



Neutral citation [2017] CAT 13

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1274/1/12/16 (IR)

Victoria House
Bloomsbury Place
London WC1A 2EB

23 June 2017

Before:

PETER FREEMAN CBE QC (Hon)
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) FLYNN PHARMA LIMITED
(2) FLYNN PHARMA (HOLDINGS) LIMITED

Applicants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING

1. This is the Tribunal's ruling on the application by the Competition and Markets Authority ("CMA") that Flynn Pharma Limited and Flynn Pharma (Holdings) Limited ("Flynn") pay its costs in respect of Flynn's unsuccessful application for interim relief which I heard on 17 January 2017. After Flynn's application was determined, Flynn filed an appeal against the disputed decision by notice of appeal dated 7 February 2017. Flynn's substantive appeal (the "main action") will be heard later this year.
2. The CMA applies for an order for costs on the grounds that it has been unable to reach agreement with Flynn, that it was successful in defeating the application, that it has spent public funds in doing so, and that the issue that informed the Tribunal's refusal to grant relief, namely the balance of interests pending trial of the main action, has been resolved and will not be affected by the outcome of the main action. The CMA also submits that its costs were reasonably incurred and reasonable in amount.
3. Flynn resists the application on the grounds that the decision on interim relief was not as clear cut as the Respondent claims, that an immediate award should only be made in "exceptional circumstances" and that such circumstances did not exist in this case. Flynn asks for costs to be reserved pending final determination of its appeal in the substantive proceedings. Alternatively Flynn submits that costs should lie where they fall, in effect that I should make no order, or, as a further alternative, that the CMA's costs are "grossly excessive".
4. I have had the benefit of reading the application by the CMA, and its schedule of costs incurred, Flynn's response and the CMA's reply together with a revised schedule. I have decided to determine this application on the papers without a hearing.
5. The Tribunal's power to award costs is governed by Rule 104 of the Competition Appeal Tribunal Rules 2015. This gives a wide discretion, subject to a requirement to take account of a number of matters. These include the conduct of all parties in relation to the proceedings, any schedule of costs incurred, the success or otherwise of any party, and the reasonableness and proportionality of the incurring of the costs and of their amount. No offers to settle were made by either party and I am not required to consider the consequences of any such offer.

6. Although I have a wide discretion, this application concerns costs at an interim stage of a potentially substantial appeal process. I would therefore not normally consider making any award of costs at this stage unless there were exceptional circumstances making it necessary or fair to either party to do so. Both parties made submissions on whether such circumstances existed in this case.
7. It is true that the CMA successfully resisted this application. It may also be true that the decisive factor in my decision to refuse relief was that the potential damage to the public in granting the relief outweighed the potential damage to the applicant in refusing it and that issue will not be affected by the outcome of the main action. But, against that, the application for relief was not without merit and the decision itself was finely balanced. It remains open to Flynn to re-apply if it can show that circumstances have changed.
8. In all the circumstances, and having carefully considered the arguments made by both parties, including those made by the CMA in reply to Flynn, I have decided that the most just and reasonable course is to reserve the question of costs pending determination of Flynn's appeal in the main action, and I rule accordingly.
9. It follows that I do not need to consider Flynn's alternative applications, and in particular the reasonableness or otherwise of the CMA's costs as detailed in its revised schedule of costs dated 16th June 2017. These matters may have to be considered in due course, if the parties remain unable to reach agreement on such matters, but not yet.

IT IS ORDERED that the costs of Flynn's application for interim relief be reserved pending a decision in the main action.

Peter Freeman C.B.E. Q.C. (Hon)
Chairman

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

Date: 23 June 2017