Neutral citation [2016] CAT 24

IN THE COMPETITION APPEAL TRIBUNAL

Cases Nos: 1251-1255/1/12/16

Victoria House
Bloomsbury Place
London WC1A 2EB

17 November 2016

B E T W E E N:

GENERICS (UK) LIMITED

Appellant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

GLAXOSMITHKLINE PLC

Appellant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

(1) XELLIA PHARMACEUTICALS APS
(2) ALPHARMA LLC

Appellants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

ACTAVIS UK LIMITED

Appellant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

MERCK KGAA

Appellant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING (EXPERT EVIDENCE)

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1. There is before the Tribunal an application by the Competition and Markets Authority ("CMA"), the respondent to these appeals, to serve a further rebuttal expert's report from one of its economic experts, Professor Carl Shapiro. I have to say that the way this application has been advanced was very unsatisfactory. It is critical to the efficient and effective handling of a case management conference that the Tribunal does pre-reading. In the CMA's skeleton argument I was told that the estimated time for pre-reading was two hours, and that I should read the skeleton arguments and the references therein. The application has been advanced on the basis that a further report from Professor Shapiro would be fair and proportionate in order to respond to very specific new points put forward in the reports of three economic experts giving evidence for three of the appellants. Though it is clear from the CMA's skeleton argument that this application would be made, the references in the skeleton argument to the other expert reports were made only in relatively general terms save only as regards the second report of Dr. Jenkins.

2. Today, Mr. Turner QC for the CMA, in support of the application, has taken me to a large number of passages in the three reports in question as the foundation for the application. The appellants' counsel opposing the application have taken me to yet other passages. As a result, I have had to try to digest in the course of short oral argument selected passages in complex economic reports in order to attempt to assess their significance, and indeed whether they are new or foreshadowed in previous reports.

3. For the future, I should make clear that any such applications should be much more fully developed in the skeleton argument so that the Tribunal, and indeed the representatives of the other parties, can understand exactly what issues it is that the further report seeks to address. As for today, I must do the best that I can.

4. It should go without saying, but perhaps it is worth saying nonetheless, that in determining the application the Tribunal must have regard to the governing principle in Rule 4 of the Tribunal's Rules, that a case is to be dealt with justly and at proportionate cost. It may be that the cost element of the issue on this application is less significant, because I suspect it is a small drop in the ocean of costs being deployed on this case.

5. Here, it seems to me, three considerations apply. First, the Tribunal should manage a case actively so that expert evidence can be handled effectively and efficiently at the hearing of the appeals. The challenge for courts presented by economic evidence in competition cases has been the subject of much discussion, and it is a challenge even for a Tribunal of which one member may be a distinguished economist. Secondly, it is of great benefit for the Tribunal, and indeed all parties, if the views of the economic experts are set out in writing in advance. See also under the governing principle, Rule 4(5)(e): active case management includes planning the structure of the main hearing in advance with a view to avoiding unnecessary oral evidence. Thirdly, it is necessary to avoid a potentially endless ping-pong of expert evidence where each expert puts in a further report responding to criticism in the last report of the opposing expert. It is self-evident that there is a certain tension between the second and third of those considerations.

6. Various parties in argument this morning made criticisms of the other side for failure to put in evidence earlier, or indeed whether particular expert evidence should really be taken into account at all. That is no part of my decision on this application. No formal objection has been taken to any of the expert evidence now before the Tribunal, and so it will all be before the Tribunal at the substantive hearing.

7. Having regard to all that has been said, I have concluded that it is appropriate and helpful, and will not cause any prejudice, if Professor Shapiro is permitted to put in in a very short time a further brief report addressing the following:

(i) Dr. Stillman's second report, paras.43-53;
(ii) Dr. Majumdar's report, paras.12-13 and 30-31;
(iii) section 3 of Dr. Jenkins' second report.

It must be so limited, and I place some weight on the fact that Mr. Turner said that the proposed report would be short, and it must be submitted by 30th November. I should make clear I do not give permission for the report to address the separate point made in paras.63 to 65 of Dr. Majumdar's report. It seems to me his comments there are purely responsive and can satisfactorily be addressed in the experts' joint statement.

The Honourable Mr Justice Roth
President of the Competition Appeal Tribunal

Charles Dhanowa O.B.E., Q.C. *(Hon)*
Registrar

Date: 17 November 2016