Neutral Citation Number: [2019] EWCA Civ 1631

Case No: C3/2018/1874(B)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Competition Appeal Tribunal
HHJ Peter Freeman CBE QC
1275-1276/1/12/17

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/10/2019

Before :

LORD JUSTICE GREEN

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Between :

The Competition and Markets Authority	**Appellant**
- and -	
Flynn Pharma Limited **Flynn Pharma (Holdings) Limited ("Flynn")**	**1st & 2nd Respondents**
- and -	
Pfizer Inc. **Pfizer Limited** **("Pfizer")**	**3rd and 4th Respondents**
- and -	
The Commission of the European Union	**Intervener**

- -

Mr Mark Hoskins QC & Ms Jennifer MacLeod (instructed by **Competition and Markets Authority**) for the **Appellant**
Mr Mark Brealey QC, Mr Robert O'Donoghue QC and Mr Tim Johnston (instructed by **Clifford Chance LLP**) for the **3rd & 4th Respondents**

Hearing date: Thursday 26th September 2019

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Approved Judgment

Lord Justice Green:

A. Application

1. There is before the court an application made on behalf of the Competition and Markets Authority ("CMA") to amend its Grounds of Appeal pursuant to CPR 52.17 and PD 52C paragraph 30. There will, at the full appeal, be four parties. The appellant is the CMA. The first and second respondents are Flynn Pharma Limited and Flynn Pharma (Holdings) Limited (together "*Flynn*"). The third and fourth respondents are Pfizer Inc. and Pfizer Limited (together "*Pfizer*"). The intervener is the European Commission ("*the Commission*").

2. The application to amend the Grounds of Appeal is opposed only by Pfizer.

B. Background

3. On 7th December 2016 the CMA issued a decision entitled "*Unfair Pricing in Respect of the Supply of Phenytoin Sodium Capsules in the UK*" ("*the Decision*") addressed to Pfizer (the manufacturer) and Flynn (the distributor). The CMA found, *inter alia*, that (i) Pfizer's supply prices to Flynn; and (ii) Flynn's onward selling prices for the capsule form of the drug phenytoin sodium, which is used to treat epilepsy, were unfairly high. In consequence both Pfizer and Flynn were found to have infringed the Chapter II prohibition set out in the Competition Act 1998 ("CA 1998") and Article 102 TFEU. Both provisions prohibit the abuse of a dominant position. A financial penalty of £84.2m was imposed by the CMA upon Pfizer and a fine of £5.2m was imposed upon Flynn. Both companies were ordered to reduce their prices.

4. Pfizer and Flynn appealed against the Decision to the Competition Appeal Tribunal ("*the Tribunal*"). The appeal was heard during October and November 2017. Judgment was handed down on 7th June 2018 and is reported at: [2018] CAT 11 ("*the Judgment*"). The Tribunal upheld the conclusion of the CMA that the relevant markets in which to assess the alleged dominance of Pfizer and Flynn were (i) with regard to Pfizer, manufacture of Pfizer-manufactured phenytoin sodium capsules that were distributed in the UK and (ii) with regard to Flynn, the distribution of Pfizer manufactured phenytoin sodium capsules in the UK, and that both Pfizer and Flynn each held dominant positions in their respective relevant markets.

5. However, in respect of the finding in the Decision that both Pfizer and Flynn had abused a dominant position in the relevant markets the Tribunal set aside the CMA's findings on several bases. These may be summarised as follows. First, that the CMA had erred in its reliance in the Decision upon the cost-plus approach to excessive pricing by which it found that the prices charged by Pfizer and Flynn were excessive because they materially exceeded their respective costs plus a reasonable rate of return. Second, that the CMA had failed properly to assess the possible impact of meaningful comparators for the purpose of assessing whether Pfizer and Flynn's prices were unfair. Third, that the CMA had erred in finding that there were no cost related factors which would increase the economic value of the capsule product beyond Pfizer's and Flynn's prices.

6. In view of the conclusion in relation to abuse, which resulted in the Decision (which therefore included the penalty) being set aside, it was unnecessary to arrive at a separate decision upon the legality of the fines imposed by the CMA.

7. The CMA sought permission to appeal the Judgment. By an order of 12th December 2018, Newey LJ granted permission to appeal on the papers having regard to the arguments set out in the skeleton argument of the CMA. The judge stated as follows:

> "The arguments advanced in the appellant's skeleton argument have sufficient substance for the appeal to have a real prospect of success. The appeal raises, moreover, important points of principle, in particular as to the significance of the opinion of Advocate General Wahl in the Latvian Copyright case."

8. A central issue arising upon this appeal is the test to be applied under EU and domestic law for the determination of when a price is abusive and the extent, if at all, to which a decision maker (here the CMA, but it could also include a court) is bound to have regard to evidence of relevant comparators.

9. The seminal authority on abusive pricing is Case 27/76 *United Brands v Commission* EU:C: 1978:22. ("*United Brands*"). At paragraphs [248]-[253] the Court of Justice stated:

> "248 The imposition by an undertaking in a dominant position directly or indirectly of unfair purchase or selling prices is an abuse to which exception can be taken under Article 86 of the Treaty.
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> 249 It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.
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> 250 In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse.
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> 251 This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin; however the Commission has not done this since it has not analysed UBC's costs structure.
>
> 252 The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, it the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.

> 253 Other ways may be devised — and economic theorists have not failed to think up several — of selecting the rules for determining whether the price of a product is unfair."

10. Paragraph [252] identifies a test with three components. The first component is to determine whether the difference between the costs actually incurred and the price actually charged must be determined to see if it is "*excessive*". If it is, then the second and third components are to decide (a) whether a price has been imposed which is either unfair *"in itself"* or (b) whether a price has been imposed which is unfair *"when compared to competing products*". The scope and effect of this formulation has been the subject of much debate ever since it was first articulated. Save to set out the competing positions of the parties, it is unnecessary to explore the wider debate here.

11. Pfizer relied upon evidence before the CMA of comparators which it was argued demonstrated that the prices for the products in question were fair. The CMA explains that its Decision was adopted upon the basis that to establish that the impugned prices were abusive, the law required it to be shown that a price was either unfair "in itself", or, when compared to competing products. In other words, the second and third components of the test were alternatives: See for example paragraphs 5.476 – 5.477 of the Decision. For this reason (and I summarise) once the CMA had found that the prices were unfair in themselves there was no requirement in law to go on and compare those (*ex hypothesi*) unfair prices with relevant comparators to see whether that conclusion held good.

12. In the Judgment, the Tribunal acknowledged that a "*key issue*" between the parties was whether this analysis of the test was correct. The Tribunal held that it was not. At paragraphs [367] – [368] the Tribunal held that an authority could not simply ignore a *prima facie* valid argument that a price was fair under one alternative (because for instance it bore a reasonable relation to a competing product - the comparator - which itself was fair) but then proceed to find an infringement upon the basis that the price was unfair in itself ie without reference to comparators. The Tribunal stated:

> "That is not to say the authority cannot find that there is an infringement where one Alternative demonstrates unfairness and the other does not since it does not need to succeed on both heads. However, the authority must consider whether a prima facie case of fairness under one Alternative undermines the basis for the finding of unfairness under the other Alternative and produced a reasoned basis for determining that the Unfair Limb is satisfied."

13. The Tribunal observed that this conclusion flowed not only as a matter of logic but that it also accorded with the burden of proof and the principle of respect for the presumption of innocence. Moreover, it accorded with the approach adopted by Advocate General Wahl in his opinion in Case C-177/16 *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība* EU:C:2017:286 ("*Latvian Copyright*") at paragraphs [124] - [128].

C. **The application to amend the Grounds of Appeal**

14. I turn now to the issue arising. In its application for permission to appeal dated 8th August 2018, Ground 1(b) was in the following terms:

> "As to the unfairness limb of the United Brands test, the Tribunal *misapplied its own test* in finding that the CMA had taken insufficient steps to ascertain whether phenytoin sodium tablets provided a suitable comparator product. The Tribunal's approach was wrong in law and over burdensome: correctly applying the Tribunal's own test the CMA had sufficiently investigated the tablet market, and its decision the tablets were not an informative comparator was justified as within its margin of appreciation."
>
> (Italics added)

15. In its skeleton argument also dated 8th August 2018, the CMA contended that the effect of the judgment of the Tribunal was that the alternatives under the unfairness limb of the *United Brand* tests were in reality not alternatives at all. It is argued that upon the basis of the impugned judgment the CMA is required to establish unfairness under both limbs in order to establish abusively high pricing. It is said that this is "*fundamentally inconsistent*" with the judgment in *United Brands*.

D. The position of the parties

16. The argument was addressed in the skeleton argument of Flynn and the Commission. The Commission supports the interpretation of the law argued for by the CMA. Flynn supports the analysis of the Tribunal.

17. The position adopted by Pfizer is different. It argues that the legal issue raised in the skeleton of the CMA is not covered by its Grounds of Appeal. The argument is developed in the following way. In the original Grounds of Appeal it is said that the Tribunal misapplied its "*own test*" in finding that the CMA had taken insufficient steps to identify a suitable comparator product. The reference to "*own test*" was to the conclusion of the Tribunal that the *United Brands* formulation did not mandate that the second and third components of the test were to be treated as discrete, alternative, components. It is said that by this formulation the CMA accepted that it was under a legal obligation to consider tablets as a comparator but simply disagreed with the criticism made by the Tribunal that on the evidence it had insufficiently investigated the tablet. As drafted the reference to "*its own test*" therefore indicated that the test (as articulated by the Tribunal) was not in dispute. However, it is said that in its skeleton argument the CMA adopted a quite different and inconsistent position which was that in law and principle the two limbs of the *United Brands* test were, properly understood, distinct and disjunctive, and, accordingly, there was no need for the CMA to consider any comparators at all.

18. Pfizer also pointed out that in the course of the trial below, during a lengthy and important exchange between the Tribunal and leading counsel for the CMA, counsel acknowledged that the CMA *would* always examine good comparators at some stage of the analysis and implied that a failure so to do would amount to the error of ignoring a relevant consideration.

19. In view of the position taken by Pfizer the CMA has, it says as a matter of precaution only, applied for permission to amend its Grounds of Appeal to introduce the specific averment that the Tribunal erred in law. The amended Ground, with the new text italicised, now reads:

> "As to the unfairness limb of the United Brands test, *the Tribunal erred in law in holding that it was not sufficient for the CMA to rely solely on its finding that Pfizer and Flynn's prices were unfair in itself.* The Tribunal misapplied its own test in finding that the CMA had taken insufficient steps to ascertain whether phenytoin sodium tablets provided a suitable comparator product. The Tribunal's approach was wrong in law and over burdensome: correctly applying the Tribunal's own test the CMA had sufficiently investigated the tablet market, and its decision the tablets were not an informative comparator was justified as within its margin of appreciation"

20. The CMA subsequently wrote, on 8th July 2019, to Pfizer inviting them to, in effect, consent to the amendment. Pfizer's solicitors replied on 11th July 2019 refusing consent. Flynn's solicitors did not respond but have subsequently indicated that they do not oppose the amendment.

21. I turn now to the specific objections raised Pfizer to the grant of permission to amend the Ground of Appeal.

E. The submissions of Pfizer

22. Pfizer's submissions may be summarised as follows.

23. First, the CMA should not be permitted to resile from a deliberate and thought through concession made during the proceedings below in response to precise questions from the Tribunal, to the effect that recourse to the analysis of comparators was an integral part of the *United Brands* test. I have read with care the transcript of the debate between the Tribunal and counsel for the CMA upon this issue and I am clear that a concession was made to the effect that if a *prima facie* comparator product was available it would be treated as admissible and relevant by the CMA. I do not need to set out the evidence for this in any detail. Upon conclusion of the evidence and before hearing closing submissions, the Tribunal handed down a document containing a series of questions designed to clarify the issue. Question three concerned comparators and provided:

> "In relation to the identification of an "unfair" price under paragraph 252 [of the judgment in United Brands] (limb 2):
>
> (a) Are the criteria of "unfair in itself" and "unfair when compared to competing products" genuine alternatives?
>
> (b) Does the decision-maker have unfettered freedom to choose one or the other regardless of what evidence is available?"

In closing the CMA submitted that there was no absolute right to disregard all comparables and that there was an obligation to consider the pricing of a *prima facie* valid comparable product.

24. In view of this Pfizer argues that the CMA made a clear and unambiguous concession to the Tribunal. The position initially set out in the Grounds of Appeal was consistent in that it concerned a challenge to the approach adopted by the Tribunal to an issue of fact; but not to any issue of law. Accordingly permission of the Court of Appeal is now required for any departure from that concession.

25. Second, the courts should only permit a concession to be withdrawn in exceptional circumstances: see for example *Jones v MBNA International Bank Limited* [2000] EWCA Civ 314 ("*Jones v MBNA*"). At paragraph [52] May LJ emphasised the importance of legal certainty. This was not merely a matter of efficiency, expediency and cost but, so it was there said, also of "*substantial justice*":

> "Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in this case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed…"

26. Third, there are no exceptional grounds warranting the grant of permission in this case and it would be contrary to the just administration of competition law to permit the CMA radically to alter its case. The change mooted in the amended Ground borders on the "*unconscionable*" and it is contrary to jurisprudence under Article 6 ECHR, which treats competition law as a species of criminal law, for the CMA now to change its position. Its stance gives rise to an unfair process and would set a dangerous precedent.

27. Fourth, the grant of permission would undermine the appellate scheme under the CA 1998. Under the Act the Tribunal determines appeals upon their merits and an appeal to the Court of Appeal lies only upon a point of law pursuant to section 49. Parliament created the Tribunal as a specialist body to review, with a high degree of rigour, the lawfulness of the infringement decisions of the CMA, characterised as they are by criminal penalties. In any merits appeal the Tribunal applies its own expertise including specialist competition law and economic knowledge. In the present case the CMA seeks to bypass this carefully crafted appellate structure. Had the CMA not made the concession the Tribunal would, most likely, have dealt with the issue of comparator products and the applicable law in materially greater detail and the parties would have responded commensurately in submissions to this court. The *volte face* by

the CMA deprives the Court of Appeal of a more detailed judgment on an important issue in the case. The appellate structure created by the Act is hence undermined if permission is granted.

28. Fifth, permission should be refused because, if granted, it undermines Pfizer's case on the relevant fines. Pfizer contends that it was common ground that Pfizer benchmarked the price of the phenytoin sodium capsule by reference to the price of the phenytoin sodium tablet. The price to Flynn was over 50% lower than the price of the tablet. It is also said to be undisputed that the price of the tablet was set as the result of an intervention from the Department of Health ("DOH"). The decision imposed the highest ever fine upon the basis that Pfizer had at least acted negligently in its pricing of the capsule. Pfizer explains that whilst the fine has been set aside by the Tribunal if the CMA succeeds upon the appeal the question of the level of the penalty would need to be considered again. The CMA's concession that comparables *were* relevant cannot be ignored or undone and it was a relevant factor which Pfizer could have prayed in aid in advance of its submission that it did not act negligently. This is a further reason why it would be unfair for the CMA to withdraw the concession it made.

29. Sixth, the CMA has never given any sort of an explanation for its change of position, which it is required to do in law. The skeleton argument of the Commission suggests that the strict test applied in the Decision by the CMA is one which has (for it) the beneficial effect of reducing the regulatory burden on enforcement, since it limits the evidence that must be considered. If this is so, argues Mr Brealey QC, then that is a very bad reason for seeking permission to amend.

30. I turn now to my conclusions on the issues arising on this application.

F. Conclusions

31. I start with two observations by way of preface.

32. The first is that nothing that I say in this ruling is intended, expressly or by implication, to express any view as to the merits of the issues arising on the appeal.

33. Next, Mr Hoskins QC for the CMA has argued that, properly construed, the proposed amendment is merely a clarification of the initial Grounds of Appeal and the point falls within the broad scope of the Ground as originally drafted. He refers to the fact that Newey LJ, when granting permission, did not identify or object to any perceived daylight between the Grounds and the position set out by the CMA in its skeleton. I have subjected the initial Grounds as drafted, and the proposed amendment, both in the light of the CMA skeleton and the exchanges occurring between the Tribunal and counsel for the CMA during the trial, to scrutiny. There are several ambiguities which arise from the drafting of the initial Grounds. I do not need to go into them here. I have concluded that the sensible way to proceed upon this application is to treat, for the purpose of testing the arguments, the proposed amendment as raising an issue which is discreet and qualitatively different from the points set out in the original Grounds of Appeal. I also proceed upon the pragmatic basis that the grant of permission by Newey LJ did not dispose of this matter definitively in the CMA's favour.

34. Nonetheless, for reasons which I will now set out, I have decided that it is appropriate to grant permission to amend the Grounds of Appeal.

35. First, the point arising is one of law as the Tribunal recognised in the introduction to the Judgment: see paragraphs [3] – [5]. The issue, moreover, is of substantial importance in economic and societal terms, again as the Tribunal acknowledged. It impacts directly upon the regulation of drug prices, including to the NHS, and thereby has implications in relation to health policy and financing. And given that the *United Brand*s test applies across all sectors it is a point of broader relevance to the regulation of prices in the economy. Put shortly it is a point that needs to be addressed.

36. Second, my ruling does not prevent the respondents, if they are so advised, from relying upon the position adopted by the CMA before the Tribunal for instance to make the forensic point that the CMA then saw real force, having given the matter due consideration, in the arguments that they now reject. Permitting the CMA to amend its Grounds does not, as it were, wipe the forensic slate clean.

37. Third, to grant permission is not inimical to the just administration of competition law. To the contrary, legal certainty and the administration of competition law will be improved by a mature consideration of this important and far reaching point. If the issue is not now resolved it will lurk in the gloom and arise in the next case. I am told by Mr Hoskins QC that the CMA has other cases which it is investigating which raise the same issue. And in the interim, before the issue is finally resolved, the resultant uncertainty could chill or distort regulatory and commercial decision making.

38. Fourth, courts focus upon resolving the "*real*" issues in dispute between parties and it is commonplace for legal arguments to evolve and hence change during an appeal and in particular during oral argument without complaint from any side or the court. Judges are less forgiving however where there is real prejudice caused by a change of position for instance because had the new point been raised in the court below the evidence and arguments there might have materially altered and this might have led to a different judgment or at least different reasoning. That was the case in the *Jones v MBNA* (ibid), relied upon by Pfizer, where, at paragraph [39(1)], the court explained that the "*shift*" in focus which occurred during the appeal relative to the position adopted in the court below, could, had it been advanced properly at first instance, have resulted in the case below being conducted differently in a material fashion and in the judgment being concluded on a different evidential and legal basis. It could, in particular, have led to different lines of enquiry being conducted and further and different evidence being tendered. It was essentially for this reason that the Court declined to permit a new point to be advanced for the first time on appeal. Other cases cited by the parties make the point, which is in any event logical, that where the new issue is one of law, as opposed to being contingent upon facts or evidence, the court is more likely to grant permission: See for instance, *Pitallis v Grant* [1989] QB 605 at page [611C-F]; and *Preedy v Dunne* [2016] EWCA Civ 805 at paragraphs [43] and [44]. In this case the point sought to be raised is not one of evidence. The evidence relating to the comparators and their probative strengths and weaknesses was before the Tribunal and is referred to in the transcripts and in the Judgment (cf e.g. paragraphs [374] – [402]) and that evidence is a given upon this appeal. The issue is also not a new one but was canvassed fully before the Tribunal. Its parameters were well understood then, as they are now. I can detect no real prejudice of significance

to Pfizer in addressing the issue on this appeal and I observe that Flynn and the Commission have already addressed the points in their written submissions, without any obvious difficulty.

39. Fifth, I address the argument that the proceedings under the Act are "*criminal*" and that this is a reason to refuse permission: see *NAPP Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] CAT 1, paragraphs 98 – 99. I do not consider this to be relevant. The nature of the argument sought to be advanced is unaffected by its characterisation as "*criminal*", which in any event arises largely because of the severe nature of the sanctions that can be visited upon breach. One might even say that *because* it is criminal and because violation can be met with such substantial penalties that it is all the more important that the point of law is clarified so that other companies, including pharmaceutical companies, are not penalised on an erroneous basis in the future. Certainty in the field of criminal law is always of great importance.

40. Sixth, permitting this point of law to be raised does not undermine the carefully constructed appellate structure for appeals from the Tribunal. It is said that but for the concession the Tribunal would have addressed the point in greater detail and this court has thereby been denied the benefit of a more fully formed judgment and analysis. There may be some truth in the argument. Nonetheless, it is apparent from the written submissions of the parties below, from the transcript of the argument before the Tribunal, from the Judgment, and from the skeleton arguments prepared for this court, what the argument was and is, and this court will not be significantly disadvantaged because of the more truncated analysis of the Tribunal in the Judgment.

41. Seventh, as to the argument that the CMA has failed to proffer any sort of an explanation for its change of position, Mr Hoskins QC explained that the short answer was that the CMA has decided that its earlier position was wrong and the position it now advances is correct. He says that a good faith change of position by a public authority reflects responsible, not bad, administrative practice. In terms of ordinary public law principles this is correct. A public authority should not persist in applying a policy that, on reflection, it considers to be wrong in law. If that means, as here, seeking to withdraw from a stance formally adopted in earlier legal proceedings, then that is an appropriate course of action to adopt. Whether the "*new*" position turns out to be good or bad in law will, of course, depend upon the final assessment of the Court.

42. Finally, in relation to alleged prejudice arising out of the impact of the concession upon fines, I have already observed that granting permission does not wipe the slate clean. If the appeal is allowed, and assuming that the Court then remits the case to the Tribunal for a consideration of any outstanding issues (such as the appeal against penalties), then it seems to me that in deciding whether Pfizer acted negligently it remains open to Pfizer to refer to the CMA's position, and to uncertainty in the law as evidenced by changes in that position, as relevant and significant mitigation. Conversely, if the appeal is refused then the matter becomes academic because the Decision including the fine will remain quashed. And if and insofar as the CMA was then to adopt another decision to address and remedy defects identified in the Judgment, Pfizer could at that stage still pray in aid changes in the earlier position of the CMA as relevant. At all events I do not consider that this argument, even if it had greater force, would amount to a reason to refuse permission.

43. For all these reasons I grant permission to amend the Grounds of Appeal.