Neutral citation [2024] CAT 53

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1671/5/7/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

5 August 2024

Before:

HODGE MALEK KC

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) THE SCOTTISH MINISTERS
(2)-(15) THE SCOTTISH HEALTH BOARDS

Claimants

-and-

(1) ACCORD-UK LIMITED (FORMERLY KNOWN AS ACTAVIS UK LIMITED)
(2) ALLERGAN UNLIMITED COMPANY (FORMERLY KNOWN AS ACTAVIS PLC/ALLERGAN PLC)
(3) INTAS PHARMACEUTICALS LIMITED
(4) ACCORD HEALTHCARE LIMITED
(5) WAYMADE PLC (FORMERLY KNOWN AS WAYMADE HEALTHCARE PLC)
(6) AMDIPHARM UK LIMITED
(7) AMDIPHARM LIMITED
(8) ADVANZ PHARMA SERVICES (UK) LIMITED

Defendants

RULING (SERVICE OUT OF THE JURISDICTION)

A. INTRODUCTION

1. By application dated 25 July 2024 the Claimants seek permission pursuant to Rule 31(2) of the Competition Appeal Tribunal Rules 2015 ("the 2015 Rules") to serve the claim form out of the jurisdiction on two out of the eight Defendants, who are based outside the jurisdiction ("the Application"). The relevant defendants are Allergan Unlimited Company ("Allergan") the Second Defendant, and Intas Pharmaceuticals Limited ("Intas"), the Third Defendant (together "the Foreign Defendants"). Allergan is based in Dublin, the Republic of Ireland and Intas is based in Ahmedabad, the Republic of India. The Claimants rely on 3 jurisdictional gateways listed in CPR PD6B, para.3.1(3) (where anchor defendants within the jurisdiction), 3.1(9)(a) (damage sustained within the jurisdiction in respect of a tort) and 3.1(9)(a) (tort claim governed by the law of England and Wales). The Application is supported by the witness statement of Ms Catherine Percy and the Claim Form.

B. THE PARTIES

2. The Claimants are the bodies within NHS Scotland that have borne the cost of reimbursing pharmacists and dispensing general practitioners for drugs dispensed in the NHS in Scotland including the supply of 10mg and 20mg immediate release hydrocortisone tablets ("the hydrocortisone tablets").

3. The Defendants were at all material times either directly or indirectly in the pharmaceutical industry and involved in the production and/or supply of hydrocortisone tablets.

C. THE CLAIM

4. The claim is set out in detail in the Claim Form issued on 24 July 2024. In summary it is a claim for damages under section 47A of the Competition Act 1988 ("CA 1998") based on the facts and matters set out in the decision dated 15 July 2021 of the Competition and Markets Authority ("the CMA") which found that the Defendants had infringed the CA 1988 in respect of the sale and

supply of hydrocortisone tablets ("the Decision"). The Decision found infringements of both s.2 ("the Chapter I Prohibition") and s.18 of the CA 1998 ("the Chapter II Prohibition") ("the Infringements"). The Claim Form has been or shortly will be served within the jurisdiction on the other six Defendants.

5. As to the Infringements, in summary:

(1) Auden/Actavis charged excessive and unfair prices for 10mg hydrocortisone tablets (the "10mg Pricing Abuse") and 20mg hydrocortisone tablets (the "20mg Pricing Abuse") (together the "Pricing Abuse Infringements").

(2) The 10mg Pricing Abuse lasted from 1 October 2008 to 31 July 2018 (the "10mg Pricing Abuse Infringement Period") and the 20mg Pricing Abuse lasted from 1 October 2008 to 8 January 2017 (the "20mg Pricing Abuse Infringement Period") (together the "Pricing Abuse Infringement Periods").

(3) Between 11 July 2011 and 30 April 2015 (the "20mg Agreement Infringement Period"), Auden McKenzie (Pharma Division) Limited ("AM Pharma") and "Waymade" were parties to an agreement that had the object of restricting competition (the "20mg Agreement") based on a common understanding that: (a) AM Pharma would supply Waymade with 20mg hydrocortisone tablets on terms that amounted to monthly value transfers to Waymade; and (b) in exchange for these payments, Waymade would not enter the market independently with its own 20mg hydrocortisone tablets.

(4) Between 23 October 2012 and 24 June 2016 (the "10mg Agreement Infringement Period"), AM Pharma, Accord-UK Limited (then known as Actavis UK), Waymade and AMCo were at various times parties to an agreement that had the object of restricting competition (the "10mg Agreement") based on a common understanding that: (a) AM Pharma, initially, and then subsequently Actavis UK, would supply Waymade initially, and then subsequently AMCo, with 10mg hydrocortisone

tablets at prices that were heavily discounted off the market rate and amounted to very substantial value transfers; (b) in exchange for which Waymade, initially, and then subsequently AMCo would not enter the market independently with its own 10mg hydrocortisone tablets.

6. Other than in respect of the 20mg Agreement, the CMA's infringement findings in the Decision were appealed under s.46 of CA 1998 (the "Hydrocortisone Appeals"). Those appeals were determined by the Tribunal in the following judgments (the "Relevant Tribunal Judgments"):

(a) *Allergan plc v Competition and Markets Authority* [2023] CAT 56 ("Hydrocortisone 1"), decided on 18 September 2023. This was an appeal against the Pricing Abuse Infringements, which were upheld by the Tribunal.

(b) *Allergan plc v Competition and Markets Authority* [2023] CAT 57 ("Hydrocortisone 2"), decided on 29 September 2023 and published on 8 March 2024. This was an appeal against the CMA's findings relating to the 10mg Agreement. The Tribunal found that "[a]ll of the grounds of appeal fail. The 10mg Agreement … is a by object infringement of the Chapter I prohibition. The object was flagrantly anti-competitive and the anti-competitive effects significant, in that an abused monopoly position was maintained and supported". However, the Tribunal stated that it was unable finally to determine these appeals because of concerns as to whether the CMA had properly put its case to witnesses who gave evidence during the trial, in respect of which the Tribunal invited submissions and which were the subject of the following judgment.

(c) *Allergan plc v Competition and Markets Authority* [2024] CAT 17 ("Hydrocortisone 3", 'Due Process'), decided on 8 March 2024, which considered questions of due process arising out of Hydrocortisone 2 and ultimately determined that the findings in Hydrocortisone 2 ought to be set aside.

(d) *Allergan plc & others v Competition and Markets Authority* [2024] CAT 29 ("Hydrocortisone 4", 'Penalties'), decided on 29 April 2024, was a s.46 appeal of the penalty imposed by the CMA in respect of the 20mg Pricing Abuse. The CMA's penalty decision was affirmed by the Tribunal.

7. The current position is that:

(1) the CMA's 20mg Agreement infringement finding has become final (as the time for appealing against it expired without an appeal being brought) and is therefore binding on the Tribunal for the purpose of these proceedings under s.58A CA 1998; and

(2) the other infringement findings (i.e. relating to the 10mg Pricing Abuse, 20mg Pricing Abuse and 10mg Agreement infringements) have not yet become final as they have been appealed and those appeals processes are ongoing.

8. The loss and damage claimed by the Claimants is the difference during the relevant infringement period between the amounts that the Claimants paid to reimburse Dispensing Contractors for dispensing the hydrocortisone tablets and the amounts that they would have paid absent the Infringements.

D. LEGAL FRAMEWORK

9. As the Foreign Defendants are not based within the jurisdiction, permission of the Tribunal is required for service of the Claim Form on them outside the jurisdiction pursuant to Rule 31(2)-(3) of the 2015 Rules. So far as is material to the Application Rule 31(2)-(3) provides as follows:

> "(2) Where the permission of the Tribunal is required for service of the claim form on one or more foreign defendants out of the jurisdiction, the claimant shall make an application for permission verified by a statement of truth setting out—
>
> (a) the address of such foreign defendant or, if not known, in what place that defendant is, or is likely, to be found; and

(b) that the claimant believes that the claim against any such foreign defendant has a reasonable prospect of success; and

(c) if under rule 30(3)(b), the claimant contends that the proceedings are to be treated as taking place in England and Wales, which ground set out in paragraph 3.1 of Practice Direction 6B of the CPR is relied on;

…

(f) any material facts relied on.

(3) Where paragraph (2) applies, the Tribunal shall not give permission for service out of the jurisdiction unless satisfied that the Tribunal is the proper place in which to bring the claim."

10. The Claimants contend that the current proceedings are to be treated as taking place in England and Wales for the purpose of Rule 18 of the 2015 Rules. In such a case, the Tribunal approaches service out of the jurisdiction on the same basis as the High Court under the CPR: *DSG Retail Ltd v. Mastercard Inc* [2015] CAT 7 at [17]-[18].

11. There are numerous cases both in the High Court and the Tribunal dealing with the requirements for service out of the jurisdiction. The principles and relevant test have been helpfully summarised by the Tribunal in *Epic Games v. Apple* [2021] CAT 4 at [78]:

(1) There is a serious issue to be tried on the merits of the claim: i.e. that there is a real as opposed to fanciful prospect of success on the claim. This is the same test as would be applied if the claimant were resisting a summary judgment application by the defendant: *AK Investment CJSC v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7 at [71].

(2) There is a good arguable case that the claim falls within one or more of the categories of case, generally referred to as "gateways", set out in CPR Practice Direction 6B at para 3.1. For this requirement, "good arguable case" means that the claimant has the better of the argument on whether the claim comes within the gateway(s) relied upon. Where this depends on an issue of law, the Tribunal would normally decide that issue as opposed to determining whether there is a good arguable case

on it: *AK Investment CJSC* at [81]. Insofar as this involves an issue on the facts, the effect of the test is as follows:

> "(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."

Per Lord Sumption in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 at [7], as approved in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 at [9].

(3) In all the circumstances, England is clearly or distinctly the appropriate forum for the trial of the claim and the Tribunal ought to exercise its discretion to permit service of proceedings out of the jurisdiction. This is reflected in rule 31(3) of the 2015 Rules. As regards this requirement, the task of the Tribunal is first, to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice; and then to determine whether England is clearly or distinctly the appropriate forum: *VTB Capital Plc v Nutritek International Corp* [2012] EWCA Civ 808 at [101].

12. On each of these requirements the burden of proof is on the Claimants.

E. THE TRIBUNAL'S ASSESSMENT

13. The Application itself contains the information required by Rule 31(2)(a)-(c) as well as the material facts relied upon within Rule 31(2)(f). In view of the Decision and the Relevant Tribunal Judgments on the appeals from that Decision, it is not necessary in this Ruling to set out the facts of the alleged infringements in any detail. There are clearly serious issues to be tried on the merits in this follow-on claim for damages under Section 47A of the CA 1998. In the light of the matters set out in the Claim Form, the Decision and the Relevant Tribunal Judgments on the appeals, the claim has a real prospect of

success. The Tribunal appreciates that the result of the pending appeals from the Tribunal's judgments may change the assessment of the merits, but the Tribunal must work from the material that is before it and form its own view as to whether the merits requirements has been met, which is a relatively low threshold.

14. CPR PD 68, paragraph 3.1 so far as is relied upon by the Claimants provides as follows:

> "3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –
>
> …
>
> (3) A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and—
>
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.
>
> …
>
> A claim is made in tort where –
>
> (a) damage was sustained, or will be sustained, within the jurisdiction;
>
> (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction; or
>
> (c) the claim is governed by the law of England and Wales".

(1) The Gateways

15. The Tribunal is satisfied that there is a good arguable case that the claim falls within each of the 3 gateways relied upon by the Claimants.

16. As regards the gateway in para.3.1(9)(a) (damage sustained within the jurisdiction), the Tribunal is a UK jurisdiction. "Damage" in this gateway refers to "actionable harm, direct or indirect, caused by the wrongful act alleged": *FS Cairo (Nile Plaza) LLC v. Brownlie* [2021] UKSC 45 at [81]. In relation to this gateway, it has been held in the context of an abuse of dominance claim alleging an overcharge for goods supplied that if the loss is paying an overcharge when

buying the goods, the loss would seem to be made where the goods are bought: *Apple v. Qualcomm* [2018] EWHC 1188 (Pat) at [99]. In the present case there is a good arguable case that damages have been sustained within the jurisdiction (in this case, the UK) as the Claimants are based in the UK and made allegedly inflated payments for goods supplied in the UK.

17. As regards the gateway in para.3.1(9)(c) (claim governed by the law of England and Wales), as the Tribunal is a UK jurisdiction, it is enough that the claim is governed by the law of any part of the UK.

18. Losses sustained by the Claimants which predate 11pm on 31 January 2020 are governed by Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II"). Losses which postdate 11pm on 31 January 2020 are governed by the retained version of Rome II (Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II) (Retained EU Legislation) ("Retained Rome II")), which is in equivalent terms to Rome II. References below to provisions in Rome II are also to the equivalent provisions in Retained Rome II.

19. Article 4(1) of Rome II sets out the general rule that, unless otherwise provided for:

> "the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur".

20. Article 6(3)(a) of Rome II makes specific provision for competition claims, and states that states that "[t]he law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected".

21. Recitals (21) and (22) of Rome II explain that Article 6 is a clarification of the general rule in Article 4(1), i.e. Article 6 is intended to state a version of the principle that the applicable law is that of the country where the damage occurs,

particularized for competition law. Thus, in *Westover v Mastercard* [2021] CAT 12 at [50], the Tribunal stated:

> "The general rule is that the governing law is the law of the country where the damage occurs: Art 4. That is considered to strike a fair balance between the defendant and the claimant: recital (16). Thus Art 6(3)(a) can be seen as a particular application of this approach: where there is a restriction of competition then the market affected is likely to correspond to the place where the anti-competitive damage occurs."

22. There is a good arguable case that this gateway is satisfied. The Marketing Authorisations which form part of the alleged abuses cover the whole of the UK, the CMA and the Tribunal have both defined the relevant geographic market as UK wide, the hydrocortisone tablets were distributed in the UK, and the damages alleged consist of inflated payments for the supply and sale of such tablets in the UK.

23. As regards the gateway in para.3.1(3) (necessary or proper party where anchor defendant), there a number of potential anchor defendants who are domiciled in the UK and are capable of being served with the Claim Form within the jurisdiction (D1, D4, D5, and D6 to D8). Companies within the same corporate group may be liable for competition law infringements on a joint and several liability basis as alleged here: *CMA v. Volkswagen AG* [2023] EWCA Civ 1506 at [84]. Allergan and Intas form part of the same economic undertaking as UK-based companies that are alleged to be direct participants in the infringements.

24. For each claim, there is a real issue to be tried against at least one English defendant who can be served as of right. The CMA Decision, insofar as upheld on appeal, establishes that:

    (1) For the 10mg Abuse, Accord-UK/Actavis UK (D1) is liable as direct participant and/or as economic successor to AM Pharma throughout the whole period from 1 October 2008 to 31 July 2018; and Accord (D4) is liable as parent, and/or as a company that was part of the same economic undertaking as a direct participant, from 9 January 2017 to 31 July 2018.

(2) For the 20mg Abuse, Accord-UK/Actavis UK (D1) is liable as direct participant and/or as economic successor to AM Pharma throughout the whole period from 1 October 2008 to 8 January 2017.

(3) For the 10mg Agreement, Accord-UK/Actavis UK (D1) is jointly and severally liable as direct participant and/or as economic successor to AM Pharma throughout the whole period from 23 October 2012 to 24 June 2016, along with:

(i) Amdipharm UK (D6) as direct participant for the period from 23 October 2012 to 30 October 2012; and

(ii) Amdipharm UK (D6) and Advanz Services (D8) as direct participants from 31 October 2012 to 24 June 2016.

(4) For the 20mg Agreement, Accord-UK/Actavis UK (D1) is jointly and severally liable as direct participant and/or as economic successor to AM Pharma throughout the whole period from 11 July 2011 to 30 April 2015.

25. As regards the "necessary or proper party" requirement, in *Altimo Holdings v Krygyz Mobil Tel Ltd* [2011] UKPC 7 at [87] the Privy Council considered the "proper party" test as follows:

> "…the question whether D2 is a proper party is answered by asking: "supposing both parties had been within the jurisdiction would they both have been proper parties to the action?": *Massey v Heynes & Co* 21 QBD 330 , 338…D2 will be a proper party if the claims against D1 and D2 involve one investigation: …and in *Carvill America Inc v Camperdown UK Ltd* [2005] 2 Lloyd's Rep 257, para 48, where Clarke LJ also used, or approved , in this connection the expressions "closely bound up" and "a common thread": at paras. 46, 49."

26. Allergan (D2), and Intas (D3) are all proper parties to the claims:

(1) They are both addressees of the CMA Decision and involved in the appeals before the Tribunal and Court of Appeal.

(2) They were all involved directly or indirectly in the manufacture, marketing, selling and/or distribution of 10mg and/or 20mg hydrocortisone tablets. At all material times relevant to their liability, they formed part of an undertaking which was directly involved in the infringements:

(3) The claims against the Foreign Defendants would involve the same or substantially the same issues as would be in a trial in England and Wales, and such a trial would involve the substantially the same witnesses and experts. The Foreign Defendants can be expected to generate documents which would be of use in the claim against the anchor defendants and which are relevant to the issues of causation and quantum.

(2) Proper Forum

27. The factors that may be taken into account in determining the proper forum are wide ranging. As stated by the Tribunal in *Epic Games v. Apple* [2021] CAT 4 at [132]:

> "The governing approach to determination of whether England is clearly the appropriate forum derives from Lord Goff's classic speech in *The Spiliada* [1987] AC 460. Lord Goff there emphasised that the fundamental consideration is the interests of all the parties and the ends of justice. As numerous judgments have subsequently shown, a range of factors may therefore be taken into account, including (i) the residence or place of business of the parties; (ii) the location of likely witnesses; (iii) the existence of parallel proceedings; (iv) the applicable law (v) the cost and delay; (vi) a legitimate personal or juridical advantage; and (vii) the jurisdictional gateway relied on. See note 6.37.16 in *Civil Procedure 2020 (the "White Book"*), However, this is not an exhaustive list, and the relevance and importance of any factor will vary significantly from one case to another in the "evaluative or balancing exercise" which the court or tribunal has to carry out: per Lord Neuberger in *VTB Capital* at [97]."

28. The UK and specifically the Tribunal sitting in England and Wales is clearly the proper forum for the determination of the claims set out in the Claim Form in view of the following in particular:

(1) Five anchor defendants are based in the UK.

(2) It would be undesirable for the same claims to be litigated across multiple jurisdictions with the majority of the Defendants in England and Wales, and Allergan and Intas in Ireland and India respectively.

(3) The CMA Decision and the Tribunal judgments in respect of which this is a follow-on damages claim were made in England and Wales and it is appropriate that this Tribunal determines the question of follow-on liability and damages.

(4) It is likely that the majority of the factual and expert witnesses will be based in England and Wales.

29. In all the circumstances it is appropriate for the Tribunal to exercise its jurisdiction to permit the service out of the Claim Form on Allergan and Intas. Accordingly, the Claimants are permitted to serve them out of the jurisdiction at the following addresses:

(1) Allergan at Clonshaugh Business & Technology Park, Dublin 17, Coolock, Dublin, D17 E400, the Republic of Ireland, or elsewhere in the Republic of Ireland; and

(2) Intas at 2nd Floor, Chinubhai Centre, Off Nehru Bridge, Ashram Road, Ahmedabad, 38009, the Republic of India, or elsewhere in the Republic of India.

30. As this Application has been determined on the papers *ex parte*, the Foreign Defendants may apply to set aside this decision on the basis that the Tribunal does not have jurisdiction, or such jurisdiction should not be exercised pursuant to rule 34 of the 2015 Rules.

31. In view of the pending appeals against the Relevant Tribunal Judgments, the parties should consider applying for a stay of these proceedings after all the Defendants have been duly served. The parties should also consider whether they agree that the current proceedings are to be treated as taking place in England and Wales for the purpose of Rule 18 of the 2015 Rules.

Hodge Malek KC
Chair

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

Date: 5 August 2024