



Neutral Citation Number: [2020] EWHC 1806 (Pat)

Case No: HP-2020-000020

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PATENTS COURT (ChD)
SHORTER TRIALS SCHEME

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Tuesday, 7th July 2020

Before:

MR. JUSTICE BIRSS
(Remotely via Skype)

Between:

FACEBOOK IRELAND LIMITED (a company incorporated in Ireland)	<u>Claimant</u>
- and -	
VOXER IP LLC (a company incorporated under the laws of the State of Delaware)	<u>Defendant</u>

MR. THOMAS MITCHESON QC (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**

DR. BRIAN NICHOLSON QC (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Defendant**

Approved Judgment

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MR. JUSTICE BIRSS:

1. I have before me an application to fix a trial date in a case which is currently in the Shorter Trials Scheme (CPR Part 57A, Practice Direction PD57AB, Section 2). The case is a patent revocation action brought by Facebook Ireland Limited against the patentee Voxer IP LLC, relating to patent EP (UK) 2 393 259 entitled “Telecommunications and multimedia management method and apparatus”. It is part of an international dispute between Voxer and Facebook. On 7th January 2020, Voxer commenced infringement claims in the United States alleging infringement of some related patents. On the same day Voxer also started proceedings in Germany alleging infringement of two patents, one which is the German equivalent of the EP (UK) patent in issue in this case.
2. There has not been any discussion between the parties about litigation in England prior to this. Facebook brought this claim without sending a letter before action and I will come back to that.
3. Given the date of issue of the claim the case management conference would, if one ignored the summer vacation, normally take place in late August or early September. However Facebook has applied now to fix the trial date because it is keen to get on with these proceedings. It makes no secret of the fact that one of its motivations is in order to have a decision on the validity of the UK patent prior to the consideration of the infringement claim brought by Voxer in Germany. It will be recalled that in the German system, infringement and validity are bifurcated. The hearing in Germany is likely to take place in April or May 2021. Facebook seek that the trial be listed from a date starting from 1st March 2021.
4. Voxer resist fixing a trial date now. They contend that the right thing to do so to fix the trial date at the case management conference, and that that hearing of the CMC should take place in October.
5. When the court is considering an application for an expedited trial date, various judgments of the Patents Court have made it clear that arranging for a trial in London of a validity dispute prior to a hearing on infringement of the same EP in Germany is not, on its own, a ground for expedition; albeit that it is a factor which the court can take into account, not necessarily a particularly strong factor.
6. The principles which apply to decide the questions I have to decide depend on two matters. The first is the terms of the Shorter Trials Scheme (STS) itself. Under its terms it is clear that parties can do what Facebook are doing in this case and apply for a trial date before the CMC. That is designed into the STS at paragraph 2.38 as follows

2.38 At the CMC the court will—

- (a) review the issues;
- (b) approve a list of issues;
- (c) consider ADR;
- (d) give directions for trial;

(e) (if it has not already been done before the CMC,) fix a trial date (or window), which should be not more than 8 months after the CMC and with a trial length of not more than 4 days (including reading time);

(f) fix a date for a Pre-Trial Review.

7. As paragraph 2.38(e) provides, under the scheme normally the trial date will be fixed at the CMC, but it can be fixed before the CMC. This provision is intended to accommodate circumstances in which one or both parties seek to have the trial date set at an earlier stage prior to the case management conference
8. One dimension, as Mr. Mitcheson QC for Facebook, pointed out, is that the STS itself arranges for a relatively late date for the case management conference as compared to the timing of the CMC in other cases outside the scheme, such as many patent actions (see STS paragraph 2.26). That is one reason why the rule at paragraph 2.38 is drafted in the way it is. It is there in order to allow for the early fixing of a trial date. Early certainty about when a trial will take place can be useful; early fixing of a date being not necessarily the same thing as the fixing of an early date.
9. As Mr. Mitcheson also points out, if the CMC took place in October as Voxer proposes, from that perspective a trial date in March would only be in about five months time. At such a CMC, which itself would be later than one would have expected normally for a case like this, Voxer might ask the court not to fix a trial in March on the ground that by then there would be too little time to prepare for it.
10. The second matter is whether this is an application for expedition. Dr. Nicholson QC for Voxer submitted that it was common ground that this is an application for expedition. I do not agree. The window for the trial sought by Facebook is within the contemplation of the STS itself. When the original pilots for the STS and the Flexible Trial Scheme were commenced, guidelines were given as follows:

“The aim of both pilot schemes is to achieve shorter and earlier trials for business related litigation, at a reasonable and proportionate cost. The procedures should also help to foster a change in litigation culture, which involves recognition that comprehensive disclosure and a full, oral trial on all issues is often not necessary for justice to be achieved.

That recognition will in turn lead to significant savings in the time and costs of litigation. The Shorter Trial procedure offers dispute resolution on a commercial timescale. Cases will be managed by docketed Judges with the aim of reaching trial within approximately 10 months of the issue of proceedings and judgment within six weeks thereafter.”
11. This Guidelines remains just as relevant to the Shorter Trials Scheme today now that the pilot is finished and the scheme is incorporated into the rules applicable to the Business and Property Courts as it did when the pilots started.

12. This claim was issued on 27th May 2020 and served a week or so later. Therefore a trial listed to be heard sometime from March or early April 2021 onwards is within the contemplation of the guidance. Furthermore the provisions of the STS make it clear that the reference to a trial date eight months from the CMC is to the trial being not more than eight months after that. Accordingly, looking at the matter that way, to fix a trial date within the window sought by Facebook does not involve an order for expedition, it involves the normal application of the Shorter Trials Scheme. By contrast if a party had been seeking a date which was materially earlier than one contemplated by the guidance and the terms of the STS, then questions of expedition would arise, but that is not what is going on on this application.
13. The question therefore is whether I should make an order directing that the trial date be fixed from a date in a window starting at the beginning of March? I have decided should, for a number of reasons. First of all, from examining the patent -- as I did in my pre-reading and also the quick look at it that Mr. Mitcheson took during the hearing -- it is clear that as presently constituted, this case is eminently suitable for a three to four-day trial under the Shorter Trials Scheme. It relates to the validity of a telecommunications patent. The technical category rating is 4, which means that it will be heard by one of the category 4 judges. There are two items of prior art. From what I can see of the arguments on validity as they are now, they are the sort of things that could readily be done in the Shorter Trials Scheme.
14. I said I would come back to the lack of a letter before action. STS paragraph 2.17 provides that a letter before action ought to be sent unless there is a good reason not to; and paragraph 2.19 provides that the defendant should normally respond within 14 days. Nevertheless this is not a case concerning a new dispute between the parties. By the time this case began Voxer had already started patent proceedings against Facebook on a corresponding European designation of the same patent. Therefore the absence of a letter before action has two but only two consequences. We do not yet know whether Voxer agrees that the action should proceed in the STS and it could be said that the claim was started about 14 days earlier than it might otherwise have done. The former point is addressed next. The latter is not significant.
15. Dr. Nicholson submits that his clients may take various steps in the proceedings which might mean that the case is not suitable for the STS, and there may be an application to transfer it out of the Scheme when the CMC comes to be heard. That may be. Mr. Mitcheson asked for the order to be made now without prejudice to the ability of Voxer at the CMC to apply to transfer out. If I thought the case was not suitable for the scheme at all then it would not be sensible to make such an order, but I have already addressed that point. The possibility of a later transfer out of the scheme is an inevitability when one is fixing trial dates prior to the CMC, but it is built into the STS itself and is not a reason not to do it. I will make the order on the basis Mr Mitcheson proposes. One point to note is that if the case does turn out to require more days to try than the STS provides for then the normal approach is for the trial to be taken out of the list and re-fixed in the normal way. The STS is not a method for acquiring early trial dates for cases which do not fit in the scheme.
16. In terms of the listing priorities and the expedition of hearings, it is relevant to take into account the philosophy of the Shorter Trials Scheme. A business related dispute which can be dealt with in the scheme will take up fewer court resources than it would

ordinarily have required. Ordinarily the longer trial which would have been needed would have been listed for a later date, but since the dispute will occupy less of the court's resource, accordingly the court is able to offer an earlier date. That is part of the *quid pro quo*, if I can call it that, which is at the heart of the idea of this scheme.

17. It is said that counsel are unavailable in March. That may or may not be so but that is a matter of the ordinary listing priorities which the parties can liaise with the Listing Office about when fixing the precise trial date. Counsel's convenience is not a matter of great weight when addressing issues of this kind at this stage.
18. Another dimension, which is a small point, is the presence of the Easter vacation. That is another reason why it makes sense to have the listing window for this case starting in early March such that it will be at least possible, if the court can accommodate it, to have a trial before Easter rather than after it. Ten months from issue would more or less coincide with that vacation, which does not make sense. In any case as I said, this is not an application for expedition, because the Shorter Trials Scheme makes clear the trial date ought, if possible, to be not more than a certain distance from a given date.
19. For all those reasons, I will make the order sought by the claimant.

(For continuation of proceedings: please see separate transcript)
