Kluwer Competition Law Blog

United Kingdom: interim injunctions in competition litigation

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Private competition litigation is continuing to develop in the United Kingdom. The courts and the Competition Appeal Tribunal are seeing an increase in the number and complexity of follow-on damages actions, often between foreign claimants and/or defendants. In addition, an increasing number of "standalone" competition disputes between private parties are being brought in the courts, in which the claimant alleges that the defendant is infringing or has infringed competition law.

Private competition disputes raise different issues from follow-on claims. First, the claimant must prove that an infringement has been committed: there is no prior Office of Fair Trading or European Commission decision that the defendant has infringed competition law. Second, in many cases, the alleged infringement will be continuing and the claimant will seek an interim injunction restraining the alleged infringement until trial; this may be particularly the case where an abuse of a dominant position is alleged, which is causing on-going harm to the claimant and will continue to do so unless restrained by the court.

The English courts have recently handed down three judgments, *Chemistree Homecare v. Abbvie* (Court of Appeal, 7 November 2013), *Dahabshiil v. Barclays Bank* (High Court, 5 November 2013) and *Arriva The Shires v. London Luton Airport* (High Court, 18 June 2013, unreported) that provide further clarity for both claimants and defendants on when an interim injunction will be granted or refused. Each case concerned an alleged refusal to supply services or access to a facility.

Background: conditions for the grant of an interim injunction

Under well-established legal principles, a court may grant an interim injunction where the claimant can show that there is a serious issue to be tried and, on the facts of the case, that it is just to award an injunction if this is the course of action most likely to cause the least irremediable prejudice to one party or the other. An injunction will not normally be awarded if damages would be an adequate remedy. A court may be reluctant to grant an injunction if this would cause irremediable prejudice to the defendant, unless there is a high degree of assurance, that at, trial it will appear that the injunction was rightly granted.

***Chemistree*: injunction refused as no realistic prospect of abuse being established on any properly defined relevant market**

Chemistree concerned a refusal by a manufacturer (Abbvie) of an HIV drug, Kaletra, to continue supplying a customer (Chemistree). Chemistree provided a "homecare" service, in which it

administered drugs to HIV patients in the own homes under contracts with local hospitals, whose doctors had prescribed the drugs, including Kaletra. Chemistree also operated a wholesale pharmacy business, which supplied customers in other EU countries. Once it became aware of export sales of Kaletra, Abbvie reduced its supplies to the level required by Chemistree's UK homecare service, in part to avoid shortages of Kaletra in the United Kingdom.

Chemistree alleged that the reduction in supplies was an abuse of a dominant position. The High Court refused Chemistree's application for an interim injunction, as it had not established a serious question to be tried on the issue of dominance. This was confirmed by the Court of Appeal, which held that, applying the standard "SSNIP" test, Chemistree had failed to identify any relevant product market on which Abbvie could conceivably be dominant.

As there were alternative effective therapies to Kaletra, Abbvie could be dominant only if Kaletra formed its own product market. However, Chemistree had not adduced evidence to support its assertion of such a narrow market, for example the number of "captive" patients for which there was (for medical reasons) no alternative to Kaletra or the relative price of different drugs. The Court of Appeal held that Chemistree's assertions of dominance were based on the theory that a patented drug can constitute a distinct market of its own, were not supported by any evidence and were thus unfounded.

It is notable that, at first instance, the High Court had also refused to grant an injunction on two other grounds. First, that Chemistree had not established an arguable case that (even if Abbvie were dominant) the refusal to supply was abusive. Abbvie was entitled not to supply Kaletra to Chemistree's wholesale business, as it did not supply Kaletra to wholesalers in the UK (since it is prescribed only by hospitals). Further, Abbvie was prepared to continue supplying Chemistree's homecare business. Second, any loss that might have been suffered by Chemistree's wholesale business could be compensated in damages, were it to succeed at trial in establishing that the refusal to supply was abusive.

***Dahabshiil*: injunction granted requiring continued supply of banking services**

Dahabshiil concerned a withdrawal of banking services to the claimants. Following a strategic review, Barclays decided to cease providing banking services to many money services businesses, including the claimants, who operated bureaux de change and international money transfer services. Barclays did so because it wished to reduce its exposure to the money services sector, given the risks of money laundering and terrorist financing inherent in money transfer servie businesses, although it had no specific concerns relating to the claimants' businesses.

The claimants alleged that Barclays' withdrawal of banking services amounted to an abuse of a dominant position and, in the absence of alternative banks willing to offer them services, would force them to cease business.

Both parties adduced expert economic evidence on the relevant market on which Barclays operated, although each of the claimants and Barclays took a different view of the relevant market. The Court found that there was an arguable case that Barclays was dominant on a market for the supply of banking services to money remitters in the UK: Dahabshiil's evidence showed that, on such a market, Barclay's share was around 70%. Barclays chose, at this stage in the proceedings and presumably for tactical reasons, not to rebut that evidence. There was also an arguable case that Barclays was dominant on a wider market for the supply of banking services to money

services businesses, although the evidence of dominance on this market was weaker. Again, Barclays failed to adduce evidence of its market position on such a market. The judge drew adverse inferences from this failure, even though he refused to accept that evidence of the claimants' failure to find alternative banking services was itself probative of Barclays' alleged dominance. In the judge's view, there was a triable issue as to whether Barclays was dominant.

Barclays argued that its withdrawal of services was objectively justified and therefore could not, even if dominance were established, be abusive. However, the judge considered that the questions of abuse and justification could only be established at trial and he could not be certain that Barclays' defence would succeed. The court therefore found that the claimants had an arguable case of abuse that could only be determined following a full trial.

As no other bank was willing to provide banking services to the claimants, who thereby faced having to cease trading if Barclays did not continue to provide banking services to them, the court readily found that the balance of convenience favoured an injunction requiring Barclays to continue providing services to its existing customers, pending trial.

***Arriva*: injunction refused, despite an arguable case of abuse being made out**

Arriva concerned the provision of coach services between London Luton Airport and central London. Arriva had been the incumbent operator of these services, but lost the contract to do so following a tender conducted by the airport. A new, exclusive contract was awarded to another operator, National Express. As a result, Arriva was unable to operate direct services between the airport and London, although it continued to operate an indirect service, requiring a change of bus en route. Arriva alleged that the airport's award of the new exclusive contract constituted an abuse of a dominant position and that it had lost passengers as a result, threatening the viability of its service.

It was accepted that whether the airport had a dominant position and, if so, had abused it, were matters for a full trial. The question of whether to grant an interim injunction therefore turned upon whether damages would be an adequate remedy and whether justice required the airport to continue providing access to Arriva, notwithstanding its exclusive contract with National Express.

The court refused to grant an interim injunction. It did so for a number of reasons. First, Arriva had not adduced evidence that it would be forced to cease operating its service before a full trial was heard. Second, any losses suffered by Arriva would be financial in nature and could be compensated in damages. Third, if an injunction were wrongly granted, this would cause losses for National Express. Fourth, even if Arriva were to be successful at trial, the court could not then grant an injunction ordering that Arriva be permanently given access to the airport's facilities, merely that a lawful tender process be re-run, which Arriva might not win. Fifth, an injunction would lead to practical difficulties in determining the commission that Arriva (and National Express) would need to pay the airport in the interim and in the arrangements needed for both operators to be able to access the airport. Finally, Arriva had responded to the tender by also seeking an exclusive contract, for 10 years, which was longer than the seven year contract awarded to National Express: if it had had real concerns as to the lawfulness of the award of a long-term, exclusive contract, it should have raised them earlier, before the contract was awarded to National Express.

Conclusions

In a case of alleged abuse of a dominant position, it is trite that the claimant must prove both dominance and abuse, and that establishing dominance requires an assessment of both the relevant market and the defendant's power on that market. These are matters that can only be established at trial: they are not suitable for determination at an interlocutory stage.

A claimant cannot obtain interim an injunction on a purely speculative basis. It is plain that a claimant must present an arguable case on dominance, with evidence both as to the relevant market on which the defendant is alleged to be dominant and its market power on that market. This may require expert evidence to be provided and will clearly require factual evidence. This, the claimant in Chemistree failed to do; mere assertion will not suffice.

Where the claimant does demonstrate an arguable case as to dominance and abuse, to resist an injunction, the defendant must provide evidence to rebut the inference of dominance; in *Dahabshiil*, Barclays chose not to do so, presumably for tactical reasons. Rebutting an inference of abuse may be more difficult, since this can realistically only be determined at trial after hearing full evidence.

Where an arguable case is made out by the claimant and is not rebutted by the defendant, the "balance of convenience" needs to be assessed. In *Dahabshiil*, this favoured an injunction: without continued access to Barclays' banking services, the claimants would have had to cease trading, causing irreversible damage. By contrast, little or no harm would be caused to Barclays by continuing to provide these services.

In *Arriva*, an injunction was refused for numerous reasons. It is clear that an injunction will not be granted where damages are an adequate remedy: an injunction is therefore likely only where a claimant can show that it would otherwise be irretrievably forced out of the market. An interim injunction will likely also be refused where it would provide relief that could not be awarded by the court on a permanent basis.

It is therefore clear that, in competition litigation between private parties, both claimants and defendants must consider carefully the requirements that must be satisfied for a court to grant an interim injunction.

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