

Competition and Markets Authority (Respondent) v Flynn Pharma Ltd and another (Appellants)

Case ID: 2020/0113

Case summary

Issue

When considering what costs to award following an appeal before the Competition Appeal Tribunal from an infringement decision of the Competition and Markets Authority, is there a starting point and if so, what is it? In particular, was the Court of Appeal correct to decide that there is a starting point that no order for costs should be made against a regulator if it has been unsuccessful, except for a good reason, or is the starting point instead that an order for costs should be made against the regulator where it is unsuccessful?

Facts

This appeal concerns costs and arises out of an investigation by the Competition and Markets Authority (the CMA) into the pricing of an epilepsy drug. Following an investigation lasting over three years, the CMA found that Flynn and Pfizer had abused their dominant positions in the UK market under domestic and EU competition law by charging excessive prices. Flynn and Pfizer appealed the CMA's decision to the Competition Appeal Tribunal which decided that although Flynn and Pfizer held dominant positions in the market, the CMA had made errors in deciding that they had abused their positions.

The Competition Appeal Tribunal separately considered costs arising out of the appeal. Flynn and Pfizer both claimed their costs on the basis that they substantially won their respective appeals. The Competition Appeal Tribunal decided that Flynn and Pfizer were entitled to recover some of their costs from the CMA. The CMA appealed to the Court of Appeal. The Court of Appeal allowed the appeal and decided that the starting point or default position is that no order for costs should be made against a regulator who has brought or defended proceedings in the Competition Appeal Tribunal acting purely in its regulatory capacity. That starting point can be departed from for good reason but the mere fact that the regulator has been unsuccessful is not enough. Flynn and Pfizer now appeal to the Supreme Court.

Judgment appealed

[\[2020\] EWCA 617](#)

Parties

Appellant(s)

(1) Flynn Pharma Ltd, (2) Flynn Pharma (Holdings) Ltd

Respondent(s)

Competition and Markets Authority

Interveners

Association of the British Pharmaceutical Industry & British Generic Manufacturers Association
Office of Communications
Solicitors Regulation Authority Ltd
Oakridge Farms Ltd

Appeal

Justices

Lord Hodge, Lord Sales, Lord Leggatt, Lord Stephens, Lady Rose

Hearing start date

22 February 2022

Hearing finish date

23 February 2022

Watch hearing

22 February 2022 [Morning session](#) [Afternoon session](#)

23 February 2022 [Morning session](#) [Afternoon session](#)

Judgment details

Judgment date

25 May 2022

Neutral citation

[2022] UKSC 14