

# Depressing result for Lundbeck as Resolution not kept down by legalities - the narrow scope of Privity of Interest

Resolution Chemicals Ltd v H Lundbeck A/S Court of Appeal (Civil Division), 29 July 2013

Lundbeck's patent for the pharmaceutical enantiomer escitalopram has been extensively litigated worldwide. In 2005, as part of this litigation, Generics (UK) Ltd and Arrow Generics (UK) Ltd ("Arrow") sought the revocation of the UK designation of the patent. The case reached the House of Lords, wherein it was held to be valid (the "2005 Action").

The patent has now returned to the High Court, with Resolution, a sister company of Arrow at the time of the 2005 Action, applying to invalidate the patent. Resolution is now independent of Arrow, but Lundbeck have sought to argue that Resolution are estopped from taking this action due to the prior relationship with Arrow. At first instance, Arnold J held that Resolution were not so estopped. Lundbeck appealed, with the key issue being privity of interest between Resolution and Arrow. The Court of Appeal upheld the first instance judgment, and the case continues to trial.

## **Background and Decision**

Resolution was established in 1986 as a manufacturer of active pharmaceutical ingredients. In 2001, the company was sold to the Arrow Group - a group of companies founded by one Mr Tabatznik. Mr Tabatznik was CEO of the Arrow Group, took charge of major patent matters (including litigation) and was on the Board of Directors for Resolution.

Due to the relationship between Resolution and Arrow, and particularly due to Mr Tabatznik's involvement with both companies, the key issue on the appeal was whether Resolution had an interest in escitalopram at the time of the 2005 Action, but had simply sat back and let Arrow fight the 2005 Action on its behalf. Such an interest and scenario would have led to Resolution and Arrow having "privity of interest" such that Resolution would have been estopped from proceeding with the invalidity suit (in the same way that Arrow are precluded from re-litigating the same issues against Lundbeck).

An issue estoppel prevents an issue that has already been litigated and decided upon from being re-litigated to prevent the litigant from being vexed twice in the same cause. Conditions for an issue estoppel are that the issue raised is the same in both proceedings and the parties to the decision are the same or privies to the proceedings in which the issue was raised. Privity of interest may be established where a relationship exists between parties to the first proceedings and non-parties which have the same legal interest in the proceedings. For example, and at a high level, privity of interest is recognised where C knows of proceedings between A and B in which his rights are being tested but stands back and does nothing.

While Resolution had, prior to the 2005 Action, an interest in citalopram (the racemate) and indeed had undertaken some work in relation to escitalopram, the Court of Appeal followed the judge at first instance, finding that by the time of the 2005 Action, Resolution's interest in escitalopram had ceased. Potentially key to this finding was the fact that Resolution had been unable to commercially produce citalopram and consequentially would have been unable to commercially produce escitalopram.

## **Comments**

This particular decision is very much fact specific, however it does make clear that companies within the same group do not necessarily have privity of interest in relation to litigation brought by a member or members of that group. Each case will turn on its own facts, but if at the time at which the proceedings are brought, a company within such a Group of companies has no interest in the outcome of the proceedings but then later acquires an interest, privity of interest will not necessarily be a bar to the non-party litigating the issue at a later date. However, while the case indicates that independence is not directly relevant to privity of interest, had Resolution remained a part of the Arrow Group the judgment also indicates that the court would have had to consider whether Resolution were merely a vehicle for re-litigating the issues on behalf of the Arrow Group. This additional factor that arises out of a lack of independence could result in a different outcome as compared to when the relevant parties are independent.

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