
From: Bull, Alison [mailto:Alison.Bull@lovells.com] On Behalf Of Macfarlane, Nicholas
Sent: Friday, January 30, 2009 3:50 PM
To: COMP SECTOR PHARMA
Subject: Submission in Respect of Pharmaceutical Sector Enquiry

Dear Sirs

I am a partner in the firm of Lovells and I have over thirty years of experience in intellectual property and in particular patent litigation. I am a founding member of the Intellectual Property Lawyers Association and was its secretary for many years. I have seen my Association's Submission and wish to endorse everything therein. Further, I have heard and read the comments of Lord Justice Jacob and would support all that he says. Accordingly I will not go into great length in my submissions. I simply want to make some quick points.

1. The concept of patents is in place to encourage innovation. They are anti-competitive by nature. All that you can do with them is stop others infringing or alternatively, if appropriate, extract a royalty.
2. Innovation is a good thing. In the pharma industry we have seen extraordinary leaps forward which has resulted in world health improving year on year.
3. The patent system is not perfect. There may be patents which turn out to be invalid. This can only be dealt with by the Courts. However, the report is prone to use perjorative terms such as thickets and clusters. A patent is either valid or invalid.
4. Whilst the generic companies may ultimately bring the price of medicines down, (i) they have not been involved in the costs of research; (ii) they have not been involved in the costs of clinical trials; (iii) they wish to keep the price up as long as possible.

Sympathy for generic companies should be tempered by the obvious fact that they too are trying to make money.

5. A European wide patent is suggested by the Preliminary Report as being a possible palliative which both generic companies and innovative companies would like to see. I am surprised by this. I think that innovative companies are extremely nervous of a system which could expose their patents to attacks for invalidity in jurisdictions where less than first class knowledgeable judges could knock out an exclusivity across Europe.

6. The Enquiry seems to have taken very little evidence from professionals versed in patents and in particular patent litigation.

7. The patent and regulatory system has been in place for many years. There seems to be a finding that there is a delay caused by patent litigation and other shenanigans. However, the delay seems to be no more than seven months. Given that innovative companies very often do not get on to the market until ten years has passed after the first patent was applied for, the length of time seems relatively trivial. The important thing is that there has been a competitive situation between innovator and generic companies which has resulted in the exclusivity finishing in the end.

I have only ever acted for innovative companies. In my experience they have always played well within the rules but at the same time fought vigorously where they have been justified in doing so. The pharmaceutical industry is a very special one where regulations and patent exclusivities intertwine together to produce a complex matrix of rights which have to be pitted against the generics. They in turn do what they have to do and ultimately the Courts must decide. However, it must be remembered that if there was no patent system there probably would not be such a strong innovative pharma

industry and in turn we would not be enjoying the benefits of the life enhancing drugs that we are able to take advantage of.

Regards.
Nicholas Macfarlane.

Nicholas Macfarlane

Partner

Lovells LLP

Atlantic House
Holborn Viaduct
London
EC1A 2FG

Tel: +44 (0) 20 7296 2000

Direct: +44 (0) 20 7296 5355

Fax: +44 (0) 20 7296 2001

Email: nicholas.macfarlane@lovells.com
