

Diagnosics Company Preventx Tests the Boundaries of Interim Injunction Relief in Abuse of Dominance Claim Against Royal Mail

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The High Court has granted an interim injunction to Preventx in its abuse of dominance claim against Royal Mail in relation to the return of Preventx' remote diagnostic testing kits.

Background

Preventx provides remote diagnostic testing and related services for sexually transmitted infections. Preventx customers can obtain testing kits at no cost either by applying online or being provided with them in person at a GP surgery or clinic. Used kits are then returned to Preventx for testing via Royal Mail's pre-paid 'Business Reply' and 'Freepost Standard' packages which can be sent via post. Preventx has contracts with local authorities and NHS Trusts for the delivery of its services.

Earlier this year, Royal Mail sought to enforce certain amendments to its terms and conditions which had been in place previously but not expressly imposed on Preventx. The amendments would mean that Preventx would be no longer able to use a Business Reply service for items, such as used kits, which are classified as "Dangerous Goods"; instead Preventx would have to move to Royal Mail's, more expensive, 'Tracked' service as well as comply with different packaging requirements. Royal Mail gave Preventx 30 days from the end of May 2020 to migrate to the new Tracked service.

Proceedings and the judgment

Objecting to Royal Mail's insistence that Preventx move to the Tracked service, Preventx brought a claim in the High Court against Royal Mail seeking injunctive relief and damages for alleged abuse of dominance, breach of contract and estoppel.

Interim injunction test

The relevant test for granting interim injunctions was established in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396: the test is essentially whether there is a serious question to be tried and whether or not the interim relief should be granted on the balance of convenience. Where the claimant would be adequately compensated in damages if successful at trial (and the defendant has the ability to pay such damages), an interim injunction should not normally be granted. If damages are not an adequate remedy, the court should consider the contrary position of the claimant being granted an injunction and the defendant succeeding at trial and consider whether, in this scenario, the defendant would be adequately compensated by the claimant's cross-undertaking in damages.

Abuse of dominance claims advanced by Preventx

Preventx relied on Chapter II of the Competition Act 1998 (“CA”) in alleging several forms of exploitative abuse by Royal Mail. The High Court considered two forms of abuse in particular when deciding whether or not the injunction should be granted. These are discussed below.

Limitation of markets

Preventx argued that the increase in price for Royal Mail’s postal services as a result of a move to the Tracked service would mean that Preventx would need either to: (i) absorb the cost of the service, becoming weakened as a player in the STI testing market as a result; or (ii) increase the prices it charged to local authorities, which would likely lead Preventx to reduce their purchases of Preventx’ services. Preventx stated that the fact that Royal Mail was applying the same policy to other suppliers did not justify Royal mail’s conduct but merely showed that the conduct would force the overall market to shrink.

The Court decided that this allegation by Preventx did not give rise to a serious question to be tried. Excessive pricing is a particular form of abuse of dominance in relation to which a two-fold test (established in the European Court of Justice’s *United Brands* judgment) applies: first, the price must be excessive (e.g. by comparison to costs of production/service); and second, the price must also be unfair either in itself or when compared to competing products/services. Preventx could not simply circumvent this test on the basis that the price increase would lead to a “limitation of the market” by decreasing the demand for the services in question. As argued by Royal Mail, the “limitation of markets” form of abuse of dominance referred to in section 18(2) CA concerns a limitation of output as a means of distorting competition, not simply a dominant company increasing its prices.

Imposition of unfair trading conditions

Preventx also alleged that Royal Mail was abusing its dominance by imposing unfair trading conditions on Preventx. In relation to this allegation, the Court considered that the statutory concept of “unfair trading conditions” extends to the unfair reliance on a contractual term in certain circumstances. It focused on two aspects of Preventx’ case:

- Relying on its general terms, Royal Mail threatened to destroy Preventx’ sample returns sent by Freepost. Royal Mail would only agree to process them by charging a premium price, substantially higher even than the normal Tracked service. Royal Mail had previously knowingly acquiesced to Preventx’ use of the Freepost Standard service for many years. Therefore, it was arguable that reliance on general terms for this purpose amounted to unfair and abusive conduct.
- Royal Mail required Preventx to migrate to the Tracked service within 30 days. The fact that Royal Mail imposed such a short notice period where it has been well aware of the nature of Preventx’ business was arguably an unfair trading condition.

For these reasons, the Court granted an injunction preventing Royal Mail from refusing to provide its Freepost service to Preventx’ and processing the kits sent using that service.

Comment

This judgment from the High Court is a timely reminder to the potential claimants affected by anticompetitive conduct that the courts are willing to take steps to prevent harm caused by anticompetitive conduct by granting injunctive relief. Claimants considering this step are not constrained to making such applications in the High Court but can also apply for interim relief in the specialist Competition Appeal Tribunal, which provides for a so-called ‘fast-track’ procedure which can deal with urgent interim injunctions.