

Neutral Citation Number: [2022] EWHC 2060 (Pat)

Case No: HP-2022-000007

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

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

Date: Friday, 8th July 2022

Before:

MR. CAMPBELL FORSYTH
(Sitting as a Deputy Judge of the High Court)

Between:

COOK (UK) LIMITED
(a company existing under the laws of France)

Claimant

- and -

(1) BOSTON SCIENTIFIC LIMITED
(a company incorporated under the laws of
Bermuda)
(2) BOSTON SCIENTIFIC MEDICAL
DEVICE LIMITED
(a company incorporated under the laws of
Ireland)

Defendants

AND

BOSTON SCIENTIFIC SCIMED INC
(a company incorporated under the laws
of Minnesota, USA)

Third Party

- and -

COOK MEDICAL EUROPE LIMITED
(a company incorporated under the laws of
Ireland)

Fourth Party

COOK NEDERLAND B.V.
(a company incorporated under the laws of the Netherlands) **Fifth Party**

WILSON-COOK MEDICAL INC
(a company incorporated under the laws of the state of North Carolina, USA) **Sixth Party**

COOK IRELAND LIMITED
(a company incorporated under the laws of Ireland) **Seventh Party**

Transcript of the Stenograph Notes
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MR. IAIN PURVIS QC and MR. TOM ALKIN (instructed by **Powell Gilbert LLP**)
for the **Claimant**
MR. MICHAEL CONWAY (instructed by **Simmons & Simmons LLP**) for the
Defendants
THE THIRD TO SEVENTH PARTIES did not appear and were not represented

APPROVED JUDGMENT ON CMC

MR. CAMPBELL FORSYTH:

1. This is a case management conference in a patent action between Cook (UK) Limited ("Cook") as Claimant and Boston Scientific Limited and Boston Scientific Medical Device Limited as Defendant's ("Boston"). It also involves a number of other related entities. The action was commenced on 8th March 2022 by Cook and issued in the Shorter Trials Scheme. There was an *ex parte* hearing before Mr Justice Meade on the same date, 8th March 2022, which related to

interim anti-suit injunctive relief relating to parallel proceedings in the Netherlands. That matter has been settled between the parties.

2. At that time the patent in dispute was EP (UK) 3 023 061 (the “061 Patent”). The 061 Patent relates to medical devices, in particular endoscopic clips, which can be used to treat, amongst other things, gastrointestinal bleeding. The substantive claim brought at that time by Cook was for a declaration of invalidity in relation to the 061 Patent, with a single piece of prior art asserted for novelty and inventive step.
3. At a further hearing before Mr Justice Mellor , on 18th March, Cook sought to obtain a trial listing, in its claim on the 061 Patent, with the objective of obtaining, apparently, an early trial date. At that time, the matter related to a single patent and trial was envisaged to take four days, with two experts on either side and was therefore deemed suitable for the Shorter Trials Scheme.
4. I have been referred to Mellor J's judgment, in particular his paragraph 19, which stated:

"For the moment, I will leave this case in the Shorter Trials Scheme. If it transpires that EP 915 is to be brought into the action, then this case is very likely to be transferred out of the Shorter Trials Scheme at the CMC. The reason I will leave this case in the Shorter Trials Scheme is to take account of the possibility that the trial will only involve EP 061. However, I will direct a listing on the basis of five days in court, with one day pre-reading and one day off to prepare closing submissions. I have increased the estimate to take account of the distinct possibility that EP 915 will shortly be added into the action and, as usual, the parties must keep the trial estimate under review and if it changes, they must notify the court promptly and, in this case, the trial estimate can be reviewed by the court at the CMC."

5. Mellor J was aware from the proceedings that Boston had, as I understand it, written to Cook in relation to related Dutch proceedings asserting a related patent EP 3 443 915 (the "915 Patent") and, therefore, as is noted in his judgment, it was his view that it may arise in the related High Court proceedings. At the time of that hearing, Boston were unable to confirm if that was the case. I understand that in April, I believe by 21st April, the 915 Patent was introduced into the High Court proceedings along with a counterclaim for infringement by various Cook products. In turn, Cook also claims that 915 Patent is invalid.
6. This matter is part of complex cross-border patent litigation. By way of background, after the EPO Opposition proceedings in relation to one of the patents in issue, a preliminary injunction was applied for and obtained in Germany by Boston against Cook. The 061 Patent will expire before trial in September 2022 and therefore injunctive relief is claimed only in relation to the 915 Patent which expires in September 2024.
7. The parties provided detailed submissions and evidence in relation to this CMC which I have reviewed. There have also been arguments in relation to the meaning of the comments of Mellor J in his noted judgment. I believe it is clear that in his decision Mellor J was making a sensible provision for the prospect of a dispute on the 915 Patent being heard at the same time as the 061 Patent case in the High Court proceedings and that in those circumstances he expected this matter to come out of the Shorter Trials Scheme as no longer being suitable for the Shorter Trials Scheme.
8. In order to manage this CMC and any directions for trial appropriately, I need to make a decision on whether this case remains in the Shorter Trials Scheme

or is transferred out. I have considered the submissions and evidence on this issue, including the fourth witness statement of Mr. Powell for Cook, at paragraphs 6 and 7. He notes there that this is a matter that is no longer appropriate for the Shorter Trials Scheme. Likewise, Mr. Burdon's first statement for Boston, at paragraph 12, similarly accepts this is no longer a matter that should fall within the Shorter Trials Scheme.

9. In the circumstances of this matter there is no need to record too much detail on the relevant procedure. There have been earlier decisions which have dealt with the power of the court to transfer Shorter Trials Scheme cases out, including Birss J, as he was then, in *Family Mosaic Home Ownership Ltd v Peer Real Estate Ltd* [2016] EWHC 257. In coming to my decision on this matter I have considered the overriding objective to deal with cases justly and at proportionate cost.
10. There are now two patents in issue (the 061 Patent and the 915 Patent "the Patents"), with multiple pieces of prior art. There is a potential for experiments in the case. There is also a concern about the potential level of fact evidence. Further, the parties agree (subject to my approval) that an additional day needs to be added to the court timetable for trial. In all the circumstances, this is not a case that is any longer suitable to remain in the Shorter Trials Scheme.
11. In making that decision, I have taken into account any potential impact on the overall administration of the Court and the list. I understand the additional day for the trial can be accommodated by the Court list. I have therefore decided this case should now be transferred out of the Shorter Trials Scheme.

(For continuation of proceedings: please see separate transcript)

12. This is a further decision as part of the case management conference in relation to the noted case between Cook and Boston. I set out relevant context and background earlier. Further to my decision that this case is no longer suitable for the Shorter Trials Scheme and has been transferred out of the Shorter Trials Scheme, I invited the parties to consider the consequences of that decision on any directions for trial. I pointed out that as part of that consideration, they should look at costs budgeting and possible disclosure issues.
13. After a short adjournment, the issue that I have been addressed on first was that of costs budgeting. Both parties have explained that the issue of costs budgeting (where the case was transferred out of the Shorter trials Scheme) was not something that had really occurred to them. It is unfortunate that in this context, where the parties were clearly made aware of this potential by Mellor J in his decision on 18th March and in circumstances where their own evidence accepted this case was not suitable for the Shorter Trials Scheme, no thought had been given to aspects of the consequential directions that would necessarily be matters the Court has to consider in the proper conduct of the case.
14. The position of Cook, explained by its counsel Mr. Purvis, is that they are not willing to certify this case as one that is worth more than £10 million. That figure comes from CPR rule 3.12, which states:

"(1) This Section and Practice Direction 3E apply to all Part 7 multi-track cases, except -

(a) where the claim is commenced on or after 22nd April 2014 and the amount of money claimed as stated on the claim form is £10 million or more ...".

15. The default position would therefore be that this case would now be cost-budgeted and appropriate directions should be made for costs budgeting.

However, the position put by Cook's counsel is that, effectively, we are where we are, we have conducted this case on the basis it is in the Shorter Trials Scheme and that it is proportionate to continue on that basis.

16. I pointed out that on any basis, now that this matter is no longer part of the Shorter Trials Scheme, it would not seem the rules relating to the summary assessment of any costs orders in a later trial would apply, which was agreed.
17. However, it was Cook's view on the matter that the case should be dealt with by way of summary assessment on costs to this point in time at least, and then from a point that I may order, continue onwards to be assessed in the normal way.
18. Boston's position is that this is a case that should, in the ordinary way, now be dealt with by way of costs budgeting. Neither party has said the practicalities of cost budgeting could not be achieved, albeit there is a slightly compressed timescale to deal with here.
19. As regards summary assessment of costs applying to costs up to this point in the case is concerned, Boston proposed it would be more appropriate for the costs incurred up to this point be set out as part of any costs budget in the normal way for a case that has not been part of the Shorter Trials Scheme.
20. This appears to be a valuable case. However, the party that brought the initial action, Cook, and which may be subject to a claim for damages, has explained it does not believe this is a matter which has a value of more than £10 million.
21. Taking into account the submissions on this issue, in all these circumstances, it is my decision that this case should be costs budgeted going forwards. The

parties have indicated they will attempt to agree appropriate directions for the costs budgeting as part of the overall directions to trial.

22. I also need to decide how costs should be dealt with up to the CMC, the point from which I have ordered costs budgeting. On balance, the most appropriate and proportionate way to deal with these costs in the circumstances is to leave those costs to be summarily assessed by the Court at the appropriate time on the basis they were incurred while the case was within the Shorter Trials Scheme.

(For continuation of proceedings: please see separate transcript)

23. This is a further decision as part of the case management conference in relation to the noted case between Cook and Boston. The parties dispute the terms of proposed disclosure and/or fact evidence as part of the directions to trial.
24. Parties to a patent case are normally obliged to provide disclosure in accordance with CPR Part 31, as modified by CPR Part 63 and the relevant Practice Direction and Practice Direction 51U. I have been addressed to the Patents Court Guide, in particular paragraphs 11.3, 11.4 and 11.5. In the end, I am not convinced the discussions on this point really took the disputed matter much further forwards. Cook is to provide a Product and Process Description ("PPD") on the issue of infringement. The parties accept that the information in the PPD must be adequate to deal with all questions of infringement. However, in the context of this dispute it is, in the end, a description of the product.
25. Cook explains its understanding of how the case against it is being put is the claims, in particular Claim 1 of the 915 Patent, require the allegedly infringing products in their use to provide 'user feedback'. They further characterise this as

an alleged non-visual stimuli perceived by a user during the clinical deployment of the device. Its position appears to be that this is a subjective experience of the user and therefore to deal with this it may need to supplement the PPD with disclosure (and fact evidence). Boston explains fact evidence or disclosure dealing with such subjective views will not have been made with the particular requirements of the claims in mind nor be applying the same standard of what might constitute “feedback” in reporting their experiences of the clip.

26. Paragraph 11.5 of the Patents Court Guide states:

"Insofar as a party is not able to verify that the PPD is a true and complete description of all relevant aspects of its product or process (for example because it does not make certain components in its product and does not know how they work), then the correct course is for the party to verify such parts as it is able, and to serve a disclosure list (which may or may not contain any documents) in relation to the remainder."

27. Therefore, the correct course where a PPD is not able to verify a true and complete description of all relevant aspects is to serve a disclosure list in relation to the remainder. Cook are aware of the need to comply with these obligations. However, that does not necessarily deal with the point before me. What happens if, as is suggested, the PPD were supplemented by disclosure from Cook and this information still does not deal satisfactorily with the explained points on, for example, user feedback? Of course, it will depend on the reasons and it is open to Boston, in the usual way, to try to obtain further and better particulars.

28. Cook takes the position that in the context explained in its evidence this is a situation where the Court should also order limited disclosure from Boston on

this issue of 'user feedback'. It argues this is a critical point, one where Boston has relevant information and is proportionate and fair in the circumstances.

29. The position taken by Boston is, in summary (I have considered the points more fully but do not repeat all the arguments here), that the PPD should be sufficient and it is then for experts to opine as needed on any such feedback issue. It also appeared to accept this issue may require experiments as a way of dealing with the dispute by looking with logical analysis scientifically at the relevant forces involved and an opinion from an expert of what that may mean in the context of the claims as properly construed. Cook's concern appears to be (again I do not deal with all their points here but have taken them into account) that such an analysis may not be satisfactory. It may want to put evidence before the Court that, even if an expert opined on what may be experienced by a user through such forces, if nobody or a significant portion of users did not have such an experience, it says that may be a material consideration for the Court to be able to deal with the matter justly.
30. The parties have accepted that in the context of this matter being transferred out of the Shorter Trials Scheme, the consequential amendments to the procedure and directions can be dealt with at this hearing, including dispensing with certain of the procedural requirements. In the circumstances, and bearing in mind the nature of the dispute and the positions taken by the parties I will use my case management powers to waive the usual disclosure procedural requirements that would normally be in place had this case started in this track.
31. Boston resists the request for disclosure (and the related fact evidence) as set out in three broad categories at paragraph 31 of its skeleton argument. I have

discussed the first category above. The second main argument is that seeking to rely on the materials requested would not be probative to the issues of the claimed user feedback. The third is, in that context, it would require a very substantial search and disclosure exercise and would not be proportionate.

32. Cook have explained why it believes there is an issue here and that these disclosure documents may be of relevance. The specific documents that are being requested relate to Boston's analysis or alleged analysis and database of information relating to the issue of 'user feedback' relating to Cook's products which are alleged to infringe. Cook's position appears to be that it may have no information on this point because it was not at the forefront of its understanding in the context of its products, whereas it apparently was for Boston. Therefore, it says, this information may well be of use to the Court, depending on how matters develop.

33. There was considerable debate on this point. Having considered the arguments and evidence, I accept (without taking any view on substantive issues which would be dealt with at trial, such as construction) that the issue of the claimed 'user feedback' could be a relevant point in the case. I also understand this issue relates to the 915 Patent and this is the patent where injunctive relief is being claimed.

34. It seems to me the information in these documents could therefore potentially be of probative value in the context of this case, as described to me. Obviously, it is an early stage in the proceedings, but I need to assess how to deal with this case justly and proportionately. In this context, it is my view, based on all of the evidence and submissions that I have been provided with (I have not mentioned

all the points raised but have considered them) and bearing in mind the overriding objective, this is a case where I should, subject to proportionality, allow limited disclosure from Boston for the issues that have been identified.

35. The matter of proportionality has been raised in relation to the argued probative value, but also simply the expense of undertaking the exercise. Evidence has been given by Mr. Burdon for Boston on this topic. In his first statement he explains the exercise could cost £100,000 or in excess of that amount. At the hearing, although not given in evidence, in submissions Boston noted there were a set of documents numbering around 730,000 which were identified in the discovery database in the related US proceedings. I understand the evidence provided on proportionality of the disclosure exercise was provided by Boston in consideration of this discovery database. Boston's counsel explained that on a further analysis of this database with some word searches, a significant number of documents were identified. In assessing this on rough and ready basis of one hour per document it would come to around £360,000. It was also, quite correctly, pointed out that is just the disclosure exercise, there could be additional costs flowing from the consequences of such an exercise in the context of documents being reviewed and dealt with in the case.
36. It was confirmed at the hearing that Cook would only look for any disclosure to be given in relation to a subset of this database, the 26,000 documents that had been disclosed in the US proceedings.
37. In this context, I should say these are large companies involved in this area of medical devices and this is a significant case, albeit I recognise it is one that has not been certified at more than £10 million. It is also part of significant cross-

border litigation and subject to injunctive relief where the 915 Patent is found to be valid and infringed. Points were also made regarding the lack of suitability of such disclosure in the context of a Shorter Trials Scheme case. The points specific to that argument tend to fall away now that the case has been transferred out.

38. I also note that it appears, although I do not have any evidence on it, that one hour per document may be the case on some documents, but in my estimation this would seem quite a lengthy period of time to be assessed as needed for all documents of any size. However, regardless of that point, the actual number of documents now being considered is less than 5% of the number that was actually considered in issue by Boston in its evidence and submissions. Therefore, in the circumstances, it is reasonable to assess it is likely to be a much less significant exercise than was expected. That being said, it is important to ensure this exercise does not take on a life of its own. To that end, in the circumstances, it is reasonable and proportionate to allow the limited disclosure from Boston on this issue. The parties indicated they will try to agree the precise terms of the detail of that disclosure exercise in the proposed directions, bearing in mind my comments and ensuring that it does not become overly expensive or interfere with the proper conduct of the preparation for trial.

39. There is a related issue on fact evidence. Cook explain, for effectively the same reasons as set out in its arguments for disclosure from Boston, that it should be permitted to lead fact evidence to deal with the alleged infringement, in particular of the 915 Patent and it would be wrong in principle to preclude Cook from leading appropriate evidence of fact.

40. As mentioned, the probative value of the fact evidence is related to the point on disclosure and, in effect, the arguments on the subjective views of users and their impression of relevant feedback. There was debate about tactile feelings for users in the use of the allegedly infringing products and about the particular ways that the products are used. It is early in the proceedings to be dealing with that and any particular construction. Nobody is going to be tied to any particular point at this stage in the case. The view of Cook is that this fact evidence is important, depending on how the case transpires, to show that if, on their view of how the claims may be asserted, a party does not sense any feedback, that may be material to their case on non-infringement.
41. Boston's view on the issue is similar to its position on the disclosure. It does not believe fact evidence on this issue will be helpful or necessary in the context of the PPD. However, Boston has acknowledged that in the context of experts in the case, they may be called upon to give such fact evidence if appropriate. It was also explained to me that in addition to that evidence, Boston had acknowledged it may be acceptable to have one set of fact evidence on a user experience.
42. It has also been pointed out to me that fact evidence would normally be allowable in such a case.
43. Taking into account all the circumstances, this is a case where this point on the subjectivity/objectivity of the noted user experience with feedback may or may not ultimately be material to the claimed infringement going forward. However, I have seen evidence that convinces me it could be an issue and it should not be discounted at this point.

44. In identifying what fact evidence may therefore be being prepared to allow for the proper conduct of the case I am concerned by the open-ended nature of this potential evidence and the inability of Cook to be able to give me wholly acceptable assurances in relation to the volume of that evidence. I have, however, been given assurance by Cook's counsel that it will not impact on the trial and that obviously gives me some comfort.
45. Mr. Powell also notes in his evidence for Cook for this hearing that the fact evidence should not be restricted to that being given by the parties' nominated experts but instead should be given by individuals familiar with the operation of the Instinct Clip and Instinct Plus (allegedly infringing products). I understand this fact evidence is therefore limited to individuals familiar with the operation of the products alleged to infringe, the Instinct Clip and Instinct Plus on the user feedback. With that in mind, and on the basis that it will not interfere with the trial preparation or the trial date, and on the basis there will be an opportunity for this to be reviewed at the PTR, then I will allow fact evidence on those terms.

(For continuation of proceedings: please see separate transcript)

46. There is a request from Cook for samples of Boston's products called the Resolution. The request appears to relate to the situation where there is some evidence in the US related proceedings that this product has been mapped onto various related patents claims. It seems that even if there are some interesting aspects to this product in the sense that it somehow is assumed to be derived from the technology that is in the Patents in issue in this case (which I am not sure is accepted and the Resolution product does not appear to be mentioned in

the Patents) the Court's task is somewhat different. The Court will construe the claims of the Patents through the eyes of the skilled team.

47. Although it sounds like a relatively straightforward exercise to provide such samples, the consequences of could be significant. I also need to be aware of not simply making such a provision where there is not a good reason at this point. Therefore, on balance, bearing in mind the need to be proportionate in dealing with matters in this case, I do not agree that a sample should be provided.

(For continuation of proceedings: please see separate transcript)

48. In relation to the directions, there has been agreement between the parties over statements of case on infringement and validity in large part. I am pleased to see that. Many patent cases benefit from early and better particularisation and this is already a step forward on where many cases were for many years. The parties have recently agreed to a further point that was in dispute and the Claimant has now agreed it will also identify which element of each relevant embodiment in the prior art corresponds to which integer of each claim.
49. The remaining issue regarding the statement of case on validity is the Defendant's request that the Claimant also states the adaptations or modifications that Cook contends would have been obvious for the skilled team to make to each such embodiment. At the start of the hearing I referred the parties to a case I was aware of *Emtelle UK Limited v Hexatronic UK Limited* [2019] EWHC 2230 (Pat) where Mann J dealt with a request for further particularisation on a statement of case on validity. It is just an example. I take

no more from it than the fact there was an analysis undertaken by the Judge in that case.

50. A benefit of increased particulars is to allow the parties to narrow the issues and focus their efforts. However, that can only go so far. As has been pointed out, expert evidence is critical, particularly to obviousness. Experts do not need to be named for many months. Therefore, requiring a party to undertake this further particularisation as suggested could result in difficulties later, not least that later amendments could become necessary. It is, on balance, too onerous a requirement at this stage. It is in my view, in the context of this case, not a fair step in managing the case. What has been agreed in relation to the statement of case on validity should be a useful guide for the experts to consider and enough for the moment in the current circumstances.

(For continuation of proceedings: please see separate transcript)