Neutral Citation Number: [2020] EWHC 2276 (Ch)

Case No: CP-2020-000011

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMPETITION LIST (ChD)

By Skype for Business
Date: 20/08/2020

Before :

MR JUSTICE ROTH

- -

Between :

PREVENTX LIMITED	**Claimant**
- and –	
ROYAL MAIL GROUP LIMITED	**Defendant**

- -
- -

Mr Robert O'Donoghue QC and Mr David Heaton (instructed by **Gowling WLG (UK) LLP**) for the **Claimant**
Mr Philip Woolfe (instructed by the **Group Legal, Royal Mail Group Ltd**) appeared for the **Defendant**

Hearing dates: 22 - 23 July 2020

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Judgment Approved by the court for handing down

Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on 20 August 2020.

* In the public version of this Judgment, certain pricing figures have been redacted on the grounds of confidentiality.

Mr Justice Roth :

INTRODUCTION

1. This is an application for an interim injunction. It concerns the basis on which the Defendant ("RMG") is willing to offer and carry out a returns service for patient samples for testing for sexually transmitted infections ("STIs") on the basis of testing kits provided by the Claimant ("Preventx") which have been either sent or given to members of the public ("service users"). There is no issue as regards the arrangements whereby such kits are sent out to service users.

2. Preventx contends that the changes in the arrangements and requirements for a returns service which RMG has told Preventx it is about to impose constitute an abuse of a dominant position on the part of RMG contrary to the Chapter II prohibition under s. 18 of the Competition Act 1998 (the "CA 1998") and, further, that RMG is estopped from denying that it is contractually obliged to continue to provide it with its returns service on the existing basis (the "Freepost Standard" service).

FACTUAL BACKGROUND

3. Preventx provides remote diagnostic testing services, partner notification and onward clinical referral services for STIs, such as HIV, hepatitis B and C, Human Papilloma Virus (HPV), chlamydia, gonorrhoea, and syphilis. Service users obtain Preventx's testing kits either by applying online or by being provided with a kit in person at a GP surgery or clinic, in either case at no cost to them. Preventx was founded in 2008 and is now a market leader in its field. I was told that it holds about 25% of the market in remote STI testing services.

4. RMG is the well-known provider of postal services in the UK. It has a universal services obligation ("USO"), subject to regulation, to deliver regular mail to every part of the UK. However, RMG also operates a number of other services and the commercial returns service at issue in this case is not part of its USO or a regulated service.

5. There is no doubt that the services provided by Preventx bring important public health benefits. Remote testing means that the service user can obtain a diagnosis (and onward referral in the event of testing positive) without having to attend a clinic. This brings obvious benefits of convenience and accessibility, along with a sense of privacy which is particularly important in this field. The alternative of in-person testing at, for example, a sexual health clinic has been found to be a significant disincentive for many, including those from more vulnerable sections of society. Moreover, funding for many clinics has been cut. As explained by Preventx's CEO, Ms Ruth Poole, in her witness evidence, Preventx's service users include teenagers, victims of sexual assault, sex workers and drug addicts. Remote testing has become still more significant during the Covid-19 lockdown when it has enabled the continuing provision of STI testing services while many clinics were closed, and demand for Preventx's services has risen accordingly: it is currently sending out about 2000 testing kits a day.

6. Early detection and treatment of STIs clearly promotes public health. The witnesses for Preventx exhibited documents produced by the House of Commons Health and Social Care Committee and by the Department of Health together with Public Health England which described these concerns.

7. Preventx provides these services under contract with local authorities and NHS Trusts, who are its customers. Most service users receive the STI testing kits and related services at no cost to them. Preventx currently has contracts with 60 local authorities, of which the largest is its contract with the City of London that covers both the City and 30 London boroughs. Ms Poole says that most of these contracts are for a fixed term and that they often "operate within a static

financial framework with no capacity to go beyond the agreed pricing of procurement." The agreement with the City of London is a long-term contract under which Preventx can raise its prices only by reference to an increase in the RPI.

8. The significance of the returns arrangement with RMG for Preventx is that service users are able to return their samples for testing in a pre-paid package by posting it in a pillar box. They do not need to attend at a Post Office to hand it over in person. Thus Preventx says that it is dependent on the nation-wide network of RMG pillar and letter boxes. Prompt return of patient samples is important: delay reduces the effectiveness of STI testing because of the haemolysing of blood samples.

9. RMG operates a number of commercial returns services, in particular Business Reply and Freepost, and Tracked Returns. Business Reply and Freepost comprises a range of response services run by the letters arm of RMG. Freepost Standard forms part of this group, and offers the alternatives of first-class and second-class post. Preventx has been using the Freepost Standard first-class service. Tracked Returns is operated by the parcels arm of RMG. It includes Tracked Returns 24 ("T24R"), a next working day returns service, and Tracked Returns 48 ("T48R"), a two-day return service. As their name suggests, the T24R and T48R services involve tracking the progress of the returned item, which is achieved by scanning it at various points in the network.

10. Tracking enables RMG to provide customers with information about expected day of delivery and is valuable to RMG in providing operational information (e.g for sorting arrangements and efficient billing). Generally, Tracked Returns items should be dropped off at a Post Office branch or Customer Services Point in order to obtain an acceptance scan, proving that RMG took custody of the item (and on what date). However, Mr Antony Harvey, a commercial director of RMG with a particular focus on its domestic parcels business, says in his witness statement that RMG allows medical samples using its T24R or T48R services to be dropped off in a post box or parcel post box.

11. Mr Harvey emphasises the distinction between RMG's letter services and parcels services. They are operated by different teams within RMG and are processed in different ways, with different sorting arrangements. Letters are predominantly sorted by machine, whereas parcels are generally manually sorted (although RMG is in the process of introducing more parcel sorting machines). However, large letters will be sorted either manually or by machine, depending on the facilities available at the relevant mail centre. Mr Harvey says that large letters may go into a 'letter' type sorting process (sorted into frames) or into a 'parcel' type process (sorted into York cages), depending on their size and shape: thus, rigid items or packets would typically go into the 'parcel' type process. RMG charges higher prices for parcel services, which it justifies on the basis that parcels tend to cost it much more to handle and that customers typically place significantly more value upon them.

12. Pursuant to the European Agreement Concerning the International Carriage of Dangerous Goods by Road (generally known as "ADR"), and other agreements for international transport, the patient specimens that are included in a returned STI testing kit constitute Category B substances under the UN3373 classification. That involves a requirement that they are packed in accordance with Packing Instruction 650 ("PI 650"). The relevant requirements and consequences are discussed further below.

RMG TERMS AND CONDITIONS

13. The various contractual documents governing the service provided by RMG to Preventx are helpfully exhibited by Mr Harvey.

14. RMG publishes a Rate Card for its Business Reply and Freepost Response services. The Rate Card in evidence shows the prices with effect from 23 March 2020. There is an annual licence fee and then a charge on a per item basis. The services covered by this Rate Card are the Response Plus services (Business Reply Plus and Freepost Plus) and the Response Standard services (Business Reply Standard and Freepost Standard). For Freepost Standard, the service used by Preventx, the current annual licence fee is £99.50 and the per item charges are set out in a table, divided as between "Letter", "Large Letter" and "Parcel". The Preventx package used for the return of testing samples was classed as a "Large Letter" and as it weighs under 100g the per item charge is £0.84 for first class. The price brackets for "Large Letters" go up to 750g items. The first price bracket under "Parcel" is for 0-1000g, charged £4.30 for 1st class, and it seems clear from the rate card that the "Parcel" category envisages heavier items.

15. In his witness statement, Mr Harvey says of the Freepost Large Letters service (or possibly he is referring to the Freepost Standard service generally):

> "From Royal Mail's perspective this service is aimed at carrying documents…"

Whatever may be RMG's internal perspective, that is certainly not indicated in RMG's detailed *Response Service User Guide* (the *"RS User Guide"*), exhibited by Mr Harvey. On the contrary, in the Introduction, the *RS User Guide* distinguishes the two Response Plus services from the two Response Standard services as follows. For Response Plus, it states:

> "Response Plus is a reply paid, end to end service which can only be used for letters…. Response Plus letters can be read easily by our sorting machines and have a lower cost per response than Response Standard."

For Response Standard, it states:

> "Response Standard is a reply paid, end to end service, which can be used for letter, large letter or parcel responses."

The *RS User Guide* proceeds, in section 5, to set out the different specifications for a "Large Letter" and a "Parcel" as follows:

> "**Large letter**
>
> Any item that has a dimension exceeding the maximum dimension for a letter and any item weighing more than 100g is a Large Letter.
>
> The maximum weight is 750g.
>
> The maximum sizes are given below. For Response services the maximum thickness is 50mm.
>
> …
>
> **Parcel- box**
>
> Any item that has a dimension exceeding the maximum dimension for a large letter and any item weighing more than 750g is a Parcel…."

16. Moreover, the *RS User Guide* states:

> "This user guide forms part of your agreement with us for Response Services. The agreement also includes the specific terms for Response Services and our general terms and conditions of business."

17. The RMG Specific Terms for Response Services (the "Specific Terms"), also state, at cl. 1.2, that the agreement with the customer for response services comprises those terms along with the *RS User Guide* and RMG's general terms and conditions of business. The Specific Terms similarly define, at cl. 2.1, a "large letter" as:

> "an item which is not a letter and is no larger than 353 millimetres by 250 millimetres, no thicker than 50 millimetres, and no heavier than 750 grams."

Clause 4.2 of the Specific Terms, as in force since 22 October 2018, states:

> "You must ensure that: (i) any customers, agents or other parties using Response Services are aware of, and comply with, the prohibitions and restrictions on sending certain dangerous materials in the mail as set out in the general terms and (ii) they do not include any Restricted Materials as part of the Response Service posting used."

18. The RMG General Terms and Conditions (the "General Terms") is a lengthy document comprising 23 clauses and numerous sub-clauses, and an extensive Appendix of definitions. The General Terms include the following:

> "**Restricted and Prohibited Materials and Sanctions Laws**
>
> 3.16 You must comply with any prohibitions, restrictions or specific requirements in the UK and the destination country for international deliveries. You are responsible for checking whether an Item is prohibited, restricted or subject to Sanctions Laws. You must check the list of Prohibited Materials and Restricted Materials (and any applicable restrictions) prior to posting any Item.
>
> …
>
> 3.19 You may only post Restricted Materials if the relevant Additional Terms expressly permit you to do so. A summary of these permissions is as follows:

Relevant Products	**Permission to send Restricted Materials**
Parcel Products *Note: **ONLY** the Parcel Products as listed in the next row	**Only** the following Products can be used to post Restricted Materials: Special Delivery Guaranteed by 9am, Special Delivery Guaranteed by 1pm, Royal Mail Tracked 24, Royal mail tracked 48, Royal Mail Tracked Returns 24, Royal Mail Tracked Returns 48 and Special Delivery Guaranteed Returns.
International products	**Only** as expressly permitted under the Specific Terms for International.

Marketing Products	You may **not** send and Restricted Materials using Marketing Products.
All other Products to which these General Terms apply	**Only** if you are expressly permitted to do so under the relevant Additional Terms.

Provided that the Additional Terms give express permission to post Restricted Materials then you must also comply with the restrictions and requirements set out on www.royalmail.com/restrictedgoods/business (**Restricted Guide**). If there is any conflict or inconsistency between these General Terms and the Restricted Guide, then the Restricted Guide shall prevail.

…

3.22 If we have reasonable suspicion that an Item contains Prohibited Materials, Restricted Materials which do not comply with this Agreement or does not comply with Sanctions Law we may:

3.22.1 open that Item or delay processing and delivery; and/or

3.22.2 deal with such Item in our absolute discretion (without incurring any liability whatsoever to you or your Intended Recipient) including destroying or otherwise disposing of such Item in whole or in part, or returning the relevant Item to you.

If we take one or all of the actions described in this clause, we are entitled to charge you the cost of disposal and/or destruction, the standard Postage price and all other costs reasonably incurred by us."

19. Under the definitions in Appendix A, "Additional Terms" here means the Specific Terms, and "Restricted Materials" are:

> "the materials listed on www.royalmail.com/restrictedgoods/business"

20. The General Terms include the following relevant provisions about bringing the agreement to an end:

> "15.1 If we find that you have not carried out any of your duties or you have breached any term of this Agreement (including giving us the wrong details about the Posting), we may contact you or your agent to decide what action we will take. We may, in addition take any of the following actions:
>
> …
>
> 15.1.8 end this Agreement immediately upon providing this notice to you.
>
> 16.1 We can end this Agreement or stop providing any one or more of the Products by giving you at least 30 days' notice. You can end this agreement by giving us at least 30 days' notice.

> …
>
> 16.3 Either of us may end this Agreement immediately by giving notice to the other if the other is not complying with any of its responsibilities under this Agreement and:
>
> 16.3.1 it cannot do anything to put the matter right; or
>
> 16.3.2 it can do something to put the matter right but fails to do so within 14 days of being asked."

21. The *Restricted Guide*, accessed through the link under either cl. 3.19 of the General Terms or the definition of Restricted Materials, describes itself as a guide for RMG contract and account customers. Mr Harvey exhibits with his witness statement the *Restricted Guide* as valid from 15 July 2013. The material section states the following:

> "**Biological substances**
>
> *(including blood and urine. Category B (UN3373) as classified in the latest edition of the Technical Instructions for Safe Transport of Dangerous Goods by Air published by the International Civil Aviation Organization (ICAO))*
>
> UK destinations: **Yes**
>
> International destinations - **No**
>
> **Follow these packaging guidelines:**
>
> May only be sent by, or at the specific request of, a qualified medical practitioner, registered dental practitioner, veterinary surgeon, registered nurse or a recognised laboratory or institution. The total sample volume/mass in any parcel must not exceed 50ml/50g. All biological substances must be posted in packaging that complies with Packaging Instruction 650, such as our Safebox product. *The sender's name and return address must be clearly visible on the outer packaging*" [emphasis added].

22. However, the current version of the *Restricted Guide* includes the following addition under the entry for Biological substances:

> "Returns can only be sent using Royal Mail Tracked Returns® and Royal Mail Special Delivery Guaranteed Returns®. All variants of Business Response and Freepost are excluded."

Mr Harvey states that the second sentence above was added in June 2019. It is unclear on the evidence at what point after July 2013 the first sentence above was added.

23. Mr Harvey says that a communication was sent to all customers in May 2019 "to remind them of this restriction" and he exhibits the form of communication that would have been sent to Preventx. It is a standard form letter entitled "Important information about service terms and conditions changes." The letter states:

> "Here are some key pieces of information you need to be aware of as one of our valued business customers."

The material paragraph below states simply:

> "**Restricted and prohibited items – a reminder**
>
> Restricted materials can only be posted within the UK using certain Royal Mail services. For international items, senders should refer to the International Specific Terms and Conditions. Customers should check the items they send meet the restrictions for Restricted and Prohibited items at **royalmail.com/restricted**"

There is nothing in the letter indicating that new restrictions or requirements for the posting of restricted materials were being introduced.

PREVENTX'S DEALINGS WITH RMG

24. Since Preventx started trading in 2008, it has sent out some 2.5 million STI testing kits, of which about 2 million were returned using RMG's Freepost Standard service. In the early years, Preventx used a third party laboratory for testing and it was that third party to which the packages were returned and which held a Response Service licence with RMG. Since 2011, Preventx has integrated the testing into its own operations and has itself held a Freepost Standard response licence with RMG. Ms Poole states that until recent events which have given rise to these proceedings, Preventx enjoyed a positive relationship with RMG.

25. Preventx set up its account for a Freepost Standard response service with RMG in 2011. In applying for that account, Mr Tim Alston, the Technical Director of Preventx, wrote to the RMG response services team drawing attention to the fact that the dimensions of the Preventx package were (at that time) 72 mm x 172 mm (x 24 mm deep), which he expressly noted were slightly smaller than RMG's minimum dimensions. RMG did not suggest this was a problem and proceeded to set up a response service for Preventx.

26. Since that time, Preventx has had a dedicated account manager at RMG, who has been fully aware of the nature of its business and the nature of the items being sent. In July 2014, Preventx's Technical Director was in communication with Mr Paul Kirk, RMG's Field New Business Manager for the South West of England, regarding the RMG's services. Mr Kirk wrote on 8 July 2014 giving his "recommendations" for the best services for Preventx to use. As regards incoming (i.e. returns) services, he wrote:

> "Business Reply will be the best option still as rates are only 66p.
> Tracked Returns start at £1.96."

27. In around April 2017, RMG set up a new Response service licence for Preventx when the company moved to a new address within Sheffield.

28. On 31 August 2017, Preventx's then account manager at RMG, Mr Paul Dooley, wrote to Mr Ryan Kinsella at Preventx to inform him of some changes to RMG's General Conditions. None of the changes to which he referred inhibit the continuing use by Preventx of the Freepost Standard service for returns.

29. In November 2018, a concern was raised at RMG's Plymouth Mail Centre about a poorly packaged return of an HIV testing sample to Preventx, which was taken up by RMG's Dangerous Goods Team. Mr Dooley was alerted, as the Preventx account manager, and specifically asked Ms Jayne Egley of the Dangerous Good Team whether Preventx's packaging was not meeting the correct specifications. On 22 November 2018, Ms Egley wrote to Mr Alston at Preventx, drawing attention to the requirements in the *Restricted Guide* for the carriage of biological substances (see para 21 above). She said in her email:

> "As stated below all samples sent through the network regardless of whether you are using the freepost service need to have the senders name and address on.
>
> I understand that the samples do state that they are HIV samples and this may create an issue with the senders name and address been [sic] on there so I suggested to Paul [Dooley] maybe a reference number or a unique code for each test so the customer feels at ease with sending the test back.
>
> I am not sure what packaging is used presently but I have attached a diagram of some packaging I have found and was just wondering if perhaps there is a more secure way of sending these items back to you.
>
> …
>
> We do want to work closely alongside Paul and get this issue resolved going forward."

30. Mr Alston responded explaining that the sender's name and address should not appear on any return packaging "as this would absolutely be a confidentiality issue." He stressed that otherwise the packaging was compliant, that a problem with any dried blood on the outside posed no health risk and is a very rare occurrence, and that Preventx was planning to phase out the smaller HIV service boxes to replace them with stronger brown card boxes (as indeed has happened).

31. As can be seen from the email quoted above, the RMG Dangerous Goods Team recognised that Preventx was using the Freepost returns service and did not suggest that this in itself presented any problem. Further, although Mr Harvey refers to this incident and a couple of other "historic issues" involving blood on the outside of Preventx's return packages and says that RMG considers that medical specimens in general should be handled as parcels for safety reasons, RMG accepted that its opposition specifically to the application for interim relief was not based on any safety issues.

32. It appears that Preventx currently holds two Response Service licences with RMG:

    i) licence no. RTXR-RHXZ-JATU, which appears to have started on 5 April 2017 and was renewed each year thereafter. The last renewal was in April 2020, pursuant to an invoice from RMG dated 9 March 2020;

    ii) licence no. RSTB-RJRH-ABGB, which appears to have started on 25 October 2011, and was renewed each year thereafter. The last renewal was in October 2019 pursuant to an invoice from RMG dated 26 September 2019.

    It appears that the reason why Preventx has two licences is that the older licence (i) relates to its former address (see para 27 above) and has been retained since some older testing kits are still held at GP clinics or specialist centres and therefore have a returns label to that address. Most of Preventx's returns are sent using the licence referred to in (i) above.

THE EVENTS LEADING UP TO THE APPLICATION

33. Mr Dooley was succeeded by Mr Andrew Dewhirst as Preventx's territory account manager at RMG. On 24 February 2020, Mr Dewhirst wrote a lengthy email to Mr Alston stating that RMG was taking steps to enforce amendments made to its terms and conditions in January 2013, which mean that Preventx can no longer use a Business Response Service for items

classified as "Dangerous Goods" so that it would have to move to a Tracked Returns service. He said that although that service normally requires the items to be handed over at a Post Office, due to the sensitivity of the Preventx items RMG would agree that they could be placed directly into a pillar box.

34. An urgent meeting was arranged with Mr Dewhirst at Preventx's offices, but in the interim the acting CEO of Preventx, Mr Richard Jones, wrote to Mr Dewhirst on 25 February 2020 to ask for his confirmation that no mail or patient samples would be destroyed before that discussion had taken place. Mr Dewhirst responded that he thought it was unlikely that RMG would return or destroy any samples since its focus was on migrating customers over to a Tracked Returns solution, but added:

> "It does however state in our General Terms and Conditions 3.22 that we may so I am unable to give you categoric assurance."

35. The meeting duly took place on 3 March 2020. According to Preventx's contemporary notes of the meeting, Mr Dewhirst acknowledged that he had been aware of the nature of Preventx's business and of the patient samples being returned for many years. He said that RMG had decided for commercial reasons that it would now enforce the changes introduced into its conditions in 2013 and that this was not about any safety concerns. On 10 March 2020, Mr Jones wrote to Mr Declan Breen, the Regional Sales Manager at RMG (cc to Mr Dewhirst) and summarised in his letter some of the points made at the meeting, including the following:

> "a) It is acknowledged that Preventx has been using this service for many years, with no suggestion of any deliberate wrongdoing and Mr Dewhirst was keen to emphasise that his brief coming into the meeting was to start the discussion about migrating Preventx onto new commercial arrangements (i.e. the tracked returns service). Preventx is not being singled out in this regard as this is a general commercial policy being applied in order to fulfil Royal Mail's aim of moving all fulfilment business[1] away from the Freepost Large Letter service and onto a tracked-returns service.
>
> b) To facilitate this change, new labelling would be required in order to allow the returns to be tracked (i.e. adding a unique label including a barcode). No changes would be required to Preventx's packaging itself because it already complies with all the relevant safety standards (UN 3733)."

36. Mr Jones emphasised Preventx's concerns about the proposed changes and their potential impact on its services, and stressed that it would be unreasonable to implement the changes without a sufficient notice and transition period, suggesting 12-18 months. He asked specifically for confirmation that apart from the need to apply a new label, no change to Preventx's existing packaging was required, and again for written confirmation that patient samples will not be destroyed. He also raised the following question:

> "Preventx has a large number of testing kits already in circulation (e.g. with patients, at health clinics or pharmacies) with a long shelf life. These packages all have 'freepost large letter' postage labels. Please confirm how Royal Mail's [sic] proposes to process these packages."

[1] Mr Harvey explains that a "fulfilment item" refers to delivery of a product in fulfilment of a purchase or order by a customer (e.g. over the internet).

37. The response to this letter came from Mr Dewhirst, but cc to Mr Breen, dated 13 March 2020. Mr Dewhirst did not take issue with the above summary of what he had said on 3 March. He said that the next stage was to liaise with RMG's Commercial Pricing team to obtain a price and agree a bespoke Tracked via pillar box service, and to seek to agree an acceptable migration period. He confirmed that if the packaging had not been changed since it was previously approved, there was no requirement to change it further. In response to the question quoted above, Mr Dewhirst wrote:

> "Once we have agreed a migration period we can notify our Operation to continue to accept these items for the set period. Once the migration period is complete we would continue to accept the Freepost items but may introduce a surcharge for any Freepost for at least a period of 6-12 months."

38. Mr Dewhirst also refused to give any assurance that no kits would be destroyed, but added: "… we can work together during the migration period to reduce the likelihood of any items being destroyed."

39. Mr Jones wrote again to Mr Breen on 26 March 2020, suggesting that this matter be put on hold until the crisis caused by the Covid-19 pandemic was under control, since that was leading the NHS and public health authorities to direct more patients to use remote self-sampling kits and causing unprecedented demand for Preventx's services, so that this was not the time to move to an alternative arrangement. A substantive response was finally received, from Mr Dewhirst, on 23 April rejecting that suggestion, and instead asserting that the impact of Covid-19 had highlighted the need to move to RMG's Tracked Returns Service. For RMG he proposed a price of £ [ ] + [ ]% fuel surcharge per item for the T24R service or £ [ ] + [ ]% for a T48R service. As regards testing kits already in circulation, Mr Dewhirst wrote:

> "We are aware that even after you start to comply with these requirements, some items may be travelling through our network on Business Reply or Freepost services. We will endeavour to continue to process these items for a 14-day period from the date of this email. After that we may deal with your items as we see fit, including but not limited to, disposing of the items concerned."

40. Unsurprisingly, this provoked a strong response from Preventx. Ms Poole had now become CEO and wrote on 24 April 2020 to Mr Breen, with copy to the Group CEO of RMG as well as to Mr Dewhirst, protesting at the attempt to require Preventx to migrate from the Freepost Standard service that it had been using for many years to a premium Tracked Returns service which it did not want and which was not feasible for it. Her letter stated:

> "The immediacy of your threat to withdraw access to the Freepost service within 14 days and to dispose of patient samples has created a real and urgent public health risk."

41. Mr Dewhirst sent Ms Poole a further email on 4 May 2020 but made no reference to her letter. He now proposed a reduced price for the T48R service of £ [ ] for 3 months, before rising to £ [ ], with [ ] fuel surcharge for 12 months. He stated that there would have to be full migration to a Tracked Returns service by 8 August 2020. He referred to cls. 3.16 to 3.25 of the General Terms (see para 18 above) and cl. 4.2 of the Specific Terms (see para 17 above) and quoted from the latest version of the *Restricted Guide* with the clear inference that it must be complied with. That includes the requirement that the sender's name and address must be clearly visible on the outer packaging (see para 21 above).

42. Ms Poole received a direct reply to her letter from a Ms Smith from the CEO's office dated 5 May 2020, who expressed regret that Preventx felt so let down but proceeded to quote the same extract from the *Restricted Guide* regarding Biological substances.

43. On 26 May 2020, Mr Breen wrote to Ms Poole confirming what he stated was RMG's "final position" and that the 30 day migration period had commenced on 22 May 2020. He proposed pricing for T24R of £ [ ] and for T48R of £ [ ], and gave Preventx two options:

> "**Option 1**
>
> Agreement to migrate to Tracked returns within 30 days from May 22nd 2020 after which all items will be surcharged the difference between your current Business Reply charge [i.e. £0.84] and the new Tracked Return price. After the 12 month period, the Business Response licence will be withdrawn, if patient specimens continue to enter our network using this service, items will be handled in line with our Dangerous Goods policy.
>
> **Option 2**
>
> No agreement to migrate by 30 days thereby all returned items to be surcharged £3.50 for following 60 days then Royal Mail will withdraw the business reply licence. If patient specimens continue to enter our network using this service items will be handled in line with our Dangerous Goods policy."

44. Mr Breen attached to this email a copy of the agreement which RMG was offering Preventx. As well as incorporating the General Terms, RMG's specific terms for parcels and the additional terms in any user guide, the proposed agreement sets out at Appendix 4 the packaging requirements. These include, in addition to compliance with the *Restricted Guide,* an obligation that the package must bear a label which corresponds to the specification in the relevant RMG user guide. Both the illustration in Appendix 4 and the specification in RMG's *UK Parcels Service User Guide* (which covers the T24R and T48R services) show a label which includes the sender's name and address and prominently displays in bold type the words:

Tracked 24

45. On 2 June 2020, Mr Dewhirst wrote to Mr Alston telling him that the RMG Dangerous Goods team had highlighted a number of issues with Preventx's packaging. That was repeated in an email to Ms Poole and Mr Alston the next day, which specified that Preventx's packaging does not comply with the requirements of the transport regulations in a number of respects. By far the most significant in practical terms is the requirement that the minimum dimensions should be 100mm x 100mm x10 mm. Mr Dewhirst also repeated the two options which RMG was giving Preventx as set out above, making clear that the reference to the Dangerous Goods policy was to cl. 3.22 of the General Terms: see para 18 above. He added that to migrate successfully, Preventx would need "to provide a compliant packaging solution" within the 30 day timescale.

46. Following some further exchanges regarding the packaging requirements, Preventx instructed solicitors who sent RMG a letter before action on 18 June 2020. Mr O'Donoghue QC, appearing for Preventx, said that his client was reluctant to start proceedings against RMG and did so only as a last resort.

THE PACKAGING REQUIREMENTS

47. Different legislative regimes apply for the transport of dangerous goods by road or rail and their transport by air. Although Preventx testing kits sent by a RMG returns service will generally be transported by road or rail, RMG also uses air transport within the UK so some returns may be transported by air.

48. For transport by road or rail, the governing legislation is the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009 ("CDG Regulations") made pursuant to the Health and Safety at Work Act 1974 ("HSWA 1974"). Carriage of dangerous goods (for domestic as well as international transport) is prohibited where that carriage does not comply with the applicable requirements of the ADR: CDG Regulations, reg. 5. For Category B substances, this means that the packaging must comply with the version of PI 650 set out in the ADR. That includes a requirement that at least one surface of the outer packaging must have a minimum dimension of 100mm x 100mm. However, it does not include a requirement that the shipper's name and address appear on the package.

49. Infringement of the CDG Regulations is a criminal offence: HSWA 1974, s. 33(1)(c).

50. For transport by air, the governing legislation is the Air Navigation (Dangerous Goods) Order 2002. This requires that dangerous goods are carried (for domestic as well as international transport) in accordance with Technical Instructions issued by the International Civil Aviation Organisation ("ICAO").

51. The relevant ICAO Technical Instruction includes, for UN3373 goods, PI 650 but for air carriage there are some differences in the requirements imposed by PI 650. For present purposes, the significant difference is that PI 650 as included in the ICAO Technical Instruction includes the following requirement:

> "a) the name and address of the shipper and of the consignee must be provided on each package.
>
> b) the name, address and telephone number of a person responsible must be provide on a written document (such as an air waybill) or on the package.
>
> *Note: When the shipper or consignee is also the 'person responsible' as referred to in b), the name and address need be marked only once in order to satisfy the name and marking provisions in both a) and b)."*

52. The qualification in the Note that appears in the ICAO Technical Instruction is not reflected in the RMG *Restricted Guide*, whether in the 2013 or current editions: paras 21-22 above.

THE PROCEEDINGS

53. In their letter before action of 18 June 2020, Preventx's solicitors emphasised the adverse effect which a move to the Tracked Returns service would have on the provision of STI testing. They wrote:

> "In summary, it will significantly increase the price of the service our client provides to individuals and public bodies, such as Public Health England, and Local Authorities, responsible for public health, community welfare and wellbeing. This is likely to result in fewer testing kits being provided. In addition, it may deter users, to whom

> the current relatively anonymous return method is naturally important, from procuring and taking STI tests."

54. A claim form with brief details of the claim was issued on 29 June 2020, seeking an injunction and damages. As issued, the claim was only in competition law but amended Brief Details of Claim were subsequently served adding a claim for breach of contract. Preventx placed before the Court draft Particulars of Claim, which Mr O'Donoghue qualified in the course of the hearing, on the basis that as in a strike-out application, an application for interim relief should not be refused on the basis that the pleaded claim did not raise a serious question to be tried if that deficiency could be cured by amendment. Subsequent to the hearing, on 24 July 2020, Preventx served its Particulars of Claim.

55. As noted at the outset, the claim alleges that RMG is abusing a dominant position contrary to the Chapter II prohibition under s. 18 CA 1998. There is a further or alternative claim in contract alleging that RMG is contractually obliged to supply the Freepost Standard service to Preventx under the licences granted most recently in September 2019 and March 2020, and is estopped from asserting the contrary on the basis of either the contents or the packaging.

56. Evidence on the interim application for Preventx was filed by Ms Poole and Mr Kinsella, along with a witness statement from Mr Adrian Kelly, employed by the City of London Corporation as the Lead Commissioner for London's Sexual Health e-service, and on 18 July 2020 a further witness statement from Dr David Asboe, a consultant at the Chelsea and Westminster Hospital who is the Clinical Director of HIV Medicine, Sexual and Reproductive Health at the Chelsea and Westminster Hospital NHS Foundation Trust, the largest provider of HIV and sexual health services in the UK. Evidence for RMG was filed by Mr Harvey, who made three successive witness statements.

57. In his evidence, Dr Asboe emphasises the sensitivity for individuals surrounding questions of their sexual health. He states:

> "Both STI testing and diagnosis/treatment have particular stigma associated with them. People seeking STI services therefore require complete assurance that information regarding this aspect of their health, including the fact that they are accessing testing services, is not disclosed."

Dr Asboe proceeds to refer to the form of T24R returns label, as set out in RMG's *UK Parcel Services User Guide*, and states:

> "I am deeply concerned that not only would Preventx's address be on the label (a simple Google search for which would show that Preventx is the provider of STI testing services), but also that the patient's name would be clearly visible on the packaging as well. It is the combination of the user's address and the Preventx address which potentially compromises confidentiality and may damage confidence in the discretion of the service. I am also struck by how large the "tracked" wording and label appears to be. In my view, based on my many years of experience dealing with vulnerable patients using sexual health services, the addition of such a large label with a patient's full name could be damaging to the effectiveness of the remote STI testing programme. I would expect that a substantial proportion of individuals would find this return packaging grossly off-putting to the extent that it would have a deterrent effect on the amount of patients returning completed samples for testing…."

58. The evidence of Dr Asboe was not contested by RMG.

59. As regards the packaging, the legal basis for the requirements, as set out above, was clarified over the course of Mr Harvey's successive witness statements and then further during the hearing. The rationale for the minimum dimensions set out in PI 650 is not clear but it is binding on RMG as a matter of law. Preventx told the Court that it is in the course of urgently obtaining substitute packages and it expects to have sufficient supplies by the end of August. Although I think that Preventx cannot be criticised for the packages it has been using, since it drew RMG's attentions to the dimensions from the outset (para 25 above) and indeed RMG's Dangerous Goods team had considered the packages after the Plymouth incident in 2018 and made no objection to their size (para 29 above), there can be no question of an abuse or an estoppel insofar as RMG is now applying the mandatory legal requirements. Mr O'Donoghue of course accepted this.

60. As regards the requirement to place the sender's name and address on the label, in his second witness statement of 20 July 2020, Mr Harvey refers to the "Note" to this specification in the text of PI 650 which applies to air transport[2] (para 51 above) and states:

> "As regards the name and address of the patient I understand from my colleague Paul Brown our Dangerous Goods Advisor, that in the case of returns items such as these Preventx, as the consignee, is also arguably the person responsible for the parcel. As a result, the shipper's details (i.e. the name and address of the patient) will not necessarily need to be on the Tracked Returns label."

He proceeds to note that labels used for the return of Covid-19 test kits using the Tracked Returns service often do not have the name and address of the person who requested the test.

61. Although RMG's evidence was therefore somewhat equivocal on this point, in the hearing Mr Woolfe for RMG stated that RMG will not insist that the Preventx returns labels include the sender's name and address on the label unless enforcement action is taken against RMG requiring this to be done.

62. It is unfortunate that RMG did not make this clear earlier. Mr Woolfe said that until it received the evidence of Dr Asboe, RMG had not appreciated that the sender's anonymity would be compromised by the move to a Tracked Returns service because the label for that service includes the sender's name and address.

63. In any event, as a result of the above, the concerns about packaging largely, although not completely, drop out of the case. Moreover, the packaging requirements imposed through PI 650 have nothing to do with a switch to the Tracked Returns service: they apply as much to the return of STI testing samples to Preventx through the Freepost Standard service which it currently uses.

[2] Mr Harvey in fact refers to the version published by IATA. By a note submitted to the Court after the hearing, Mr Woolfe for RMG explained that in fact it is not the IATA Dangerous Goods Regulations exhibited by Mr Harvey but the ICAO Technical Instructions which have the force of law in the UK. However, the text is identical in this respect.

THE LAW

(1) Interim injunction

64. The principles governing the grant of an interim injunction are well-known. Mr O'Donoghue reminded me of the test set out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, and the words of Lord Diplock at 407-408:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial…. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

65. As regards the balance of convenience, Lord Diplock explained that if without interim relief the claimant would be adequately compensated in damages if he succeeded at trial and the defendant had the ability to pay them, no interim injunction should normally be granted. Only if damages would not be an adequate remedy should the court consider the contrary hypothesis of the claimant being granted an injunction and the defendant succeeding at trial and ask whether the defendant would be adequately compensated on the claimant's cross-undertaking in damages.

66. For the purpose of this test, I consider that it does not really matter whether the form of injunction sought is mandatory or prohibitory. As expressed in the opinion of the Privy Council delivered by Lord Hoffmann in *National Commercial Bank Jamaica Ltd v Olnit Corp Ltd* [2009] UKPC 16 at [19], the underlying principle is that "the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other".

67. In the present case, it is clear that RMG would be able to cover any damages which Preventx might recover and, equally, no issue is raised concerning Preventx's ability to meet a cross-undertaking in damages to RMG.

68. I shall discuss the legal issues raised by the claims in competition law and in contract within the confines of the test for interim relief (i.e. whether each raises a serious question to be tried) before considering whether damages would be an adequate remedy or, if not, whether RMG would be adequately compensated under the cross-undertaking.

(2) Abuse of a dominant position

69. The Chapter II prohibition set out in s. 18 CA 1998 provides, insofar as material:

> "(1) …any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
>
> (2) Conduct may, in particular, constitute such an abuse if it consists in—

> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

70. The elaboration of abusive conduct set out in s. 18(2) CA 1998 mirrors the wording of Art 102 of the Treaty on the Functioning of the European Union ("TFEU"). Pursuant to the "consistency principle" set out in s. 60 CA 1998, the concept of abuse in s. 18 is to be interpreted in the same way as under Art 102 TFEU, and this court is bound by judgments in that regard of the European Courts. In addition, the court must "have regard" to any relevant decisions of the European Commission.

71. Preventx alleges that the relevant product market for the purpose of determination of a dominant position is the market for untracked outbound/return postal service for STI test kits and completed samples by way of nationwide letter box network (or equivalent), and that the relevant geographic market is the UK. RMG is alleged to be dominant in each of those markets. RMG sensibly accepts for the purpose of interim relief that it is arguable that it is dominant as alleged. Further, it accepts that if its conduct would amount to an abuse, this will have an effect on trade within the UK. The issue between the parties is whether RMG's conduct gives rise to a serious question to be tried, or an arguable case, of abuse.

72. The Particulars of Claim allege a range of abuses. However, in argument Mr O'Donoghue made clear that the allegation against RMG concerns what is generally termed exploitative abuse rather than exclusionary abuse. He also emphasised that Preventx is not advancing a 'refusal to supply' case. Preventx recognises that RMG will supply a prepaid returns service, but as a tracked parcel service at a higher rate, and that RMG appears to be adopting the same stance towards all other customers seeking a returns service for medical testing kits.

Preventx' Submissions

73. Mr O'Donoghue stressed that the instances of abuse set out under s. 18 CA 1998/Art 102 TFEU are not exhaustive. As stated in *Purple Parking Ltd v Heathrow Airport Ltd* [2011] EWHC 987 (Ch) at [79]:

> "The statutory examples, and those developed by subsequent case-law, are ways in which the basic wrong can be committed, but at all times an eye must be kept on the basic wrong itself."

74. The Particulars of Claim allege four forms of abuse, relying on s. 18(2)(a) – the imposition of unfair trading conditions; s. 18(2)(b) – the limitation of markets to the prejudice of consumers; s. 18(2)(c) – discriminatory conduct; and s. 18(2)(d) – tying. It further alleges that the threat to destroy existing STI kits returned using the Freepost Standard service and the imposition of an "abusively short" transition period each constitute an abuse.

75. In his oral submissions, Mr O'Donoghue focused on s. 18(2)(a) and (b). He submitted that RMG's conduct amounted to (i) the limitation of the market to the prejudice of consumers and/or (ii) the imposition of unfair trading terms. I shall address them in that order.

76. As regards limitation of the market, Mr O'Donoghue pointed to the very significant increase in RMG's charge for returns using the T24R service compared to Freepost Standard: £ [ ] compared to £0.84. Preventx would inevitably have to increase its prices as a result (subject to the terms of its existing contracts), and this would lead local authorities, whose budgets were limited and under pressure, to reduce their purchase of Preventx's remote testing service. The fact that RMG was applying the same policy to other suppliers was no answer: on the contrary, it showed that its conduct would force the market generally to contract. That would clearly be to the prejudice of consumers, and that prejudice was indeed significant given the essential role played by remote STI testing.

77. Moreover, Mr O'Donoghue argued that there was an effect on competition, since Preventx's business is wholly devoted to remote STI testing. He told me that Preventx is less diversified than its competitors, so to the extent that Preventx had to absorb the increased cost itself, it would be weakened as a competitor. As he put it, using RMG's Freepost Standard service, Preventx "was able to maximise its sales and production on the market." By contrast, being forced to use the much more expensive tracked service, which it does not want, would significantly impede Preventx's ability to compete.

78. Mr O'Donoghue submitted that RMG's conduct therefore clearly came within the express wording of the abuse set out at s. 18(2)(b).

79. As regards unfair trading terms, Mr O'Donoghue relied in particular on Case C-127/73 *BRT v SABAM*, EU:C:1974:25, and the Commission decisions in *GEMA statutes* [1982] 2 CMLR 482; *Tetra Pak II* [1992] 4 CMLR 551; and *DSD* [2001] 5 CMLR 609.

80. Both *BRT v SABAM* and *GEMA* concerned copyright collecting societies. In the former, the Court of Justice considered whether the Belgian copyright society was imposing unfair conditions on its members in the exploitation of their works. The Court stated :

> "… the fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of Article [102] imposes on its members obligations which are not absolutory necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright can constitute an abuse."

81. On that basis, the Court indicated that the obligation on members to assign to the society all present and future copyrights, with no distinction drawn between different generally accepted types of exploitation, may be an unfair condition, especially if this would last for an extended period after a member had withdrawn from the society.

82. *GEMA* was a negative clearance decision by the Commission concerning an amendment to the statutes of the German copyright collecting society. The new term at issue prohibited a member from entering into arrangements with broadcasters to share part of his or her copyright revenue where the broadcaster would favour unjustifiably the member's works. The Commission referred to *BRT v SABAM* as establishing that in assessment of a collecting society's rules under the EU competition provisions:

> "the decisive factor is whether they exceed the limits absolutely necessary for the effective protection (indispensability test) and

> whether they limit the individual copyright holder's freedom to dispose of his work no more than need be (equity)."

Applying that approach, the Commission found that the rule was limited to preventing broadcasters obtaining unfair advantages through royalty sharing arrangements with composers in return for song-plugging and similar practices and so did not constitute an abuse.

83. In *Tetra Pak II*, Tetra Pak ("TP") was found to have abused its dominant positions on the related markets for aseptic and non-aseptic packaging cartons and for the equipment used for packaging in those cartons, by a series of contractual conditions governing the sale and leasing of TP equipment and the sale of its cartons. Those included: an obligation that the customer obtains maintenance and repair services exclusively from TP for the entire life of the equipment, beyond the guarantee period; restrictions on the customer adding accessories or modifying the machine without TP's consent; an obligation to advise TP of any technical improvements or modifications made to the machines or cartons, and to grant TP ownership of any intellectual property rights to such improvements or modifications; and a condition that TP's honouring of its guarantee was subject to compliance with all the terms of the contract, not limited to those terms which affected the operation of the equipment. The decision states, at recital (106):

> "… most of these clauses are intended to bind the customer to the group to the maximum extent possible and to eliminate any possibility of trade in the goods which have been supplied to it. For this purpose, a number of obligations are imposed on the customer which have no link with the purpose of the contracts, and that some of these obligations distort the very nature of those contracts, be they for the purchase or leasing of machines."

84. *DSD* concerned the operation of a nation-wide system for the recovery of sales packaging in Germany. Under German environmental legislation, manufacturers and distributors of packaged goods are obliged to have arrangements for taking back the sales packaging from final consumers free of charge; but they are exempt from this obligation if they participate in a third party system which guarantees the regular collection throughout their sales territory of used sales packaging (referred to as an "exemption service"). DSD was the only operator of such a system throughout Germany, although there were alternative operators at more regional level. Undertakings subscribed to DSD's system by entering into a trademark agreement under which they were obliged to use DSD's "Green Dot" trademark on their packages for domestic consumption, and DSD would ensure that used sales packaging would be collected in such a manner as to exempt subscribers from their statutory recovery obligation. However, the licence fee charged by DSD was based solely on the extent of use of the Green Dot mark and not on the extent of use of DSD's recovery service. Thus, if an undertaking wished to recover and dispose of its sales packaging itself ("self-management"), or to use a competing collection system to DSD, it would still have to pay DSD the same level of fee.

85. In its decision, the Commission found that this infringed Art 102 TFEU not only as an "obstructive" (i.e. exclusionary) abuse but also an exploitative abuse. As regards the latter, the decision states:

> "112. Unfair commercial terms exist where an undertaking in a dominant position fails to comply with the principle of proportionality. By giving undertakings a choice between introducing separate packaging and distribution channels or paying an unreasonable licence fee, DSD is imposing unfair commercial terms. In balancing the various interests in this case, DSD does not appear to have any reasonable interest in linking the fee payable by its contractual partners not to the

> exemption service actually used but to the extent to which the mark is used….
>
> 113. As long as DSD makes the licence fee dependent solely on the use of the mark, it is imposing unfair prices and commercial terms on undertakings which do not use the exemption service or which use it for only some of their sales packaging."

86. Both *Tetra Pak II* and *DSD* were appealed to the European Courts, which dismissed the appeals. Neither side before me referred to the European Court judgments.

87. Mr O'Donoghue stressed the reference to the principle of proportionality in recital 112 of the *DSD* decision. He acknowledged that the present case is novel and said that it may in fact be unprecedented. But he argued that this does not in itself make it problematic. He submitted that:

> "…. where a contractual clause and framework has at least a potential adverse impact on competition, it is then up to the defendant to provide a proportionate justification, bearing in mind the competing interests for that clause."

88. To illustrate the broad range of potentially abusive trading conditions, Mr O'Donoghue referred also to the decision of the German national competition authority (the Federal Cartel Office or "FCO") in *Facebook*, 6 February 2019, finding that Facebook had abused a dominant position by failing to give its consumer users a genuine choice over whether Facebook could engage in unlimited collection of their personal data from non-Facebook accounts.[3] That decision is under appeal, but the Federal Supreme Court has recently (23 June 2020) reversed a lower court's suspension of the decision pending the appeal, indicating that the Supreme Court regarded the FCO decision as well supported.

RMG's submissions

89. In summary, Mr Woolfe argued that the fact that demand may be reduced because a dominant company increases its prices has never been regarded as establishing abuse. Such a conclusion would be wholly inconsistent with the well-developed jurisprudence under Art 102 TFEU. It is of course often the case that a rise in price may suppress demand and in that sense have the effect of limiting the size of the market. But if that in itself were to constitute abuse, the case-law on excessive pricing would have taken an entirely different course. There would be no need for the complex and challenging test to determine an excessive pricing abuse set out by the Court of Justice in Case 27/76 *United Brands*, EU:C:1192:74, and applied many times since. The language of Art 102(b), and thus s. 18(2)(b) CA 1998, was addressing a limitation of output as a means of distorting the market, not simply a dominant company increasing its prices.

90. As regards unfair trading conditions, Mr Woolfe submitted that all the EU cases on which Preventx relied depended on showing an adverse impact on competition. The trading terms of a dominant company are not abusive simply because they are not proportionate. The collecting society cases arose in the context where the authors and composers had assigned their rights to the society, so that their economic freedom to exploit their copyright had been severely limited: in those circumstances, terms which limited their economic freedom to exploit their copyright more than was justifiable clearly affected competition. *Tetra Pak* was a clear case where the

[3] Although the decision was taken under German competition law and not Art 102 TFEU, the provisions are effectively the same.

terms condemned as abusive restricted competition, as recital (106) quoted above shows, and that was the basis on which they were found to infringe the Treaty prohibition.

91. As for *DSD*, Mr Woolfe pointed out that the Commission there expressly found that DSD's terms involved the imposition of unreasonable prices, since the main cost for DSD is the operation of its extensive system for collection, sorting and recycling of sales packaging whereas it incurs minimal cost simply in authorising packaging to bear the Green Dot trademark: see recital (111). Moreover, the decision goes into detail at recitals (118)-(131) specifically in terms of the effect of the impugned fee terms on competition with other exemption systems and with self-management solutions. The statement in recital (112) on which Mr O'Donoghue placed reliance must not be taken out of context. Moreover, that statement bears a footnote reference only to *United Brands*, which does not support a broad proposition that proportionality is the criterion to determine whether a term is unfair and thus an abuse. On the contrary, said Mr Woolfe, if a term might otherwise be unfair and therefore an abuse, proportionality provides a "get-out clause".

92. Accordingly, the decision of RMG to require all customers wishing to use its commercial returns service for Restricted Materials to send them under the Tracked Returns service for parcels, and not as Large Letters in the Freepost service could not amount to an unfair term or practice that constituted an abuse.

Discussion

93. As regards s. 18(2)(b) and the limitation of markets, I do not consider that Preventx's allegation of abuse gives rise to a serious question to be tried, essentially for the reasons that Mr Woolfe gave. Mr O'Donoghue's argument rested on the significant increase in price, but excessive pricing as a form of abuse has a well-established jurisprudence since the seminal judgment in *United Brands.* The test there set out cannot be circumvented on the basis that there is an abuse because the price increase leads to a limitation of the market.

94. It is trite to observe that the provisions of the EU Treaties, like all EU legislation, are to be given a purposive, not a literal, construction. The fact that Preventx might be able to show that a literal reading of Art 102(b), and therefore s. 18(2)(b), is satisfied therefore does not assist. Indeed, far from addressing exploitative abuse, which is the basis of Preventx's claim, Art 102(b) is a general formulation concerned with exclusionary abuse, i.e. conduct which has a foreclosure effect on competitors: see e.g. the judgment of the Court of Justice in Cases 40/73 etc *Suiker Unie*, EU:C:1975:174, where the finding of abuse through a system of loyalty rebates was expressly condemned under this head of abuse: judgment at [526]. The case of *SEL-Imperial Ltd v The British Standards Institution* [2010] EWHC 854 (Ch), referred to by Mr O'Donoghue in reply, does not assist his argument. There, the term alleged to violate s. 18(2)(b) had the effect of excluding independent suppliers of replica motor vehicle body parts. I should add that the interpretation of Art 102(b) as addressed to exclusionary abuse is indeed recognised by leading commentators: see, e.g., O'Donoghue and Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, 2013) at pp 240-242.

95. As regard s. 18(2)(a) and unfair trading conditions, there is force in Mr Woolfe's basic submission that RMG's requirement that all Restricted Materials should go as parcels, which generally have different arrangements for handling at mail centres, does not affect competition in any substantive sense and so is distinguishable from all the EU authorities cited by Mr O'Donoghue. Competition law is not a general law of fair dealing. However, despite over half a century of EU jurisprudence, there have been very few cases considering the meaning of "unfair trading conditions" within Art 102(a). The recent German *Facebook* decision indicates the potential breadth of this provision. Moreover, the authorities on excessive pricing, and the *United Brands* test, show that it is not necessary to show a distortion of competition to establish that form of exploitative abuse. If that is the position for the "unfair prices" limb of Art 102(a),

it is not evident that a different approach should apply to the "unfair trading conditions" limb of this provision.

96. In *Intel Corp v Via Technologies Inc* [2002] EWCA Civ 1905, where a contention of abuse of a dominant position was raised by way of defence, the Court of Appeal allowed the appeal against the grant of summary judgment where the court below had held that there was no arguable case of abuse. Sir Andrew Morritt VC (with whose judgment Mummery and Tuckey LJJ agreed) observed, at [32]:

> "… where it can be seen that the jurisprudence of the European Court of Justice is in the course of development it is dangerous to assume that it is beyond argument with real prospect of success that the existing case law will not be extended or modified so as to encompass the defence being advanced."

97. In *American Cyanamid* , Lord Diplock expressed the threshold requirement for an interim injunction, that there is a serious question to be tried, as meaning that the court "must be satisfied that the claim is not frivolous or vexatious": see at 407. In my judgment, having regard to the above considerations, it cannot be said that Preventx's allegation of unfair trading terms fails to overcome that threshold, or, put another way, that it has not set out an arguable case.

98. Moreover, aside from the general requirement that returns of STI testing kits must be sent using the Tracked service for parcels and not the Freepost Standard service for Large Letters, there are three particular aspects of RMG's recent conduct that in my view could constitute an abuse.

99. I think it is clear on the evidence, particularly that of Dr Asboe, that inclusion of the sender's name and address on the returns label together with the word "Tracked" would have a serious adverse impact on the service Preventx offers. The issue of the sender's details derives from legislative requirements and has now been resolved by RMG in its modified stance as best as I think it can be. But there remains the prominent statement of "Tracked" on the returns label. I am somewhat sceptical that this alone, without the sender's details, would be a deterrent at a time when tracking has become a common feature of so many packages. Dr Asboe does not address this point specifically. However, Ms Poole in her third witness statement says that it would have a deterrent effect, particularly on the more vulnerable and sensitive of Preventx's service users. I recognise that the reaction of a High Court judge may not reflect the attitude of such service users and it would be wrong for me to go behind the suggestion in the evidence. I note that Mr Harvey suggests that there may be other ways to achieve RMG's aim of ensuring that the items are processed in the correct way (e.g. by colour coding the labels). It seems to me that if the word "Tracked" may have such a deterrent effect as alleged, an unnecessary insistence that this word is used may well constitute an unfair term.

100. Moreover, the statutory reference to "unfair trading conditions" is broad enough, in my view, to apply to the unfair reliance on a contractual term in certain circumstances. I think that is relevant here in two respects.

101. First, the threat by RMG to destroy returns samples sent by Freepost or to refuse to process them, relying on cl. 3.22 of the General Terms. The alternative offered by RMG is that it would process them but only by charging a price of £3.50 per item, which is substantially higher than the T24R tracked price now on offer. That is held out as the alternative to Preventx signing up to RMG's offered terms, and thus in effect a coercive threat to persuade Preventx to agree. In the circumstances here, when RMG has knowingly acquiesced to Preventx's use of the Freepost Standard service over many years, and at one point encouraged it to use that service in preference to the Tracked parcel service (para 26 above), I think it is arguable that reliance on cl 3.22 for this purpose amounts to an unfair and abusive trading term. Mr Harvey says in his first witness statement:

> "Where our customers have an account manager, as a business we expect that account manager to report any breaches and to discuss and agree with the customers the most appropriate service for them to use."

However, that did not happen in the present case.

102. Secondly, there is the requirement from RMG that Preventx must "migrate" to the Tracked service within 30 days of 22 May 2020 (now extended pending the outcome of these proceedings), otherwise the Business Reply licence will be withdrawn 60 days after the expiry of that 30 day period. For that, RMG relies on its termination right under cl 16.1 of the General Terms. Again, it seems to me that such a short notice period, when applied in circumstances where RMG has been well aware of the nature of Preventx's business and could expect that Preventx would price its services relying on RMG's range of charges, is arguably an unfair trading condition.

103. In a sense, these two aspects of RMG's General Terms fall to be considered together. I do not for this purpose suggest that RMG cannot change the nature of the service it is prepared to offer to Preventx. Subject to the earlier point about the requirement to use a Tracked service at all, it cannot be an abuse for RMG to withdraw the handling of items on the basis of a Freepost Standard service after a reasonable period of notice, and therefore impose a surcharge on any kits sent that way thereafter.

104. On an interim hearing, I cannot definitively determine what that period should be, but given that Preventx received a renewed annual licence for the Freepost Standard service with effect from 5 April 2020, the duration of that licence should be more than ample for Preventx to seek to renegotiate its contracts with local authorities and for the great majority of kits already sent out to service users to be returned. The fact that a STI testing kit may have a shelf-life of five years does not indicate that many service users who have requested a kit then wait several years before they send it back. Equally, the fact that Preventx's contract with the City of London may have more than this period to run, and that it allows little scope for price adjustment, cannot in my view affect the fairness of any notice or switchover period.

(3) Breach of contract and estoppel

105. In the light of my findings as to an arguable case on abuse, it may be that Preventx's contract case adds little to its prospects, at least for the purpose of interim relief.

106. Preventx alleges that RMG is in breach of contract by threatening to cease to provide Preventx with the Freepost Standard service and/or to destroy STI test kits returned with patient samples on the basis of that service.

107. The estoppel is pleaded as precluding RMG from relying, as a ground for either of the above, on the dimensions of and/or the markings on the packages, or the circumstances that the packages constitute UN3733 Biological substances (Category B).

108. The estoppel is said to arise on the basis of either Preventx and RMG's shared assumption that Preventx was entitled to use the Freepost Standard service for its STI testing kits (i.e. estoppel by convention), and/or representations on the part of RMG by permitting Preventx to enter into licences for Freepost Standard services in September 2019 and March 2020, and or statements by Preventx's account managers at RMG (promissory estoppel).

109. As regards the dimensions of the packaging, whatever RMG may have said or assumed in the past, this is a legal requirement. As I stated above, RMG cannot be estopped from now seeking to comply with the law. However, as I indicated, Preventx is taking urgent steps to replace its packages with compliant packaging.

110. For the rest, I was somewhat surprisingly not addressed by Mr O'Donoghue on any authorities concerning the principles governing these two forms of estoppel. Mr Woolfe contended that RMG cannot be estopped from ceasing to provide its Freepost Standard service since cl 16.1 of the General Terms expressly permits it to terminate that contract on 30 days notice. I reject that submission: I think it is possible for RMG to be estopped from relying on cl 16.1 where its only reason for doing so is that Preventx is using the Freepost Standard service for the return of STI testing samples.

111. However, it is fundamental that an estoppel by representation must be clear and that the representee must justifiably rely on it. Since by the time the April 2020 licence was entered into Mr Dewhirst had already made clear to Preventx that RMG would require Preventx to use its Tracked returns service, I do not see how the issue, by what was clearly an automated renewal invoice, of a new licence could possibly give rise to an estoppel. As for the other licence, that expires on 24 October 2020. The only justified reliance upon it which I think might avail Preventx is its sending out of STI kits with Freepost Standard return labels between September 2019 and the end of February 2020, when Mr Dewhirst informed Preventx of RMG's new position. There is no allegation or evidence that Preventx entered into any new contracts with local authorities after September 2019.

112. As regards the acceptance that STI testing kits could be returned using the Freepost Standard service, as Mr Woolfe points out, a promissory estoppel as to contractual forebearance is revocable. As Stuart-Smith J stated in *Virulite LLC v Virulite Distribution Limited* [2014] EWHC 366 (QB) at [123]:

> "Where, as in *Hughes v Metropolitan Railway* (1877) 2 App Cas 439 the representation has been in the nature of an open-ended forebearance, the effect will generally be to suspend the representor's ability to rely upon the underlying contractual obligation and any breach of it until reasonable notice is given that brings the period of suspension to an end. When the period of suspension is ended, the representor will be allowed to rely upon the underlying contractual obligation as from that date, but he is generally not entitled to enforce the obligations as if they had been in full force during the period of suspension."

113. The same approach applies to an estoppel by convention. See *Spencer Bower: Reliance-Based Estoppel* (5th edn, 2017), para 8.54:

> " … the estoppel by convention, at least where the subject matter is the meaning, effect or existence of a promise (and not property) or right to future performance, operates in the manner of a promissory estoppel, with only suspensory effect so far as necessary to avoid injustice ...."

114. Accordingly, I do not see that it is arguable that the breach of contract case will enable Preventx to obtain more than a reasonable period of notice of withdrawal of the Freepost Standard service.

ARE DAMAGES AN ADEQUATE REMEDY?

115. This question has to be considered separately by reference to the different actions of RMG alleged to constitute an abuse.

116. It is rightly accepted by RMG that damages are not adequate if packages of STI testing samples posted for return to Preventx are destroyed or not delivered. Any such steps could have a potentially devastating impact on the service users affected, and may do serious damage to

Preventx's long-term reputation. However, if RMG does not destroy any kits but duly returns them to Preventx at additional cost, that cost sounds in damages and does not, it seems to me, entitle Preventx to an interim injunction.

117. If the returns packages service which RMG offers to Preventx for the future requires labelling with the word "Tracked", even if RMG will no longer insist on inclusion of the sender's name and address, may cause loss of confidence in the anonymity of the service among a significant number of Preventx's service users and so deter them from using the service, the resulting damage to Preventx's reputation with both service-users and its customers (i.e. the local authorities) will in my view also be very difficult to compensate in damages.

118. By contrast, if RMG is able to charge extra for handling Preventx STI returns sent as Freepost Standard packages, it is hard to see that it suffers any loss at all, and the same applies to the use of an alternative label which omits the word "Tracked". If I am wrong about this, and it does suffer loss, it seems to me that can only be financial and so will be compensated by Preventx's cross-undertaking.

119. However, both the above matters are distinct from the question whether the rapid withdrawal of the Freepost Standard service and offer to carry returns only as parcels by the T24R tracked service, if that should be found to be an abuse or breach of contract, in itself causes loss between now and trial which is not compensatable in damages. Once the problems about the sender's name and address and the "Tracked" label are resolved, the loss to Preventx is the extra cost of the T24R service. Mr O'Donoghue submitted that this shift will cause significant organisational upheaval to Preventx and that there will be difficulty going back. However, there is no evidence of either and I regard both as implausible. The upheaval caused to Preventx is the requirement to change its packaging to comply with PI 650, but that has to be done in any event. I should add that there was no suggestion that Preventx is unable to pay the difference in price between now and trial.

120. I have considered the evidence from Ms Poole about Preventx's expansion plans which had had to be put on hold because of the uncertainty, and the potential reduction in profitability of its core service. However, it seems to me that the former will not be resolved by interim relief: the uncertainty will remain until final judgment (or settlement) and even if relief were granted, Preventx would remain under potential liability by reason of its cross-undertaking. The latter is manifestly a financial loss which damages can remedy.

CONCLUSION

121. For the reasons set out above, on the basis that:

i) Preventx will undertake to use its best endeavours to introduce by 31 August 2020 new packaging compliant with the dimensions specified by PI 650; and

ii) RMG will undertake not to require the returns label to include the sender's name and address unless required by a third party to do so under the Air Navigation (Dangerous Goods) Order 2002,

I will grant an injunction to restrain RMG until trial or further order:

iii) from refusing to continue to provide its Freepost Standard service to Preventx for returns of STI test samples for so long as it cannot offer its T24R Tracked returns service on the basis that the returns label need not bear the word "Tracked"; and

iv) from refusing to process and deliver STI test samples returned to Preventx bearing labels for the Freepost Standard service, without prejudice to RMG's imposition of an additional charge for such processing and delivery.

122. Finally, I note that cl. 18 of the General Terms provides that if RMG and its customer cannot resolve their dispute, "either of us can refer the dispute to any recognised dispute resolution service." This is a case which in my view is a strong candidate for mediation. Both sides are commercial parties; Preventx considers that it needs to deal with RMG to carry out its service; and it is very much in the public interest that Preventx should be able to do so on a reasonable basis.