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Ex parte injunctions based on pharmaceutical patents – should they be granted?

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A recent appeal decision from the Danish High Court (Eastern Division) concerns the issue of whether an application for an interlocutory injunction should be granted on an ex parte basis.

The case concerned (one of several) cases in Denmark regarding the Danish company H. Lundbeck A/S enforcing a process patent for its block buster API, escitalopram, this time against the Danish affiliate of ratiopharm.

Lundbeck argued before the Bailiff's Court that as one injunction was already in place against the largest Danish wholesaler, Nomeco A/S, selling the ratiopharm escitalopram API there should be no need for a hearing de novo as the product, the facts, the evidence (and even counsel for the defendant) would be the same.

While the Bailiff's Court did in fact grant the simultaneous application for seizure of evidence, the court turned down the application for an interlocutory injunction.

On appeal, the High Court upheld the decision not to grant an interlocutory injunction on the requested ex parte basis with reference to, inter alia, that the defendant should not be cut off from filing and arguing its case (not least, added the High Court) since the patentee had invoked a reversed burden of proof (based on the process patent leading to a new pharmaceutical product) and the fact that – despite the earlier decision by another bailiff's court to grant an interlocutory injunction on the same product from the same manufacturer – it could be not taken for granted that the allegedly infringing product did in fact infringe upon the patent-in-suit.

It is anticipated that the decision will be appealed by the patentee even though the decision is very clear.

Bearing in mind that the Danish bailiff's courts are not specialty courts (either in terms of patent law or pharmaceutical chemistry), it would seem very unfortunate if the High Court had in fact sanctioned the patentee's approach – especially under these circumstances where the patentee chose to rely on a reversed burden of proof.

It would be interesting to know about the experiences from other jurisdictions, i.e. whether applications for ex parte injunctions based on pharmaceutical patents are likely to be (or have been) granted?

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