Neutral citation [2021] CAT 20

IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4 8AP

16 July 2021

Before:

THE HON. MR JUSTICE ROTH
(President)
HODGE MALEK QC
DERMOT GLYNN

Sitting as a Tribunal in England and Wales

BETWEEN:

GENERICS (UK) LIMITED
GLAXOSMITHKLINE PLC
(1) XELLIA PHARMACEUTICALS APS (2) ALPHARMA LLC
ACTAVIS UK LIMITED
MERCK KGAA

Appellants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING: COSTS

---

1. On 8 March 2018, the Tribunal handed down judgment ("the 1st Judgment") in these five appeals: [2018] CAT 4. Several of the grounds in the appeals were dismissed but in respect of others the Tribunal made a reference to the Court of Justice of the European Union ("CJEU") under Art 267 TFEU. The proceedings before the CJEU ("the CJ reference") culminated in the judgment of that court on 30 January 2020: Case C-307/18 *Generics (UK) Ltd v Competition and Markets Authority*, EU:C:2020:52 ("the CJ Judgment"). All the parties then made extensive written submissions to the Tribunal concerning both the implications of the CJ Judgment and their case on penalties. The Tribunal delivered a further judgment on 10 May 2021 ("the 2nd Judgment") determining the outstanding grounds of appeal, including the appeals on penalties: [2021] CAT 9. This ruling uses the same abbreviations as the two judgments.

2. The CMA subsequently applied for an order for costs and the parties have made brief written submissions in that regard. The summary schedule of costs served with the CMA's initial application showed its total costs as £2,981,892.10, but that figure was revised slightly downwards to £2,895,345.10 in an amended schedule served with the CMA's reply submissions on costs.

3. Some of the appellants have made various criticisms of the CMA's costs schedule and from that it seems that they may envisage that the Tribunal will make a summary assessment of costs. However, we consider that would be entirely inappropriate in this case. These have been prolonged and complex proceedings, involving extensive expert and factual evidence and several rounds of submissions. We have no doubt that, as Xellia/ALLC (supported by Merck and Actavis) submit, the costs, if not agreed, should go for detailed assessment pursuant to rule 104(5)(b) of the Competition Appeal Tribunal Rules 2015 (the "CAT Rules").

4. We address only one matter on the CMA's costs schedule for assistance of the Costs Judge. A criticism levelled by some of the appellants at the CMA's level of costs is that it used an excessive number of counsel. We regard that criticism as misplaced. The CMA used two QCs throughout but only its leading QC attended the oral hearing before the CJEU. Although the CMA also used five

junior counsel for the first, most substantive stage of the case, we note that the majority of the junior work seems to have been undertaken by the first junior counsel (Mr David Bailey) since his fees exceed the combined fees of the other four juniors. The juniors were at the time all of seven years call or less. For the purpose of the CJ reference, only two juniors were involved, and for the post-reference submissions prior to the 2nd judgment Mr Bailey was the only junior. Altogether, for a very complex case in which the CMA was facing five separate appeals (with the appellants represented by eight advocates in total), and substantial expert evidence, we do not regard the number of counsel instructed by the CMA as excessive or disproportionate.

5. Subject to the question of the costs of the CJ reference, the appellants all accept that the CMA should be awarded a significant proportion of its costs. The CMA accepts that there should be a deduction from the costs which it can recover. Accordingly, a principal issue between the parties as regards costs is the degree of deduction or discount there should be off the CMA's costs. However, there are two additional matters:

(1) the costs of the CJ reference; and

(2) the costs of the Chapter II appeal by GSK.

6. As regards the costs of the CJ reference, the appellants submit that each party should bear its own costs, on the basis that there is no "winner" before the CJEU. We reject that submission. The CJ reference is not an abstract, academic exercise. As the CJ Judgment states, the CJ reference is, for the parties to the national proceedings, "a step in that action pending before the national court": para 173. The appellants all participated in the proceedings before the CJEU and submitted written and oral observations contesting the CMA's position on the questions referred. The ruling of the CJEU was clearly in favour of the CMA's position (save as regards market definition): see the 2nd Judgment. Accordingly, we see no justification for treating the costs of the CJ reference any differently from the other costs in these proceedings. Although not relevant to this determination, we observe that those costs (as shown on the CMA's revised schedule) are in fact a relatively small part of the CMA's overall costs.

7. Xellia/ALLC (with whom GUK, Merck and Actavis agree) submit that they should not pay the costs of GSK's appeal against the finding of infringement of the Chapter II prohibition. That must be right, as the CMA accepts in its submissions in reply. The Chapter II issues in the case concerned only GSK. The CMA states that it broadly estimates that 15% of its time and total costs were spent on the Chapter II issues. There was of course some overlap between the Chapter I and Chapter II issues and it is only the additional costs of the Chapter II issues that are here relevant. However, the Chapter II issues concerned not only the IVAX Agreement but the difficult question of market definition. A separate experts' "hot-tub" was held between GSK's expert and one of the CMA's experts to consider that issue. On a broad brush approach, we see no reason to differ from the 15% apportionment estimated by the CMA.

8. Pursuant to rule 104(2) and (4) of the CAT Rules, the Tribunal has a broad discretion as to any order for costs. Here, as the appellants recognise, the CMA has been predominantly successful in its case. The appellants submit that these were unusual appeals which broke new ground, where the Tribunal felt it necessary to make a reference to the CJEU in order to decide the case, and that the Tribunal very significantly reduced the penalties in the Decision. They submit that the CMA should recover only 60% of its costs. For its part, the CMA submits that it should recover 80% of its costs.

9. In our view, it is necessary to distinguish between the Chapter I case and the Chapter II case (which affects only GSK). As regards the Chapter I case, we do not consider that the novelty and some of the challenging features of the case can detract from the fact that the CMA's decision on liability was upheld. The appellants vigorously pursued their appeals, as they were of course entitled to do, but they lost. They did secure a significant reduction in the penalties, but that was primarily the subject of the second stage of the proceedings and even at that stage there were several grounds of challenge to the CMA's decision on penalties that were rejected. In our view, 20% is a fair and proper discount off the CMA's overall costs.

10. As regards the Chapter II case, the position is rather different. The Tribunal did not accept the CMA's approach to market definition. The answer given by the

CJEU to the question on market definition was founded on a different and somewhat novel basis. We upheld the definition of paroxetine as a distinct market also on an additional ground (parallel imports) which had not been relied on by the CMA. The significance of this is reflected in our decision to set aside entirely the penalty imposed on GSK for breach of the Chapter II prohibition: see the 2nd Judgment at [132]-[134] and [143]. Considering the position overall, we think that the CMA should recover only 50% of its costs referable to the Chapter II case.

11. In conclusion, therefore, we decide that:

(1) all the appellants should, jointly and severally, be liable for 80% of 85% (i.e. 68%) of the CMA's costs; and

(2) GSK should pay 50% of 15% (i.e. 7.5%) of the CMA's costs.

12. In addition, the CMA should recover as against all the appellants 90% of its additional costs of its submissions on costs.

13. All the costs are to be subject to detailed assessment by a Costs Judge of the Senior Courts of England and Wales, unless agreed.

14. This ruling is unanimous.

Mr Justice Roth
President

Dermot Glynn

Hodge Malek QC

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

Date: 16 July 2021

Registrar