



Neutral citation [2019] CAT 16

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos: 1274-1275-1276/1/12/17

Victoria House
Bloomsbury Place
London WC1A 2EB

21 May 2019

Before:

PETER FREEMAN CBE QC (Hon)
(Chairman)
PAUL LOMAS
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

BETWEEN:

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

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

Appellants in Case No: 1275/1/12/17

Interveners in Case No: 1276/1/12/17

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

AND BETWEEN:

(1) PFIZER INC.
(2) PFIZER LIMITED

Appellants in Case No: 1276/1/12/17

Interveners in Case No: 1275/1/12/17

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING (PERMISSION TO APPEAL: COSTS)

A. INTRODUCTION

1. This is our ruling on a request by the CMA for permission to appeal our ruling on costs dated 29 March 2019 ([2019] CAT 9) (the “**Costs Ruling**”). The request is made under Rule 107(1) of the Competition Appeal Tribunal Rules 2015 (SI. 2015 No. 1648). For convenience we adopt in this ruling the same defined terms used in the Costs Ruling.
2. The CMA’s application, dated 9 May 2019, proposes a single ground of appeal:

“The Tribunal erred in law in adopting the starting point that costs should follow the event; and that the correct starting point, in the context of a successful appeal under s.46 (or s.47) of the 1998 Act (a Competition Act Appeal”), should have been that costs will not be awarded against the CMA unless it has acted unreasonably or in bad faith.”
3. The CMA makes this request on the basis that the proposed ground has a real prospect of success. The CMA also asserts that there is a compelling reason for the proposed appeal to be heard.
4. On 10 May 2019, the Tribunal wrote to Flynn and Pfizer enclosing the CMA’s application and providing them with an opportunity to file responsive observations. Those written submissions in response were received on 17 May 2019.
5. We have carefully considered the CMA’s application along with the responsive submissions of Flynn and Pfizer. No party has sought an oral hearing. We therefore consider it appropriate to determine this matter on the papers.

B. PERMISSION TO APPEAL

6. Section 49 (1) (c) of the Competition Act 1998 provides that an appeal lies from a decision of the Tribunal to the Court of Appeal “*on a point of law arising from any other decision of the Tribunal on an appeal under section 46 or 47*”. The Costs Ruling is such a decision and, in deciding whether to grant permission, the Tribunal applies the same test as the High Court applies under the Civil Procedure Rules (the “**CPR**”). Under that test, permission to appeal may be granted where the Tribunal considers that

the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard.

7. In our Costs Ruling we considered, at some length, the Court of Appeal's judgment in *BT v Ofcom* ([2018] EWCA Civ 2542), which concerned an appeal under the Communications Act, and its application to appeals of competition infringement decisions insofar as the approach to awarding costs against the authority is concerned. Our reasons for coming to our conclusion were fully set out in our Costs Ruling but we recognised that the matter was not free from doubt. Accordingly, we agree that, applying the tests in the CPR, the appeal would have a real prospect of success and that it would in any event be appropriate for the Court of Appeal to rule on the matter.
8. We therefore grant the CMA permission to appeal.
9. This Ruling is unanimous.

Peter Freeman CBE QC (Hon)
Chairman

Paul Lomas

Prof. Michael Waterson

Charles Dhanowa OBE QC (Hon)
Registrar

Date: 21 May 2019