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IN THE COMPETITION

Case No. 1013/1/1/03

APPEAL TRIBUNAL

New Court,
Carey Street,
London WC2A.2JT

6 May, 2003

Before:
SIR CHRISTOPHER BELLAMY
(President)

HEARING IN CHAMBERS

BETWEEN:

GENZYME LIMITED ("Genzyme")

Applicant

and

THE OFFICE OF FAIR TRADING ("OFT")

Respondent

Supported by

HEALTHCARE AT HOME LIMITED ("HH")

Intervener

Mr David Vaughan QC and Mr Aidan Robertson appeared for applicant.

Mr Jon Turner and Miss Anneli Howard appeared for the respondent.

Mr Ben Tidswell and Mr Euan Burrows appeared for the intervener.

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PROCEEDINGS
AFTER JUDGMENT

1 THE PRESIDENT: Mr Vaughan?
2 MR VAUGHAN: I think the only outstanding matter is costs.
3 THE PRESIDENT: Yes.
4 MR VAUGHAN: My primary application was that costs be reserved until you and the full
5 Tribunal has formed a fuller view of where everything stands, but I understand from Mr
6 Turner that he is going to suggest that costs lie where they fall and that there should be an
7 Order at this stage.
8 If there is an Order at this stage we would contend that effectively we have won most
9 of the issues and it is manifestly inappropriate to make any order at all. We were faced with
10 an application that there was no serious or irreparable harm, and so on. Those issues we have
11 won. We have won quite substantially on some of the issues though I accept that neither side
12 won completely on those issues, but both sides - both us and the OFT - have something to
13 gain from the Order that was made at that stage. Basically my contention would be to leave
14 this matter over until the Tribunal has a fuller view of all the matters that are involved.
15 Obviously if, for example, we are successful on the appeal then it may be a different Order
16 than if we were unsuccessful on the appeal.
17 Basically my contention is that costs should be reserved.
18 THE PRESIDENT: Thank you. Yes, Mr Turner?
19 MR TURNER: Sir, before turning to costs there is in fact one very small issue arising from the
20 Judgment which has been drawn to my attention, namely, whether the discount should apply
21 to sales, as I think you said in the Judgment, or to deliveries from 17th April. It is a small point
22 but it may have some significance and we would wish for that to be clarified. For our part we
23 feel that deliveries are more easily verifiable than sales and simpler to enforce, and therefore
24 contend that deliveries ought to be the appropriate trigger.
25 THE PRESIDENT: Goods delivered rather than orders placed?
26 MR TURNER: Yes. I do not know whether or not that is contentious.
27 MR VAUGHAN: With respect, Sir, it depends really on the contract because the contract is the
28 sale when the order is placed, because then it will be easier to see when the order placed at
29 Healthcare At Home is before or after the relevant date. Otherwise "deliveries" - which
30 deliveries are we talking about? Are we talking about deliveries by us to the hospital?
31 Deliveries by Healthcare At Home? Are they pick-ups or deliveries? With respect sales is
32 the only realistic thing.
33 THE PRESIDENT: I will hear HH on that point.
34 MR TIDSWELL: I am sorry, Sir, it is a point which has taken us slightly by surprise.
35 THE PRESIDENT: Yes, quite, if you want more time, Mr Tidswell?
36 MR TIDSWELL: I wonder if I could have a second, Sir?
37 THE PRESIDENT: Yes, of course. [Pause]
38 MR TIDSWELL: Sir, Healthcare At Home's position is that it would prefer it to be done on the

1 basis of deliveries. I suspect that that rather reflects that Genzyme would want it on the basis
2 of sales, I am afraid. There is not much I can add to that as a matter of principle to help you,
3 Sir. I am not sure that it makes an awful lot of difference either way in terms of practicality, as
4 I understand it.

5 THE PRESIDENT: It seems to me a bit difficult to apply this order to deliveries made on or after
6 17th April, that related to orders placed before that date, because before that date the
7 Directions were not yet in force, and the contract would be that the suppliers would be
8 supplied at the list price without a discount. So I think it is a sort of compromise, is it not?
9 Deliveries in respect of orders placed on or after 17th April.

10 MR TURNER: Sir, we are content with that clarification. May I turn then to the issue of costs.
11 First of all, we consider that this is an appropriate occasion for a Ruling to be made on costs
12 rather than costs reserved because, Sir, you are in possession of all of the relevant information
13 to make that Judgment.

14 Secondly, for the OFT's part we do not approach this on the basis that an attacking
15 position will yield the best result on a costs' application. We have three short points.

16 First, that neither party has essentially sustained its starting position in this case. There
17 has been a considerable amount of development and discussion and the Tribunal's main Ruling
18 lies somewhere in the middle of either parties' submissions.

19 Secondly, for the Office's part we have shown considerable flexibility and fairness in
20 our approach. The Judgment itself referred to the compromise figure proposed by the Office
21 after the first hearing as "not unreasonable" - that was a major factor.

22 Thirdly, and by contrast, it has not always been the case that Genzyme's position on
23 certain central issues has been equally fair and reasonable and a number of its main points
24 have been rejected without the need, I think, at this stage to go into detail or to seek to list
25 points. Standing back, this is clearly a case for no order as to costs because it is clearly the
26 case that, on the main point, there has been an element of compromise and the Tribunal has
27 formed its own view on the basis of information provided by all the parties.

28 Sir, those are my submissions.

29 THE PRESIDENT: Mr Tidswell, do you have anything?

30 MR TIDSWELL: Sir, I do not understand Mr Vaughan to be making an application as against my
31 client, I may be wrong about that and perhaps he would let me know if that is the position, but
32 if he were then I would suggest that that would not be appropriate in the circumstances. If he
33 is not then I probably do not need to say anything further.

34 THE PRESIDENT: The normal position for an Intervener is to bear his own costs.

35 MR TIDSWELL: Yes, Sir.

36 **RULING**

37 THE PRESIDENT: On the issues of costs in relation to the Order I have just made, Mr Vaughan
38 invites me to reserve the costs pending the outcome of the final proceedings, and he submits

1 that to a large extent his clients have been successful at the interim stage.

2 Mr Turner, on behalf of the OFT, asks me to make Ruling on costs at this stage in
3 the sense that there should be no Order for costs, on the basis that neither party has sustained
4 its starting positions - the position we have arrived at is somewhere in the middle; that the
5 OFT has shown flexibility and fairness throughout these proceedings, and that in his
6 submission at least that has not always been the case as far as Genzyme is concerned.

7 I would accept Mr Turner's submission that the OFT has indeed shown considerable
8 flexibility and fairness in the way that it has approached this case. As I said in my Judgment,
9 the attitude adopted on behalf of the Office in seeking to achieve a reasonable compromise
10 was, in my view, an eminently reasonable and appropriate attitude for the public authority to
11 have adopted.

12 A difficulty, however, is that as in all interim applications it is difficult to reach a
13 concluded view on costs at the interim stage until one has arrived at a decision on the main
14 appeal unless exceptional circumstances exist. If Genzyme were to win the main appeal that
15 would, or might have an impact on the costs of the interim stage. Similarly, if Genzyme were
16 to lose the appeal it may very well be that the order for costs, if any, would take into account
17 the situation as it arose at the interim stage. At that stage, that is to say the final stage, one can
18 also test in much more detail the strength and reliability of the various points that have been
19 made at the interim stage.

20 So in my view the Tribunal is not in a wholly satisfactory position in making an order
21 for costs at this stage and it might very well be, simply hypothetically, that either party would
22 do better at the final stage than the suggestion at present that there should be no Order as to
23 costs. In those circumstances it seems to me the right order is to reserve the costs until the
24 final determination of the appeal, acknowledging as I do the exemplary way in which the OFT
25 has conducted the interim stage of these proceedings.

26 Are there any further directions that I should be giving at this stage?

27 MR VAUGHAN: I am not sure whether it is appropriate at this stage, but we should tell you that
28 we are still on track for the date we indicated. There may be a day or two we may lose,
29 because we obviously spent a lot of time on this matter, but broadly we are on track for that.

30 In the application we will accept that Healthcare At Home should be given leave to
31 intervene, and so we will serve a copy of our appeal on Healthcare At Home, and I expect
32 the Registrar will also serve it, so that there should not be any delay in its making its
33 submissions.

34 THE PRESIDENT: Yes.

35 MR VAUGHAN: And obviously we hope the Office of Fair Trading will also presumably move
36 as quickly as it can in doing that. I hope that the fact that we were the only person who
37 achieved our deadlines here is not indicative of future conduct.

38 THE PRESIDENT: Well, I think everybody was doing their best, Mr Vaughan, but I felt a small

1 pat on the back was appropriate for your clients, it was not intended to criticise others who
2 were also doing their best in difficult circumstances.

3 MR VAUGHAN: Anyhow we are still hoping that we will achieve our objective, and therefore
4 pleading accordingly, and so therefore certainly as regards Healthcare At Home it will, as far
5 as we are concerned, treat itself as an intervener.

6 THE PRESIDENT: Yes.

7 MR VAUGHAN: Therefore we would not oppose its application to intervene.

8 THE PRESIDENT: I do not think I can formally make an Order until I have an appeal to make the
9 Order in.

10 MR VAUGHAN: I think that is right.

11 THE PRESIDENT: But we can make a consent order as soon as the appeal is received, if there is
12 no objection to that.

13 MR VAUGHAN: If we could, and maybe we could write and---

14 THE PRESIDENT: If you have already indicated that there is no objection.

15 MR VAUGHAN: We have indicated in our application.

16 THE PRESIDENT: Yes.

17 MR VAUGHAN: So that there is not time wasted.

18 THE PRESIDENT: Unless there are any other circumstances we can make an immediate Order.

19 MR VAUGHAN: I am obliged.

20 THE PRESIDENT: I do not know if we are expecting any other interveners, Mr Turner, are we -
21 The Department of Health, or the hospitals.

22 MR TURNER: We are aware of none.

23 MR VAUGHAN: Or the pharmaceutical industry.

24 THE PRESIDENT: Or the pharmaceutical industry, yes.

25 MR VAUGHAN: Anyhow, if anyone is, anyone we hear of, we will certainly encourage them to
26 move fast.

27 THE PRESIDENT: Yes, obviously anything you can do in the main appeal to keep the amount we
28 have to read down to essentials.

29 MR VAUGHAN: Well, I think that is going to be difficult.

30 THE PRESIDENT: I appreciate that.

31 MR VAUGHAN: There is a lot.

32 THE PRESIDENT: But I think your clients, I am sure, will face up to the fact that there is a case
33 they have to meet, there is no doubt about it.

34 MR VAUGHAN: Absolutely, yes, absolutely.

35 THE PRESIDENT: But we will see how we get in.

36 MR VAUGHAN: Yes. Thank you very much, Sir. I think that is all as far as we are concerned.

37 THE PRESIDENT: Yes, thank you. Anything else, Mr Tidswell?

38 MR TIDSWELL: No, Sir.

1 THE PRESIDENT: Mr Turner?
2 MR TURNER: No, Sir.
3 THE PRESIDENT: Well the text of the Judgment will be made available either later today or early
4 tomorrow and we can then deal with the question of confidentiality from that point on. Thank
5 you all very much indeed.
6 (The hearing concluded at 12.25 pm)
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