director did not then indicate any difficulty in meeting the date of 11th July, 2001, save as regards the question of some further documents that the Director had requested of Napp. On that point the tribunal made it abundantly clear at the case conference, that it expected the defence to be served by 11th July, and that the question of the documents could be dealt with later if necessary. That approach was reflected in the order that was made by the tribunal following the conference of 11th July. A further case conference is fixed for 30th July, and the hearing is fixed to commence on 24th September, 2001.

Yesterday (two days before the deadline for the defence) a letter was received from the Director dated 9th July, 2001 requesting the short extension of two and a half days for service of the defence that I indicated. The grounds set out in that letter are that Napp has raised a large number of important issues; and that the Director’s staff has been working flat out but

that despite their best endeavours they are unable to meet the deadline of 11th July, as had previously been expected.

Reference is also made to additional evidence set out at items 105 to 112 in annexe 2, to what must be a reference to the application, although it is referred to as the defence in this letter of 9 July.

Today, before me the application has been renewed and Mr Roth QC, on behalf of the Director, has explained that the scale of the exercise in preparing the defence was not fully appreciated. In particular matters have been held up by the need to obtain final witness statements from persons connected with Link and BIL, who are present or past competitors of Napp, and also work on materials supplied by Napp in its appeal concerning the pricing of certain comparative products. Mr Roth emphasises the difficulty of getting accurate information, particularly on that latter point, and makes reference to a number of unforeseen developments as recently as last week in making contact with the relevant witnesses.

As far as the applicant, Napp, is concerned, Napp takes the opportunity to signal to the tribunal, as I have already mentioned, its concern that if the hold up is due to the Director's need to obtain evidence – or further evidence – the director may be raising new issues which may in turn require time for Napp to reply to, and may give rise to prejudice to Napp, either in the timescale of the appeal, or generally in having to meet a new case not properly made in the decision.

In relation to the application itself for an extension of time for two and a half days, Napp does not seriously object to that in itself provided that there could be appropriate adjustments to the timescale to avoid any prejudice to Napp.

As regards those arguments, the question of whether the new evidence that the Director wishes to adduce is relevant or admissible or helpful to the disposal of the appeal must await the time when that evidence is available and the tribunal is in a position to evaluate it. At present the tribunal is dealing only with the application for a short extension of two and a half working days for filing the defence.

That extension of itself does not appear to prejudice Napp significantly, at least in a way that cannot be dealt with by adjustment to the timetable for the case. But the point the tribunal would wish to emphasise is that a delay in complying with a deadline fixed by the rules, or following a case management conference, even a short delay, is potentially prejudicial to the case management system set up by the rules, and explained in the Guide.

Unlike most kinds of litigation, proceedings before this tribunal run so far as possible to a timetable which is fixed and known in advance. In order to meet that timetable, a relatively complex internal planning mechanism is necessary which involves fixing sometime

in advance dates for meetings with appeal panel members – who have other commitments as well. It also involves allowing sufficient reading time, circulating often voluminous papers to appeal panel members, allocating time for the tribunal support staff to work on the report for the hearing, and so forth. All that has to be project managed in an efficient way.

Although at this stage in the tribunal’s development the two main extant appeals do not pose insuperable organisational difficulties, as the workload builds up the matter is likely to become much more complex especially when cases fall to be heard in the future outside London. In these circumstances the tribunal feels it must start as it means to go on by insisting that case management deadlines are strictly met. The time for raising problems regarding the timing of the defence (if there are any) is at the first case management conference and not two days before the defence is due.

If problems are flagged up at the case management conference, appropriate arrangements can then be made for dealing with them, for example, by providing (as the present order does) that the defence should be served by the due date, with leave to supplement it later on various outstanding points that are taking longer to resolve than others.

The tribunal in this case does not doubt that the Director and his staff have, as it is put in the letter of 9th July, been working “flat out”, nor, having itself some past experience in matters of this kind, does the tribunal underestimate the task that finalising the defence may involve. On the other hand, that same experience suggests that most deadlines can be met if an efficient system of project management is in place, and there is full recognition of the importance of keeping to deadlines in the new system, and of the discipline that that implies. That is particularly important from the respondent's point of view where the Director, having imposed a fine and adopted directions after a two year investigation, must be presumed to know what his case is and should, in normal circumstances, be in a position to explain it to the tribunal in his defence well within the six week period allowed by the Rules.

The tribunal is confident that this message will be taken into account by respondents in the future when setting up arrangements necessary for dealing with appeals. What is particularly necessary is an early exercise in identifying the points raised in the application that will require more time to deal with so that the tribunal itself is fully apprised in due time of any difficulties that may arise.

If various other persons have to be consulted internally in the OFT that should be organised in good time to enable that to happen efficiently; and if there are difficulties, the tribunal is always available to have those signalled to it, provided it is done in a timely way.

Now, as regards the present application, the tribunal would accept that to some extent all parties in these proceedings are still on a learning curve and for that reason the tribunal is

inclined on this occasion to grant the short extension requested. The tribunal also bears in mind the difficulties referred to by Mr Roth in that regard.

That said, it has to be emphasised that the tribunal's grant of the extension on this particular occasion is in the circumstances of this particular case, and the tribunal expresses the hope that it will not need to be troubled by such further applications in the future. Since the rules lay down very strict limits for applicants who have to lodge their appeals within two months with little or no possibility of extension, it would seem only fair that the tribunal should in general take a similarly strict line with the Director, notwithstanding the slightly shorter period that the Director has for serving his defence which exists, of course, for the reasons I have already explained.

The tribunal will therefore extend the time until 1 o'clock on Monday next, 16th July, 2001 in the hope that this kind of application will not be necessary in the future.

MR GREEN: I do not think there is anything else. We would reserve our position on costs, I think, until the end of the hearing in so far as it is relevant.

THE PRESIDENT: Are you making an application for costs, Mr Green?

MR GREEN: Well, we will make an application for costs, if it is appropriate to make it now then I make it now. You may think it is something which should be wrapped up at the end, but if it is appropriate to make it now we would ask for it. It would normally follow the event in the courts, that if an application for a boon from the court ---

THE PRESIDENT: I am sorry?

MR GREEN: An application for a boon, a period of grace from the court is asked for and granted, that the trouble for the other side coming forward is usually compensated for by costs in the ordinary event. It is deemed to be an unnecessary outing for the other side, so we would ask for our costs of this afternoon.

THE PRESIDENT: I think the right order is to reserve the costs of this afternoon until a later stage in the case. You are fully at liberty to reapply at an appropriate time.

Very well, thank you very much.

(The hearing concluded at 2.40 pm)