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English Patent Court grants temporary restraining order against Teva on short notice

Brian Cordery (Bristows) · Wednesday, June 29th, 2011

On 20 June 2011, Floyd J. granted a temporary restraining order preventing restraining Teva UK Limited (and two distribution companies, “Phoenix” and “AAH”) from advertising, offering for sale, selling or supplying its generic atorvastatin pending full hearing of the Warner-Lambert’s application for an interim injunction, listed for 11 July 2011.

Warner-Lambert (a subsidiary of Pfizer Inc) sought to restrain infringement of SPC no. GB97/011. In June 2010, solicitors for Teva had written to a Warner Lambert company informing them that Teva proposed to launch generic atorvastatin in November 2011, on expiry of the SPC. Pfizer responded informing them that there had been approval for paediatric use and that a six month extension was being sought for the SPC. There was no further correspondence between the parties. Almost a year later, on 20 June 2011, Pfizer discovered, through contacts in purchasing pharmacies, that Teva’s generic avorvastatin was being offered for sale by Phoenix and AAH. Deliveries were being made that day. Warner-Lambert immediately commenced proceedings in the Patents Court and sought a holding injunction on a ‘without-notice’ basis: Teva were informed of the application and were represented at the hearing, but were not given the usual term of notice; Phoenix and AAH were not formally notified of the proceedings prior to the hearing. Floyd J. heard Warner-Lambert’s application without the usual evidence and application documents being filed.

On the facts before him, the judge considered the case appropriate for the grant of a temporary restraining order pending full hearing of Warner-Lambert’s application for an interim injunction, which was scheduled for 11 July 2011. Teva had launched “surreptitiously” and without any form of notice, well ahead of the date they had indicated in correspondence. The judge commented that “[w]hatever the position may be about the obligation on a defendant to clear the way, there was nothing to stop the Defendants from at least informing the Claimants that they intended to launch at an earlier date”. Before the judge, Teva’s barrister admitted that his client would not have much of a case on infringement, but contended that the patent was invalid. Floyd J. commented that if that really was Teva’s contention, why did they not start such proceedings in at least 2010? In the judge’s view, in the weeks leading to the full hearing of Warner-Lambert’s application for an interim injunction, there was a real risk of damage being caused to Warner-Lambert, which was exacerbated by the availability of the product in question on the internet. He therefore granted the holding injunction sought against the three defendants and ordered Teva to disclose the names and addresses of every person, firm or company to whom it had offered to supply or supplied atorvastatin in the jurisdiction.

Following the decision in November 2010, also of Mr Justice Floyd, in *Cephalon v Orchid*, there

has been concern as to whether the English Patents Courts would become less willing to grant interim injunctions in pharmaceutical patent cases. In the Cephalon case the Court was unpersuaded that the damage to Cephalon by Orchid's sale of 'infringing' product prior to trial would be irreversible. The formerly assumed obligation on the generic company to 'clear the way' was also questioned in *Cephalon* – it being held that the failure to clear the way should be taken into account but that it was not decisive.

However, Floyd J.'s judgement for Warner-Lambert shows clearly that the Court will not tolerate underhand litigation practices from generic companies. Irrespective of the outcome of Warner-Lambert's application for an interim injunction pending full trial on the merits, generic companies must now be on notice that they must participate actively and constructively in the resolution of patent disputes or face stringent penalties from a responsive and pro-active court.

Co-author: Ailsa Carter
Associate, Bristows

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