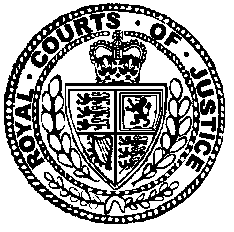
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| IN THE HIGH COURT OF JUSTICE  QUEEN’S BENCH DIVISION  ADMINISTRATIVE COURT  **[2019] EWHC 1605 (Admin)** | CO/862/2019 |

Royal Courts of Justice

Thursday, 13 June 2019

Before:

MR RICHARD CLAYTON QC

(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

THE QUEEN

ON THE APPLICATION OF

ADVANZ PHARMA CORPORATION Applicant

- and -

COMPETITION AND MARKETS AUTHORITY Respondent

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MR M. BREARLY and MR C. McCARTHY (instructed by Morgan Lewis) appeared on behalf of the Applicant.

Ms M. DEMETRIOU QC and MR R. WILLIAMS (instructed by CMA Legal) appeared on behalf of the Respondent.

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**J U D G M E N T**

THE DEPUTY JUDGE:

Introduction

1. This judicial review claim was filed on 5 March 2019, challenging the Competition and Marketing Authority’s (“CMA”) decision made on 13 February 2019 and confirmed on 1 March 2019, to refuse to extend time or suspend the next procedural step in the CMA’s investigation into unfair pricing in relation to Liothyronine tablets and that suspension was to take place pending the Court of Appeal’s judgment in a case called *Flynn Pharma v CMA*.

1. In separate proceedings, in relation to *Phenytoin*, Newey LJ ordered a stay of the CMA’s investigation in the interests of justice in a case where the same legal issues were in dispute to assess the extent to which the parties in those proceedings had charged unfair and excessive prices under competition law. The Court of Appeal case is fixed for hearing for 3 days on 25 November 2019.
2. In its skeleton and in their oral submissions, the claimant mounted three challenges. First, that the decision was procedurally unfair; second, that it involved an unreasonable assessment of prejudice suffered by the claimant and, thirdly, there was an unreasonable assessment as to public interest considerations and/or the balance of justice.

The legal and policy framework for CMA investigation

1. The process for investigation laid down by the Competition Act 1998 (Competition and Marketing Authority’s Rules) Order 2014. Rule 5 provides that if the CMA proposes to make an infringement decision, it must serve a statement of objections on a person engaged in conduct it considers amounts to an infringement. Rule 6(1) describes the form of statutory objection and r.6(3) requires the opportunity of the person adversely affected to attend the hearing and make oral submissions. There is further CMA guidelines on the investigation procedures, which I probably need not read out for these purposes.

Factual background

1. In October 2016, the CMA opened an investigation into Liothyronine. In May 2017, the CMA progressed with an investigation and in November 2017 it issued a statement of objections provisionally finding that the claimant had a dominant position in the alleged market and abused its position through unfair and excessive pricing, essentially taking the view that the subject of that investigation into prices significantly exceeded its costs plus a reasonable rate of return and also took the view that the prices were unfair in themselves in the absence of any non-cost factors which would increase the value of the tablets beyond cost and a reasonable rate of return. The CMA adopted a broadly similar approach to the one that it adopted in the earlier *Phenytoin* investigation.
2. In April 2018, the claimant responded to the statutory objections in writing. In May 2018, they made oral representations. On 7 June 2018, the Competition Appeal Tribunal (“CAT”), in a judgment which number seems to be 1275/761/12/17, gave judgment in the *Phenytoin* case, applying the Court of Justice of the European Union’s decision 27/76 *United Brands v Competition Europe*.

1. The CAT’s decision was summarised in the claimant’s skeleton argument and appears to be common ground. In the judgment, the CAT reject the CMA’s approach in its *Phenytoin* infringement decision and adopted a different one, applying, it said, the ECJ’s approach in *United Brands v Competition Europe*. The CAT observed that the Court of Justice of the European Union had enunciated a two-limb test which is being considered to a limited extent in subsequent price cases: first, the price must be excessive - in *United Brands* it was said this would be calculated as the difference between the cost of production of the product and the selling price excessive limb - and, two, the price must be unfair, either in itself, (alternative one), or when compared to competing products, (alternative two, unfair limb). In other words, the approach of the CAT was to require a different and broader analysis of economic evidence than that adopted by the CMA in the *Phenytoin* infringement decision.
2. In that case, the CAT had found that the CMA was (a) wrong in law to restrict its excessive limb assessment to the cost plus approach and to exclude other methodologies rather than to establish a benchmark price, a range that would be pertaining in the circumstances of normal and sufficiently effective competition using the evidence more widely; (b) wrong in law to adopt the costs price methodology that produced a result that pertained in the circumstances of perfect or, more accurately (for the purpose of the present case) idealised competition rather than the “real world”; and (c) made an error of assessment by relying only on the costs plus approach that it selected.

1. On the question of unfairness, the CAT found the CMA had not correctly assessed whether the prices it found to be excessive under the excessive limb were also unfair under Article 102 of the TFEU. It wrongly relied only on alternative one, unfair in itself in assessing unfairness under the unfair limb and, therefore, did not properly assess the possible impact of meaningful comparators, in particular, *Phenytoin* tablets, for the purposes of assessing whether the prices charged were unfair.
2. On the question of economic value, the CAT considered, in assessing the overall question of abuse:

“In the light of the above, our finding is that the decision was defective in its treatment of the economic value that may be derived for a patient’s benefit. Placing a precise monetary value on the patient benefit is not straightforward, but it appears to us that a qualitative assessment would be possible and should have been attempted by the CMA rather than assessing its value as nil.”

The CAT also held that:

“The CMA’s analysis of unfairness was wrong in assessing the question of economic value as part of its consideration is unfairness in itself, rather than part of an overarching assessment.”

1. In their judgment, the CAT rejected the CMA’s approach to determining the unfair, excessive pricing and held, applying article 102 to the two-limb test in the *United Brands* case in circumstances where the only alleged infringement was one of excessive pricing and dominance of an undertaking in a given market as being established. A competition authority should: (1) consider a range of possible analyses reflecting market conditions and the extent and quality of the data that can be obtained to obtain a benchmark price or range that reflects the price that would contain under conditions of normal and sufficiently effective competition. On the facts of a particular situation there might only be one basis that was credible, but the authority is not entitled to select one basis and ignore the others that are also credible. The criteria for selection in application must be objective, appropriate and verifiable. The analysis must also be done on a consistent basis; (2) compare that price (or range) with the price that has been charged in practice and determine whether that is excessive; (3) for that purpose form an assessment for the purposes of the excessive limb of whether that differential is sufficiently significant and persistently excessive as a matter of its own discretion, exercise fairly and reasonably in the light of such factors as (a) the absolute size and stability of that differential; (b) the reasons for it, taking account of the fact that conditions for excessive pricing will only usually occur where the market is one where the regulation or some other feature or other barriers to entry protect it from competition or whether it is a regulatory failure and the relevant regulator has not intervened; (c) previous decisions made finding other differentials excessive weighted for markets applicable in those cases; (d) the wider market conditions, including the evolution of pricing over time; (4) where there is a conclusion that the differential is excessive then proceed to consider whether it is unfair; (5) the decision maker is then free to use either alternative (1) (unfair in itself) or alternative (2) (unfair compared to competing and competition) to determine unfairness. (It should give due consideration to any *prima facie* convincing argument that the pricing is actually fair under either alternative and take that into account in reaching a decision under either alternative (1) or (2)); (6) if there is a finding of unfairness under the unfair limb, assess what is the economic value of the product and whether the price charged in practice bears no reasonable relation to it; (7) give appropriate consideration to any objective justification advanced by the dominant undertaking; (8) in short, the decision maker should make a finding of the infringement of article 102 if all of the conditions above are fulfilled and (i) the price bears no reasonable relation to economic value; (ii) the dominant undertaking is reaping trading benefits that it would not reap under conditions of normal and sufficiently effective competition. As is apparent and, indeed, stated in the claimant’s skeleton, the approach of the CAT, therefore, differed fundamentally from that taken by the CMA.

1. The parties in the *Phenytoin* case then applied for permission to appeal on remittal so that the investigation could continue despite the proposed appeal and, on 25 July 2018, the CAT declined to grant permission or to stay the remittal.

1. On 12 December 2018, Newey LJ granted permission for a 3-day hearing before the Court of Appeal on the basis of the following reasons: 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 relation to the significance of the opinion of Advocate General Wahl in the *Latvian Copyright* case.
2. On that same day, Newey LJ granted a stay of the proceedings. The order granted by Newey LJ simply states as reasons:

“(1) On balance, the interests of justice favoured a stay.

(2) … to extend the confidentiality order.”

1. It is important to note a number of elements to that order. It is a decision which was made on balance, in other words there were factors that pointed one way and the other and that, on balance, gave it a stay. Secondly, the reasoning was exiguous, to say the least. It stated no factual or, indeed, legal basis for the conclusion and I infer from that that the focus of the Lord Justice’s decision was on the factual circumstances that he was particularly concerned with, it being a case that normally one reads reasons on the basis that the parties themselves would understand what it was referring to. The fourth point I make about his order is that it provides no basis for asserting that the order is a general application. Indeed, quite the reverse.

1. On 30 January 2019, the CMA issued a supplementary statement of objections in the Liothyronine litigation, to which I should now turn. In those supplementary objections, the CMA states at para.5(1) that:

“… the CMA provisionally concludes that Concordia abused its dominant position in the market for Liothyronine tablets in the UK by charging excessive and unfair prices from at least 1 January 2009 to at least 31 July 2017 (the Alleged Infringement Period). As discussed in more detail below in section B, in reaching this provisional conclusion the CMA has applied the CAT’s recent judgment in the *Phenytoin* case, notwithstanding the CMA respectfully disagrees with the CAT’s interpretation of the *United Brands* in *Phenytoin* and is currently appealing the judgment before the Court of Appeal. Moreover, as explained in this section, if the CMA were to carry out its assessment on the basis of the *United Brands* test as applied before the *Phenytoin* judgment the provisional conclusions in this section would hold.”

1. I next turn in the same supplementary objections to para.5.82 which reads:

“The CMA’s calculation of costs plus during the relevant period is based on appropriate and reliable methodology applying a margin of appreciation and judgment. Nonetheless, the CMA has also applied a number of sensitivities to its costs plus calculations on a precautionary basis to reflect the main areas of judgment and the calculation of costs plus covering (i) the valuation of product rights; (ii) costs allocation and (iii) Concordia’s reasonable rate of return. The results of applying these sensitivities do not alter the overall provisional findings of the alleged infringement period.

These costs plus calculations provide an appropriate and sufficient basis against which to assess the prices actually charged to Concordia under the excessive limb of the *United Brands* test as interpreted (inaudible).

5.84. However, the CMA recognises that as part of the CAT’s interpretation of *United Brands* it was held that costs plus does not necessarily represent the only relevant measure and that in order to establish excessiveness the authority should seek to establish “a benchmark price or range” under conditions of normal and sufficiently effective competition.

585. Accordingly, the CMA has conducted additional analyses for the purpose of its provisional assessment under the excessive limb.

586. First, in response to the representations from the parties in the 2017 statement of objections, the CMA has extended the costs plus assessment to reflect a multi- firm market with several companies supplying Liothyronine tablets. The CMA refers to the outputs of this assessment as a multi-firm price.

587. Second, with a view to assessing the other comparators and, in particular, “the real world” comparators as envisaged by the CAT’s interpretation of *United Brands*, the CMA has also considered:

(a) the price of Liothyronine tablets prior to the start of the relevant period (the Liothyronine branded price);

(b) the price of Levothyroxine tablets;

(c) the prices of Liothyronine in relevant overseas markets;

(d) post-entry prices of Liothyronine tablets;

(e) the prices of Liothyronine tablets when the entry plans were made; and

(f) the manufacturer’s forecast of Liothyronine tablets.”

1. In the course of submissions made on behalf of the CMA by Ms Demetriou QC, she submitted that the two tests which were in question, the first approach of the CMA and the second approach following the CAT decision were not distinct and entirely separate. Costs plus was a single test that might be supplemented by consideration of other factors (“the CAT multi-factorial approach”). It follows that the initially narrow approach taken by the CMA was a necessary but not sufficient test of excessive prices for the purposes of assessing the case. In his reply, I specifically asked Mr Brearly QC, who represented the claimant, whether he disagree with Ms Demetriou’s analysis; he did not.

1. On 7 February 2019, the claimant’s solicitors wrote a letter which I should now turn to. It is dated 7 February and states as follows:

“In Concordia’s response to the SO dated 5 April 2018 and in its oral hearing with the CMA on 21 May 2018, Concordia explained that the CMA’s provisional finding was wrong; in particular, the CMA had materially erred in its interpretation and application of *United Brands*.

On 7 June 2018, the CAT handed down its judgment in *Phenytoin*. The CAT found that the CMA was wrong in its interpretation and application of *United Brands*. The CAT’s reasoning was materially similar to the submissions made by Concordia in its RSO and at the OH. The CMA is appealing *Phenytoin*.

You will recollect that during the SoP the CMA was asked to confirm if the CMA was going to issue an SSO. No part of the SSO could rely on issues that were under appeal in *Phenytoin*. The CMA responded by saying that it was “best for us to wait and see.”

In the SSO the CMA explains it has provisionally found that Concordia has abused its dominant position in the supply of Liothyronine tablets in the UK and that its provisional finding is based on “the CAT’s interpretation of the seminal *United Brands* judgment in the recent *Phenytoin* judgment”. The CMA goes on to explain that “notwithstanding the CMA respectfully disagrees with the CAT’s interpretation and is currently appealing the judgment before the Court of Appeal”. Moreover, the CMA’s provisional conclusion would also hold were the CMA to base its assessment on its interpretation of the application of *United Brands* before the *Phenytoin* judgment.

It is clear, therefore, that the purpose of the CMA’s SSO is to make provisional findings and views on the basis of the CAT’s judgment in *Phenytoin* to backstop the provisional finding of abuse the CMA made on the interpretation of the *United Brands* in its SO.”

It is perhaps just worth pointing out that these are described as alternatives, which seems to be slightly different from the submission made to me, which was that, effectively, the claimant was being obliged to address two separate issues at the same time.

“It is clear from the SSO that the CMA thinks that the only outcome from its appeal would be a decision by the Court of Appeal, on whose interpretation of the *United Brands* is correct, the CMA’s or the CAT’s. But that is not the only possible outcome. There is a very real possibility that the Court of Appeal will be coming to a different decision on the basis of a different combination of matters that are before it. It is clear that the matters that Concordia has been asked to respond to in the SSO, and which it has already responded to in the SO, are subject to determination in parallel proceedings before the Court of Appeal. We understand that the CMA has represented to the Court of Appeal that whilst it is appealing *Phenytoin* the CMA cannot progress its other investigations that rely on the interpretation of *United Brands* and it has therefore urged the court to progress the hearing of its appeal expeditiously.

The preparation by Concordia of its response to the SSO will require it to incur a material level of costs in the external lawyers’ fees and in external economic experts. That will all be unnecessary if the Court of Appeal does not simply make a clean determination in favour of the CMA or the CAT. The CMA is aware that Concordia has undergone a financial restructuring and its financial resources are materially limited. Concordia therefore repeats its request that the deadline for Concordia to respond to the SSO is stayed pending the judgment of the Court of Appeal in *Phenytoin*. In the event that the CMA refuses Concordia’s request, it will make an application seeking an order from the CAT in that regard.”

1. The CMA replied in a letter of 13 February 2019, which is, effectively, the decision letter for the purpose of these proceedings. In that letter it said as follows:

“The CMA has considered the points raised in your letter dated 7 February 2019 and requesting “the deadline for Concordia to respond to the SSO is stayed pending the judgment of the Court of Appeal in *Phenytoin”*. The request also refers to the supplementary statement of objections issued by the CMA to Concordia on 30 January 2019 in relation to case 50395, the investigation into Liothyronine.

As grounds for the request, Concordia submits that the preparation by Concordia of its response to the SSO will require it to incur a material level of costs in external lawyers’ fees and in external economic experts. That will all be unnecessary if the Court of Appeal (in *Phenytoin*) does not simply make a clean determination in favour of the CMA or the CAT.

This is tantamount to a request that places a hold on the progress and resolution of the Liothyronine investigation. You have not articulated how an outcome which is not “a clean determination” in *Phenytoin* might give rise to a material level of costs greater than those that would otherwise be incurred or give any indication of the likely level of such costs. Nonetheless, we have given consideration to the points made in your letter. We have decided not to accede to your request, having had regard in particular to the factors set out below.

1. You say in your letter, “The CAT’s reasoning in the *Phenytoin* judgment was materially similar to Concordia in its representations made to the CMA in response to the statement of objections dated November 2017.” As such, given the SSO is based on the CAT’s judgment in *Phenytoin*, Concordia advisers will already have considered many of the issues not covered by the SSO and have already made detailed arguments to the CMA about these points in response to the CMA’s statement of objections. Therefore, while you have provided no indication of the costs relevant to your request, the likely level of reasonable additional cost to the SSO would appear to be relatively limited.”

That is a phrase which is subject to criticism by Mr Brearly, to which I shall turn in due course.

“2. We consider it unlikely that Concordia’s response to the SSO and the Liothyronine would be irrelevant in the event the Court of Appeal in *Phenytoin* does not make a “clean determination” in favour of either party. However, in the event of such an outcome (the potential scope of which you have not articulated), the work done by the CMA and the addressees of the SSO in analysing the costs and comparators for the relevant period in the context of the unfair pricing investigation is likely to remain relevant to the parties’ arguments and/or the CMA’s assessment.

3. In any event, any costs that may be incurred by the parties must be weighed against the public interest in progressing the investigations into Concordia’s alleged infringement of competition law in a timely manner.

(a) Investigations under the Competition Act 1998 regularly take place and progress against a backdrop of litigation in similar cases. Staying such cases because of possible theoretical and unspecified outcomes in other cases under appeal would have a significant impact on the effectiveness of competition law enforcement in the UK, thereby weakening deterrence. The premise of Concordia’s request is that the CMA should not only put on hold the Liothyronine investigation but also any other current and future unfair pricing investigations for an uncertain period pending the outcome of the *Phenytoin* litigation. There could be a freezing effect on any appeal by Concordia against the decision in the current case that was an infringement of competition law if that was the decision in this case. This would effectively undermine the effectiveness and deterrent value of competition law.

(b) The provisional view that Concordia have breached competition law as set out in the Liothyronine SSO has been reached in the context of Concordia’s price increase of over 6,000% in the period under investigation. These increases resulted in a significant rise in NHS spending on Liothyronine with corresponding knock-on impacts on NHS resources and directly contributed to reduced access to the drug for patients. We have taken account of the fact that the alleged infringements as set out in the SSO came to an end in July 2017. However, if proved, the alleged infringement would amount to a very serious abuse of competition law, the expeditious pursuit of which is in the public interest. The deterrence value of any fine reflects not just the amount of the fine but also the knowledge that it could be imposed in a reasonable timescale. In addition, the financial pressure on the NHS is a matter of public record and should the CMA conclude that an infringement has, indeed, occurred, the NHS may consider a claim for compensation.”

1. What next follows is a letter from the claimant’s solicitors dated 27 February 2019 which reads as follows:

“We refer to your letter dated 13 February 2019 in connection with the above matter and respond as follows:

1. First, as to possible wasted costs, the following considerations are relevant:

(1.1) The SSO at [1.11] states that it is based on a material change in the nature of the alleged excessive unfair pricing described in the 2017 statement of objections. This material change has been occasioned by the new test for the unfair pricing laid by the CAT in *Phenytoin*. The SSO includes 856 new documents, which is substantial. The documents contain a significant amount of evidence in support of the CMA’s new arguments, all of which have been analysed by Advanz Pharma’s legal team and its external expert economists. The CMA expects Advanz Pharma to meet this new case, despite the CMA submitting to the Court of Appeal in *Phenytoin* that the new test is wrong and the test of the money spent on meeting the new test is unnecessary. In short, it is the CMA’s own case that Advanz Pharma is likely to be put to unnecessary expense.

1.2 The CMA’s assertion that because *Phenytoin* reflects much of what Advanz Pharma has said in its RSO, any additional costs Advanz Pharma will need to incur will be limited, is incorrect. The judgment postdates both the written and oral submissions in Liothyronine. The new test [443 - 444]extends before the submissions made. Obviously, much time and money will be expended in meeting the CMA’s material change of circumstance. (

1.3 A response by Advanz Pharma to the SSO, preparation for an advancement of the oral hearing and the post-oral hearing engagement could easily lead to Advanz Pharma having to incur costs in the region of £500,000 in experts’ costs, barristers’ fees and external lawyer costs. The process is also going to be demanding of a material level of senior management time from Advanz Pharma. The CMA knows well that Advanz Pharma has only recently emerged from a restructuring of the business which was undertaken to avoid insolvency and has limited financial resources.

1.4 The costs incurred at this administrative stage cannot, in general, be recovered from the CMA in any event.

1.5 We understand the Commission has applied for permission to intervene in the *Phenytoin* appeals. This would appear to indicate the determination of the Court of Appeal is going to be required to make may not be binary between the CAT’s judgment on the one hand and the CMA’s decision on the other. The Commission’s intervention also underscores the level of importance attached to the interpretation by the CMA, the CAT and the UK courts of the case precedent of the European courts and the uniqueness of the legal issues requiring determination. At this stage, it cannot be ruled out that the approach taken by the CMA and the SSO is also defective so that a further SSO will be necessary.

2. Second, as to the need to balance the risk of wasted positions with the conclusion of the investigation, the following considerations are relevant.

2.1 The CMA took nine months to issue the SSO, having taken over one year to issue to SSO after it launched its formal investigation. The CMA has not acted expeditiously to date.

2.2 The alleged abuse is historical and, as such, no actual prejudice would be occasioned by the case being stayed for eight months pending the determination of the *Phenytoin* appeals.

2.3 The CMA’s reference to the possible claim for damage by the NHS is a matter of concern as, at this stage, such an issue would not even be in the CMA’s mindset. The issue is one for the NHS that would be protected by a payment of interest, in any event.

2.4 As to deterrence, the case of *Phenytoin* and the publicity with which the CMA has so far acted on the issue of excessive pricing generally has sent a clear signal to the market.

In short, the public interest does not justify the refusal to grant a stay. Indeed, as the CMA is well aware in *Phenytoin*, the Right Honourable Lord Justice Newey granted a stay of the administrative investigation pending the conclusion of the appeal ‘because the interests of justice favour the grant of a stay’. The Court of Appeal balanced the desire of the CMA to progress the case with the risk of wasted costs to the undertakings concerned. It is illogical that the administrative phase of the test case is stayed, yet other cases will progress to a final decision.”

1. That letter provoked a short response from the CMA dated 1 March 2019, which stated, effectively, this:

“I refer to your letter of 27 February 2019. Nothing in your letter changes the CMA’s position as expressed in their earlier letter.”

1. However, the CMA has also, in these proceedings, disclosed minutes of the discussion of the letter of 27 March of a meeting that took place on 1 March 2019 which requires close analysis because it comprises a detailed and contemporaneous explanation of the reasons given by the CMA in rejecting the letters written by the claimant. I now turn to them. I am afraid the minutes are lengthy, but they strike me as critical and I, therefore, do not apologise unduly for taking time going through them.
2. What I propose to do is read out in a point by point form the point made by the letter and the CMA’s response.

“1. We refer to your letter dated 13 February 2019, in connection with the above matter and we respond as follows: As to possible wasted costs, the following considerations are relevant. The SSO at [1.11] states it is based on a material change in the nature of the alleged and excessive pricing described in the 2017 statement of objections. This material change has been occasioned by the new test for unfair pricing laid down by the CAT in *Phenytoin*. The SSO includes 856 new documents, which is substantial. These documents contain a significant amount of evidence in support of the CMA’s new arguments, all of which have been analysed by Advanz Pharma’s legal teams and its external expert economists. The CMA expects Advanz Pharma to meet this new case, despite the CMA submitting to the Court of Appeal in *Phenytoin* that the new test is wrong and that the time and money spent on meeting the new test is unnecessary. In short, it is the CMA’s own case that Advanz Pharma is likely to be put to unnecessary expense.”

The overview of the discussion that was taken by the CMA is this:

“We agree ‘that the CMA expects Advanz Pharma to meet this new case, despite the CMA submitting to the Court of Appeal in *Phenytoin* that the new test is wrong’. We also agree that the SSO includes a file of 856 documents which are new to Concordia (although note that this number is 692 when Concordia’s own documents are excluded). However:

* the co-existence of enforcement action and related litigation is not uncommon (see pay for delay cases) and it is inevitable that this may lead to additional complexity in a case
* this does not mean that the case which contains a strategic priority must be brought to a halt
* in a continued enforcement the Liothyronine cases in these circumstances, the CMA is acting proportionately
* the size of the file in this case is not out of the ordinary, given the nature of the case in the experience of the CMA
* the staying of cases in these circumstances would have a significant impact on deterrence arising from active enforcement
* the premise of Concordia’s argument is that all unfair pricing enforcement would be delayed pending the outcome in *Phenytoin*, which might not be until well into 2020 and if there is a Supreme Court appeal or ECJ reference significantly beyond which would create an unacceptable obstacle for the enforcement regime

In any event, aspects of the CMA’s analysis is set out in the SSO and may remain relevant were the CMA to be successful in its appeal to *Phenytoin*. See the CMA’s letter dated 13 February at paras 1 and 3(a).”

1. The second point made on behalf of the claimant.

“1.2 The CMA’s assertion that because *Phenytoin* reflects much of what Advanz Pharma have said in the RSO any additional costs Advanz Pharma will need to incur will be limited is incorrect. The judgment postdates both the written and oral judgments in Liothyronine. The new test at [443 - 444] of the judgment extends beyond its submissions as made. Obviously, much time and money will be expended on meeting the CMA’s ‘material’ change of case.”

The response of the CMA:

“In its letter dated 7 February, Concordia itself noted that the CAT’s reasoning in *Phenytoin* was materially similar to submissions made by Concordia in its response to the statement of objections and at the oral hearing.

A number of the analyses set out in the SSO are reflective of the arguments made by Concordia in its representation to the SSO.

In any event, the CMA agree that there is likely to be additional work that Concordia needs to do in responding to the SSO but there is an overlap between the SO response work already carried out by Concordia and the SSO analyses and the CMA will also assess the representations made by other parties to the case in response to the SO. Nevertheless, the fundamental point remains, as set out above, that parallel litigation and enforcement are not uncommon and it does not mean that the enforcement regime should grind to a halt for a lengthy and uncertain time.

See the CMA’s letter dated 13 February at para.1.”

1. The third point made on behalf of the claimant:

“A response to the Advanz Pharma to the SSO preparation and attendance at the oral hearing with the CMA and post-oral hearing engagement with the CMA could easily lead to Advanz Pharma having to incur costs in the region of 500,000k in experts’ costs, barristers’ fees and external lawyer costs. The process is also going to be demanding at a material level of senior management time from Advanz Pharma. The CMA knows well that Advanz Pharma has only recently emerged from the restructuring of the business which was undertaken to avoid insolvency and has limited financial resources.”

The CMA’s response:

“The CMA agrees that a proportion of these £500,000 costs may not be incurred were the SSO to be stayed and the CMA was to be successful in its challenge to the Court of Appeal. However, some of the costs described as falling within the £500,000 would be incurred regardless (i.e. even if the SSO was stayed and the CMA were successful in the Court of Appeal), including costs re post-oral hearing engagement (i.e. DPS etc). In any event, any costs to be incurred must be weighed against:

* the importance of active enforcement against unfair pricing for Liothyronine and, more broadly, including with regard to deterrent rather than the uncertain and long term delays and unfair pricing enforcements with which Concordia’s position implies
* the seriousness of Concordia’s alleged infringement over 1300 per cent price increase and consequent increases in expenditure for the NHS contributing to reduce access to the drugs for visitors.

See the CMA’s letter dated 13 February at para.2.”

1. The fourth criticism made on behalf of the claimant:

“The costs incurred at this administrative phase cannot in general be recovered from the CMA in any event.”

The CMA’s response:

“The fact that administrative costs cannot in general be recovered from the CMA is a feature of all cases. In addition, any potential costs need to be seen in the light of the factors at points 2 and 3 above.”

1. The claimant’s fifth point, 1.5:

“We understand that the Commission has applied for permission to intervene in the *Phenytoin* appeals. This would appear to indicate that the determination the Court of Appeal is going to be required to make is not a binary one between the CAT judgment on one hand and the CMA judgment on the other. This Commission’s intervention also underscores the level of importance attached to the interpretation by the CMA, the CAT and the UK courts of the case precedent of the European Court and the uniqueness of the legal issues requiring determination. At this stage, it cannot be ruled out that the approach taken by the CMA in the SSO is also defective so a further SSO will be necessary.”

The CMA’s response:

“There is no connection between the European Commission’s intervention and any likelihood of a third way outcome in the Court of Appeal in *Phenytoin*.”

1. The sixth point from the claimant’s solicitors:

“2. As to the need to balance the risk of wasted costs with the conclusions of the investigation, the following considerations are relevant:

2.1 The CMA took nine months to issue the SSO, having taken over a year to issue the SO after launching its formal investigation. The CMA has not acted expeditiously to date.”

The CMA’s response to that:

“The CMA has always sought to act expeditiously in this case, reaching an SO in approximately one year from the launch of the case and reaching an SSO in less than eight months. This is the correct period from the *Phenytoin* judgment, rather than nine months stated by Concordia. It is not out of the ordinary, given the complexity of the case, in the CMA’s experience. In any event, the period required…

* information gathering and drafting of the SSO on the part of the CMA and
* parties response

They are not commensurable.”

1. Point 7:

“2.2 The alleged abuse is historical and, as such, no prejudice could be occasioned by the case being determined for eight months pending the determination in the *Phenytoin* appeals.”

The CMA’s response:

“If proven:

* the alleged infringement would amount to a very serious abuse of competition law which started in at least 2019 which we pursued expeditiously
* deterrence of related conduct is also served by speedy enforcement

In addition, it is not unusual for historical infringements to be the subject of competition enforcement. In any case, any delay is likely to be significantly greater than eight months. The hearing in *Phenytoin* is scheduled for November 2019 so there will be a delay of 12 months and likely more. The same logic would apply to any onward appeal in *Phenytoin*, i.e., to the Supreme Court or the ECJ, meaning that it would be several years before *Phenytoin* is absolutely resolved. It is already more than ten years since the alleged (inaudible) and the infringement started. Enforcement cannot be put off indefinitely.

See the CMA’s letter dated 13 February at para.3(b).”

1. Point 8:

“The CMA’s reference to possible claims for damage by the NHS is a matter for concern as, at this stage, such an issue cannot even be in the CMA’s mindset. The issue is always a matter for the NHS which would be protected by a payment of interest, in any event.”

The answer from CMA:

“The main reasons for not acceding to Concordia’s request for a stay are set out in point 1 above as in the CMA’s letter dated 13 February. Nonetheless, the relevant reference to the NHS in the letter dated 13 February made clear that the CMA’s point assumed an infringement decision solely for the purpose of reasoning against the delay rather than being in any way prejudicial. Whilst interest may be payable to the NHS, it is common knowledge that the NHS is under financial pressure and a significant delay to any future fine would obviously have an opportunity cost for current NHS treatments. Patients who would benefit from additional NHS spending today may not be in a position to benefit from additional NHS money at some undefined point in the future (even if interest has been paid).

See CMA letter dated 13 February at para.3(b).”

1. The ninth point by the claimants:

“2.4 As to deterrence, the case of *Phenytoin* and the publicity with which the CMA has so far acted on an issue of excessive pricing generally has sent a clear signal to the market.”

The CMA’s response:

“The level of deterrence arising from *Phenytoin* is not a relevant factor in deciding whether to stay Liothyronine. Nor is deterrence the sole objective of competition law enforcement, which also seeks to uphold companies accountable for any infringement in a timely manner. In any event, the level of deterrence reflects not just the amount of the fine, but also the knowledge that it will be imposed in a reasonable timescale with deterrence flowing from active enforcement.

See the CMA’s letter dated 13 February at para.3(a) and 3(b).”

1. The tenth point on behalf of the claimant:

“In short, the public interest does not justify a refusal to grant a stay. Indeed, as the CMA is well aware in *Phenytoin*, Lord Justice Newey granted a stay of the administrative investigation pending the conclusion of the appeal because the interests of justice favour the grant of a stay. The Court of Appeal balanced the desire of the CMA to progress the case with the risk of wasted costs to the undertakings concerned. It is illogical that the administrative phase of the test is stayed, yet other cases will progress to a final decision.”

The CMA’s response:

“The statement of Lord Justice Newey does not purport to relate to cases other than *Phenytoin* which is, of course, the case under appeal. Following the logic of this point, the enforcement of unfair pricing cases would grind to a halt pending the outcome of the *Phenytoin* litigation which (given the possibility of a Supreme Court appeal and an ECJ reference) may not be determined for several years. In fact, as stated above, the co-existence of the enforcement action and the related litigation is not uncommon (see the pay for delay cases).

See the CMA’s letter dated 13 February at para.3(a).”

1. Now, I have read out, at very considerable length, for which I apologise, the detailed factual position because, obviously, the submissions that have been made on behalf of the claimant have to be addressed and considered in the light of their proper factual context.

1. Just briefly turning to a couple of other points in the factual history. I should also note that on 22 March 2019 Thornton J granted permission on the basis that the hearing was to be expedited to be heard between May and the end of June 2019 and made various other directions and observations, to which I need not refer. Also, on 5 March, Mostyn J made various directions, again, which I need not detain us any further with.

The legal principles

1. There is no real dispute between the parties but the CMA have drawn attention to particular principles in relation to rationality challenges, which I accept. First, judgments of the competition regulator investigating infringements very much are within their discretion and their views are to be accorded very considerable respect by the courts. They have a broad range of discretionary judgments and these factors are crucial when a court considers a rationality challenge. In that context, I propose to refer to the *Crest Nicolson* case, which is a decision of Cranston J. It seems to be called *Crest Nicolson Plc v The Office of Fair Trading* [2009] EWHC 875 (Admin). It therefore predates the current regime. For these purposes, I only need refer to para.45, which reads as follows:

“Discretion of Enforcement Authorities in Investigations

The manner in which enforcement authorities conduct investigations of infringement in law and the priority they give to different phases are matters which fall within their discretion. That follows from the most basic principles of our public law. It has been specifically recognised in relation to competition authorities, as the European Court of first instance observes in case T-24/90 Automatic 2 [1992] ECR 2-0223 at para.77

“In that connection, it should be observed that in the case of an authority entrusted with a public service task the power to take all organisational measures necessary for the performance of that task, including setting priorities within the limits prescribed by the law, were such that the priorities had not been determined by the legislature, is an inherent feature of the administrative activity. This must be the case in particular where an authority has been entrusted with a supervisory and regulatory task as extensive and general as that which has been assigned to the Commission in the field of competition.”

That passage was approved by the Court of Appeal in *The Office of Communications v Floe Telecom* [2006] EWCA Civ 768, where Lloyd LJ said:

“37. The CAT cannot know what are the competing demands on the resources of the particular regulator at a given time. It may well be that it cannot properly be told this by the regulator because of issues of confidentiality as to current investigations. It cannot, therefore, form any proper view as to the relative priority of one case as compared with the other.

38. Similar policy reasons and a similar view of the relationship between a public body which is subject to judicial review and the court dealing with an application for judicial review seem to underlie the refusal of the Administrative Court when quashing the decision and remitting it to instruct the authority as to when or how it should proceed with the matter other than to do so in accordance with the law as laid down in the court’s judgment (compare *General Medical Council v Spackman* [1943] AC 627 at 649 per Lord Wright).””

So, the first principle is that a considerable measure of deference should be accorded by the Administrative Court.

1. The second point to draw attention to is the claim in question in this case is a challenge to the discretionary judgment of the CMA to manage and prioritise its own investigation and it is, quintessentially, a decision with the margin of discretion as the authority responsible for enforcing the Competition Act 1998 and managing and prioritising its portfolio of case work. It is submitted on behalf of the defendant, and I accept, that this is essentially a case management decision involving consideration of public interest factors and concomitant damage, including deterrence to others. Ms Demetriou relied on the familiar principles that are relevant to appealing case management where there is a high threshold to overcome in making such a successful appeal. This context is particularly important because a submission made by Mr Brearly at para.54 of his skeleton, where he states that:

“It is well established that the concept of reasonableness in public law is context dependent.”

In *Kennedy v The Information Commissioner* [2014] UKSC 20 at para.51 it was observed, I think, by Lord Mance that the common law no longer insists on a uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle. The nature of the judicial review is, in every case, dependent on the context. That is why I drew attention to the particular context which is now subject to challenge.

1. The third point made on behalf of the CMA by Ms Demetriou discusses the proper legal approach to the question of what is a relevant or irrelevant consideration for the purposes of *Wednesbury* rationality. In that context, the well-known test formulated by Sir Robin Cooke in the *Creed New Zealand* case is of importance and I will pick that up in *Khatun*, which is a decision Laws LJ in the Court of Appeal, which I will turn to now. *R (Khatun & Ors) v Newham London Borough Council* [2005] QB 37 at para.34 which is relevant to the judgment I have to consider:

“As I see it, the best starting point for the consideration of this question is the passage from the speech of Lord Scarman *In re Findlay* [1985] AC 318 p.33 to p.34. I need say nothing of the case’s facts. Lord Scarman stated:

“He [counsel] prayed in aid some of the observations of Cooke J (as he then was, subsequently Lord Cooke) in the New Zealand case of *Creed New Zealand v The Governor General* [1981] 1 NZLR 172. The facts of the case bear no resemblance to this case but the judge did consider the question of the proper exercise of an administrative discretion in situations where statute permits but does not require consideration of certain matters.”

The judge said at 183:

“What has to be emphasised is it is only when a statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid in the ground now invoked. It is not enough that a consideration is one that may properly be taken into account or even one that many people, including the court itself, would have taken into account.”” Then skipping down from that to para.35: “In my judgment [Laws LJ] the *Creed New Zealand* case, via the decision in *Re Findlay*, does not only support the proposition that where statute conferring discretionary power provokes no lexicon of the matters to be treated as relevant by the decision maker, then it is for the decision maker, not the court, to conclude what is relevant, subject only to *Wednesbury* review. By extension, it gives the authority also for a different but closely related proposition, namely that it is for the decision maker and not the court, subject again to *Wednesbury* review, to decide upon the manner and intensity of the inquiry to be undertaken into any relevant factor accepted or demonstrated as such.”

So, drawing up stumps in terms of the appropriate test on relevant considerations, effectively, unless the statute enjoins a decision maker from either not taking something into account or taking something into account, there is scope for one decision maker to take one approach, another decision maker to take another approach. There is, therefore, a very considerable limitation on the reach of the principle that irrelevant considerations have been taken into account.

The Issues

1. I now turn to the three submissions.
2. One, procedural unfairness. The claimant contends in his skeleton argument at para.42 that the effect of the SSO is to require the claimant to respond to the CMA’s first position prior to the CAT judgment and/or failed to give the claimant an opportunity to respond to adverse points before a final infringement decision is made. For those purposes, he relies upon certain passages on the supplementary statutory objections, to which I now turn. I look first of all at para.5.2 of the SSO.

“As discussed in more detail in reaching this provisional conclusion the CMA has applied the CAT’s recent judgment in *Phenytoin*, notwithstanding the CMA respectfully disagrees with the CAT’s interpretation of the *United Brands* in *Phenytoin* and is currently appealing the judgment. Moreover, as explained in this section, if the CMA were to carry out its assessment on the basis of the *United Brands* test as applied before the *Phenytoin* judgment, the provisional conclusions in this section would hold.”

Reliance is also placed on para.5.16, where essentially the same point is made, that the CMA takes the view that the CAT’s interpretation of the excessive limb in the *Phenytoin* case is incorrect and refers to the grant of permission and then says:

“In this CSO, the CMA has, nonetheless, applied the CAT judgment in *Phenytoin*, although its provisional findings would also hold under the excessive limb of the *United Brands* test as applied before *Phenytoin*.”

I was not referred to it, but reliance was also placed on para.5.75 of the supplementary skeleton.

1. It was submitted by the claimant in para.43.2 of the skeleton that the SSO clearly puts forward a position that the CMA’s evidence analysis sustains infringement under either test and that that fact the claimant is addressing two separate grounds for unfairness at once results in serious unfairness. It is said at para.43.3 that this was not giving the claimant a fair opportunity to respond to adverse points before the final judgment. At para.43.4 of the skeleton, it is said that no indication at present will be given that they (the claimant) will have a further opportunity to respond at a later stage.

1. The CMA observed that these submissions appear to relate more to the terms of the SSO than to the decision under challenge. However, I do not regard that as a proper basis for forming an adverse finding because they are obviously interrelated.
2. I do, however, reject the submissions made on behalf of the claimant for three reasons. First, I do not construe the passages which the claimant relies on as involving being unfairly required to respond to two entirely different tests at the same time without any opportunity to make representations to the first test. The old test, in short. I appreciate that the claimant and, I understand, the third parties state that is their understanding of the SSO, but as we all will know the question of construction of what the SSO means does depend upon the subjective intention of the parties. It is an objective question and it is a question to be approached by construing the material objectively, not as if it is an Act of Parliament but applying objectively and using some common sense. In my judgment, properly construed objectively, the claimant is not faced with two alternative tests and have been unfairly deprived of a fair opportunity to respond to the fair test. So I simply reject the suggestion that the SSO has the meaning for which the claimant contends.

1. In any event, however, I find that the CMA’s approach does not involve any actual unfairness to the claimant, which is fundamental to any unfairness complaint. As previously indicated, my understanding of the two tests is that the first narrow test the CMA has to be considered first before the CAT multifactorial approach, the one which the CAT adopted. In other words, the tests are not two stark alternatives to one another. The first test is a necessary but not sufficient test for the purposes of the second, and it follows, therefore, the claimant has not been unfairly deprived of an opportunity to respond to the old test when addressing the new one.

1. Thirdly, I take the view that the claimant has not been treated unfairly because there was no indication given by the CMA there would be a future opportunity to respond. In my judgment, that submission is misplaced. In effect, as it seems to me, the claimant is requiring the CMA to predict the outcome of the Court of Appeal judgment, including the possibility of a third alternative different from either the CMA or the CAT’s approach. The CMA observe that this is nothing to do with the decision under challenge. It has never been raised before until the skeleton argument and relates to a scenario which is entirely hypothetical. It is common ground that the CMA is both under statutory and a common law obligation to act fairly and in my judgment it is premature at this point to complain that the CMA is acting unfairly because it is not giving an indication at this stage of how it would respond in the future. It is premature because the Court of Appeal is not likely to be the final port of detention and, in any event, the proper time to test unfairness is when the CMA states its position, not at this stage in advance. When I pressed Mr Brearly about this he seemed to say, well, it was all about getting a stay, which takes me to the second point.

1. The second criticism made of the CMA is that it acted irrationally, and it is important to remember this is an irrationality challenge with all the high threshold test that that involves, that it acted irrationally in assessing prejudice. That, of course, is not the same as saying they were sensible, although I say that without expressing any view at all as to whether the view was not sensible. Paragraph 56 of the claimant’s skeleton, supplemented by oral submissions, makes a central criticism of the fact that the letter of 13 February refers to costs being “relatively limited”. In my judgment, criticism in itself of that particular phrase is difficult to assess when it is clear that costs in this field are significant.

1. In that context, I would like to turn to the witness statement of Martin Coleman(?). paragraph 36 of Mr Coleman’s witness statement was something to which Mr Brearly drew my attention and the material part begins:

“To illustrate the process, I set out below the procedural steps in the Liothyronine investigation that the CMA would progress in the coming months were the application to stay be unsuccessful. a) Consideration of representations. The CMA would typically spend a significant period of time carefully reviewing representations on its provisional findings, which in this case would likely amount to hundreds of pages of several experts’ reports. As to part of the Liothyronine investigation, this would regard analyses and significant time commitments from the CMA’s case team, involving three economists, three legal advisors and the financial analysts.”

Then b) refers to all hearings and then refers to what is typical. Now, I am afraid what is typical rather suggests that in general terms this is a fairly expensive litigation and, in any event, really does not assist the claimant very much.

1. It is also worth stating that the claimant does not distinguish, a point made by the CMA, between wasted costs in general terms and costs which are specifically referable solely to the abuse issue, which appears to be the issue which it can legitimately complain about. In any event, what, in my judgment, is critical, is that the CMA were subsequently given a figure of £500,000 and specifically considered that figure in the context of the long minute which I read out undue. I specifically asked Mr Brearly whether he had any submissions to make following the minute, or in line with the minute; he declined to make any. In my judgment, the complaint that the CMA irrationally failed to address the question of money has to be rejected.

1. I next turn to the final ground of challenge, the unreasonable assessment of public interest considerations in the balance of justice and here reliance is placed on a judgment of the terms of the order granted by Newey LJ, but I regret to say I have failed to include something earlier which I want to turn to, which is the referral judgment of the CMA and a passage there. So, if you could bear with me to find that.

1. I am now referring to the judgment of the CMA in the earlier case and the way it addressed the timings of the remittal. Paragraph 41, where it deals with the timing of the remittal, states as follows:

“Where the decision whether or not to grant permission to appeal is clearly separate from the remittal issue, both Pfizer and Flynn have pointed out the practical connection between two matters arising from the extra burden placed upon them in the event of parallel processes…”

Pausing there, precisely the same point advanced in this case.

“… and the illogicality and possibly confusing results of the CMA conducting a remittal process on the basis of the tribunal’s judgment, while at the same time contesting a major aspect on appeal.”

Paragraph 42:

“We agree from a practical point of view that it would be somewhat unsatisfactory for the CMA to be resuming the case on remittal whilst it or any other party is contesting aspects of the judgment on appeal. Our strong preference, therefore, would be that parallel proceedings would be avoided.”

I draw attention to this passage because, as I understood it, this really drew attention to the use of the phrase “illogicality” in para.41. However, that was a point made in submissions and it was not the point made by the CAT in its judgment which referred to “not somewhat unsatisfactory”.

1. Returning, if I may, to the stay of Newey LJ, the claimant argues at para.68 of its skeleton that the CMA is not bound by the decision of Newey LJ, but absent a proper reason for distinguishing it, it is unreasonable not to apply it. The first difficulty the claimant has is that stay was expressly considered in the minute of 1 March 2019. It was considered and rejected as the whole answer. In any event, effectively, that was a case management decision by the Court of Appeal. So far as one could distil anything of general significance from it, it would appear to be fact-specific because simply there is no reference to anything other than a short sentence. In my view, it is a bold submission in view of the exiguous reasoning and apparently specific factual basis for the claimant to argue that there is some obligation to attach particular weight to the decision by Newey LJ. It has clearly been taken into account and, therefore, the real complaint here by the claimant is that it, having been taken into account, this factor was not given sufficient weight. It is, of course, for the CMA itself to decide how the balance should be struck when considering the implications of the stay in a different context of a different case. Weight is not a matter that is easily challenged in a *Wednesbury* case. “Easily” somewhat understates it.

1. The next point I want to deal with is the specific criticism made at the tail end of the CAT decision about penalties. There is criticism in the CAT case about penalties, but it is important that I am not going to go through the detail of this, to emphasise that that was not a general criticism of the very large penalty that the CMA had imposed in the particular case, but was reference to the CMA’s guidance on the appropriate amount of penalty and referred specifically to step 4 of the specific steps in referring to the level of penalty, which is para.2.21 of that guidance. So, it does not support any general criticism about the level of penalty.
2. In addition, the CMA make a number of additional points. They submit there is no basis for suggesting that the CMA should await the decision of the Court of Appeal before making a decision in this case, no basis in the order of Newey LJ itself. Two, that a stay would prevent the CMA making any progress in the case and they point out or complain or submit that the claimant fails to make any plausible basis for why the CMA’s strong preference for progressing the case should be outweighed by the prejudice to the claimant *a fortiori* if one analyses with care the actual extent of the costs to which the claimant is being subjected. They do not accept, thirdly, that the delay in the question is only until the hearing in November 2019. That, in my judgment, is an important factor to bear in mind. This is not a request for timing. It was accepted by Mr Brearly that the case was likely to end up in the Supreme Court and, therefore, we are talking about, on the logic of their submission, a much longer delay than that until November of this year. Fourthly, it is pointed out by the CMA that the logic of the claimant’s position would require a stay in all unfair pricing enforcement cases pending an outcome. It, therefore, is quite important. Fifthly, they submit that actually the claimant’s case involves a wider principle at stake, since its logic requires how the CMA should handle its caseload when an appeal is working through the system. That, if I may say so, has some considerable force, absent being a very fact-specific point that has been made and, with respect, that is not the case here.

1. In the light of the various factors addressed in the minute of March 2019, I, with respect, reject the complaint that no reasonable decision maker could have reached a decision the CMA did reach, having regard to the public interest considerations in play, which it set out at length and set out its reasoning at length.

Conclusion

1. In all those circumstances, I dismiss the claim and grant no relief.

LATER

1. A variety of different points have been made. Dealing with them in, I think, the order in which they were raised, the complaint as to the timing of the schedule, well, I am conscious of the fact that-- certainly, I am more than (inaudible), perhaps, conscious of the fact that I have given judgment pretty quickly after the hearing, so how realistic it was to expect a costs schedule to be produced within 24 hours of the hearing, given these things-- certainly I think those of us at the bar think these things are easier to do than they are in practice. That is the first point.
2. Second, as to the complaint about the pre-action protocol letter, it is difficult to argue a breach of the pre-action protocol letter in the absence of the pre-action protocol being invoked. So, I am not hugely persuaded by that.
3. I have re-looked at the minutes to see whether they are dated at all. It is obvious that that would have taken some time to agree and to formulate, but I am not much assisted by that.
4. Looking at all the circumstances, my view really is that it is not really appropriate for the court to make a summary assessment on the material that I have. I think that Mr Brearly has been handicapped to some degree by what points he could make, which he never particularly took me to, about the specifics of the costs bill, therefore I propose to make an order that there be a detailed assessment unless costs are agreed.
5. As to the summary amount to be assessed, it is always difficult. Generally one has a rule of thumb of about 50 per cent. The point made about the failure to disclose the minute in terms of transparency(?) has some weight, it seems to me, irrespective of whether the pre-action protocol was applied or not. So, what I propose to do is to make an interim order for payment of £35,000 and leave it to the parties to sort out what they want to do next.

LATER

1. In find myself in the somewhat unhappy position of dealing with the underlying concern that the CMA case itself should progress, on the one hand, and what my power is. Having now had more than three seconds to look at the two orders that have been granted by Mostyn J, it does appear that, in essence, both judges proceeded on the footing that they were dealing with what would be, in normal circumstances, a negative injunction to prohibit or to avoid rendering the whole process nugatory. As to whether I have a power or not, in these circumstances, it is not clear to me.
2. I have, with respect, suggested that there would be a point in trying to progress this. I have also suggested that in the absence of my not making an order the parties could reach an agreement. That does not appear to have commended itself either. In those circumstances, I am disinclined to exercise a jurisdiction which it is not clear to me I have the power to exercise, which is most unfortunate.
3. I note that the difference between the parties appears to be six weeks on the one hand and four weeks, which is taken from the para.76 of the skeleton, but I do hope that common sense on some level or another prevails as to how to move this forward. At least it is not the middle of the summer, so people do not need to down tools on that basis.
4. So, I am afraid, although I say this with very considerable regret, I am not satisfied on the material have, which I have been taken to anyway so far.

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