Judiciary of England and Wales

6 September 2024

Allergan, AMCo, Advanz, Cinven and Auden Mackenzie v. The Competition and Markets Authority (the CMA)
Appeal Nos: CA-2024-000706, CA-2024-101187, CA-2024-101188, CA-2024-001223, CA-2024-001312, and CA-2024-001577

JUDGMENT SUMMARY

Important note for press and public: this summary forms no part of the court's decision. It is provided so as to assist the press and the public to understand what the court decided. The full judgment of the Court of Appeal is the only authoritative document. Judgments are public documents and are available at:
www.judiciary.uk, https://caselaw.nationalarchives.gov.uk

1. In this case, the Court of Appeal (Sir Geoffrey Vos, Master of the Rolls, Sir Julian Flaux, Chancellor of the High Court, and Lord Justice Green) allowed appeals by the CMA against decisions of the Competition Appeal Tribunal (the Tribunal) known as "Hydrocortisone 2" (or H2) and "Hydrocortisone 3" (H3) respectively. The Court of Appeal refused Allergan, AMCO, Advanz, Cinven and Auden (together the "companies") permission to appeal from the decision in H2. The outcome was, therefore, that the CMA's infringement decision of 15 July 2021 in Case 50277 (the Decision) was upheld and the Court of Appeal made an order, in substitution for the decisions in H2 and H3, that finally dismissed the companies' appeals from the

CMA's Decision under section 15(3) of the Senior Courts Act 1981 and paragraph 3(2) of schedule 8 to the Competition Act 1998 (the 1998 Act).

2. The central question before the Court of Appeal was whether the CMA had properly put its case to the witnesses called by the companies, when the companies appealed the CMA's infringement Decision to the Tribunal. The Court of Appeal decided, in a judgment given by Sir Geoffrey Vos, Master of the Rolls, that it had.

3. The companies' appeals from the Decision gave rise to three lengthy decisions of the Tribunal, namely H1 on 18 September 2023 (H1), H2 on 29 September 2023, and H3 on 8 March 2024.

4. H1 found there to have been infringements of the Chapter II prohibition on abusing a dominant position in the market for 20mg hydrocortisone tablets. H1 is not relevant to this appeal.

5. H2 found there to have been infringements of the Chapter I prohibition on agreements between undertakings, having as their object the prevention, restriction or distortion of competition in the market for 10mg hydrocortisone tablets. The Tribunal in H2 did not, however, simply uphold the CMA's Decision and find that all the companies' grounds of appeal from it failed. It added some important caveats. It said that it was deciding the appeals on the basis of the evidence that it had heard, but that it was concerned that the CMA's case had not been fully put to the companies' witnesses (primarily Mr John Beighton), seemingly on the premise that issues of their dishonesty arose. It then provisionally dismissed the appeals on a factual basis that went beyond the Decision. It found that three companies, Auden, Waymade and AMCo had behaved dishonestly in

concluding the 10mg Agreement (an infringing agreement made between Auden and AMCo between 23 October 2012 and 24 June 2016), and that "Mr [John] Beighton was dishonest at the time of the conclusion of the Second Written Agreement (an agreement for the supply of 10mg hydrocortisone tablets made between Auden and AMCo on 25 June 2014); and that he lied about it in the witness box". But the Tribunal in H2 decided that it was in no position finally to determine the companies' appeals. Instead, it directed further argument as to the implications of the CMA's case not having been fully put. It said that "[t]he CMA [had] made a decision which we consider on the merits to have been correct" and "[h]ad Mr [Robert] Sully and Mr Beighton not been called, then we are entirely satisfied that the appeals ought to be dismissed for the reasons we have given".

6. The Tribunal then held a 2-day "due process" hearing on 26 and 27 October 2023where it re-opened the question of the nature of the CMA's case as to the 10mg Agreement, and as to dishonesty.

7. In H3, the Tribunal said that H2 had been provisional because "the Tribunal was concerned that a central aspect of [it] was never put to [Mr Beighton and Mr Sully]". As a result, the companies' appeals against the Decision succeeded, and the provisional findings in H2 could not stand, because of "a failure, on the part of the CMA, to put the adverse findings in [the Decision] to [Mr Sully and Mr Beighton]", which "fatally undermine[d] the conclusion, otherwise open to the Tribunal … that there was sufficient material to uphold [the Decision] when considering (in substance) the documentary evidence alone". The Tribunal made clear in H3 that the main thing that had needed to be put was the "existence of the collateral understanding", which Mr Beighton had denied. The Tribunal accepted that Auden, the *de facto* monopoly manufacturer of

10mg hydrocortisone tablets, had transferred significant value to AMCo, the purchaser of those tablets that was threatening to enter the market as a manufacturer pursuant to a marketing authorisation received in September 2012. The "collateral understanding" to which H2 was referring was an alleged understanding, outside the terms of a Second Written Agreement between Auden and AMCo, that AMCo would not actually enter the market as a manufacturer during the term of that agreement. The Tribunal thought the inference from the significant value transfer was strong, but that it "needed to be assured that alternative explanations from the witnesses could not hold water". Mr Beighton had answered questions from the Tribunal as to AMCo's reasons for the arrangement between AMCo and Auden that could not "be dismissed out of hand". The Tribunal would "never know … how Mr Sully and Mr Beighton would have defended themselves … from the inference of an anti-competitive collateral understanding". The Tribunal said in H3 it did not understand how the CMA could have put its case without alleging that Mr Beighton was lying and was dishonest, and that the failure of due process that it had identified fatally undermined its substantive decision in H2.

8. The CMA appealed from the decision in H3 on the grounds that the Tribunal had no basis for overturning its findings in H2 that the companies had flagrantly infringed the Chapter I prohibition by entering into the 10mg Agreement. Its case had been properly put to the companies' witnesses. The CMA contended that it had not found dishonesty in the Decision and had not alleged dishonesty in response to the companies' appeals and had no need to do so (something that the Tribunal repeatedly acknowledged). The CMA's case had always been clear. It was expressed in the Decision at [6.10]-[6.17]: (i) AMCo was a potential competitor to Auden, (ii) the parties reached an understanding that AMCo would not proceed to place its own product on the market, (iii) in return for

the (continuing) transfer of value from Auden. That was what was called in H2 and H3 the "10mg Agreement".

9. In the course of the CMA's oral opening before the Court of Appeal, the court pointed out that, even if the CMA were right on these points, it still needed to appeal the parts of H2 that had: (i) found dishonesty and other matters going beyond the Decision, and (ii) declined finally to determine the companies' appeals, and (iii) held that a further substantive hearing was required. The CMA ultimately filed, in the course of the hearing before us, an Appellant's Notice against the decision in H2, for which it sought permission at the hearing.

10. At a preparatory hearing before the Court of Appeal, it had directed that the companies' applications for permission to appeal from the provisional findings against them in H2 should be heard at the CMA's substantive appeal against H3 on the basis that, if permission were given, the substantive appeals would be heard at the same time.

11. Accordingly, the Court of Appeal dealt with essentially 3 substantive issues: (i) the CMA's substantive appeal against H3, (ii) the companies' applications for permission to appeal against H2, and (iii) the CMA's application for permission to appeal parts of H2.

12. The companies sought permission to appeal H2 on essentially 9 grounds. H2 did not deal properly with, and the CMA did not properly challenge, Mr Beighton's evidence that: (i) AMCo always intended to enter the market to obtain 50% of it, (ii) the Second Written Agreement was a stop gap whilst AMCo readied itself to enter the market, (iii) he had continued to try to source 10mg hydrocortisone tablets from Aesica even after

the Second Written Agreement, (iv) he had taken legal advice as to the commercial terms agreed in writing, and there was no broader or different understanding beyond the written terms, (v) he had not cancelled AMCo's production of 10mg hydrocortisone tablets from Aesica because of any unwritten collateral understanding that he would not exercise his written clause 2.2 right to enter the market at all during the 2-year term of the Second Written Agreement, and (vi) his dishonesty and serious misconduct. The seventh point was as to CMA's failure to challenge whether Auden was unilaterally incentivising AMCo not to enter the market. The eighth point made by the companies was that the collateral understanding could not anyway have persisted beyond the time when Mr Amit Patel left Auden, and Actavis took over its business on 29 May 2015. Advanz also challenged the Tribunal's finding of an "by object" infringement and its evaluation of the market, suggesting that the 10mg skinny label product (of the same tablet composition, but with indications only for use by children) was not a competitor to a 10mg full label product, and that they were not substitute products.

13. The Court of Appeal decided that none of these points, nor any of the different ways of putting them in companies' applications for permission to appeal H2, had any real prospect of success. Accordingly, no points of law arose that engaged the jurisdiction of the Court of Appeal.

14. The Court of Appeal decided, on the CMA's appeals, that the procedure adopted by the Tribunal was inappropriate in all the circumstances of this case. The process of deciding, on the evidence, whether each of the companies' appeals from the Decision should succeed was a unitary one. It was the Tribunal's duty to hear the evidence that was called, to listen to the parties' submissions, having made appropriate case management directions, before deciding whether each of the appeals fell to be dismissed or allowed

or whether some other order ought to have been made in respect of them under paragraph 3(2) of schedule 8 to the 1998 Act.

15. In this case, the veracity of the witnesses and the explanations they gave for their conduct, looked at against the backdrop of the contemporaneous and other evidence, was intimately bound up with the question of whether each of the companies had infringed the Chapter I prohibition. It was not appropriate to order a further hearing whilst also stating unequivocal conclusions, epitomised by the finding in H2 that the 10 mg Agreement was a "by object infringement of the Chapter I prohibition", whose "object was flagrantly anti-competitive and the anti-competitive effects significant, in that an abused monopoly position was maintained and supported". It was necessary for the Tribunal to **decide** whether its concerns about the way the CMA's case had been put affected those conclusions, **before** stating them.

16. The process that the Tribunal adopted was also unjust, because it allowed the parties a second bite at the cherry of argument, when they thought they had addressed the Tribunal on all relevant points. It was particularly remarkable that such argument could have occurred following a finding by the Tribunal, whether expressed to be provisional or not, that Mr Beighton was dishonest and had lied in the witness box. The situation was compounded by the fact that, on any analysis, that had never been the CMA's case.

17. It was not open to the Tribunal to deliver a provisional decision, re-open the argument on fundamental points, and then to reverse its own decision.

18. Accordingly, the Court of Appeal decided that: (i) the CMA's appeal from H3 should be allowed, (ii) the CMA's application for permission to appeal from H2 should be

granted, and its appeal should be allowed, (iii) the companies should not be granted permission to appeal from H2, (iv) the Tribunal's provisional findings in H2 that the companies' appeals from the Decision should be dismissed, should be finalised and reinstated, and (v) the Tribunal's additional findings in H2 going beyond the Decision as to dishonesty and other matters should be overturned.

19. In summary, the Court of Appeal's reasons were as follows. First, it was not appropriate for the Tribunal in H2 to proceed as it did. There was no need for a further hearing. It should have determined the companies' appeals from the Decision on their merits on the evidence that it had heard. The parties had had their opportunity to present their evidence and to cross-examine the witnesses. There was no need for a second bite at the cherry. Secondly, even if a limited further hearing about whether cross-examination on dishonesty had been needed (which it was not), it was not appropriate for the Tribunal in H3 to engage in an entirely fresh examination and analysis of the CMA's case. Thirdly, the CMA's case was always clear. It did not involve any allegation of dishonesty, and the CMA was entitled to push back against the Tribunal's insistence that it did. Fourthly, the CMA properly cross-examined the companies' witnesses on the case it had held was established in the Decision and that it advanced in H2. Fifthly, none of the companies' criticisms of the Tribunal's core findings in H2 had any substance or real prospect of success on appeal.