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Claim No. HP-2023-000043

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: Wednesday, 27th March 2024

Before:

MR. JUSTICE MEADE

Between:

(1) DISH TECHNOLOGIES LLC
(a company incorporated under the laws of the state of
Colorado, USA)
(2) SLING TV LLC
(a company incorporated under the law of the state of
Colorado, USA)
- and -

Claimants /
Applicants

(1) AYLO PREMIUM LTD
(a company incorporated under the laws of Cyprus)
(2) AYLO FREESITES LTD
(a company incorporated under the laws of Cyprus)
(3) AYLO BILLING LIMITED
(a company incorporated under the laws of Ireland)
(4) AYLO BILLING US CORP
(a company incorporated under the laws of the state of
Delaware, USA)

Defendants /
Applicants

And between:

Claim No. HP-2024-000009

(1) AYLO PREMIUM LTD
(a company incorporated under the laws of Cyprus)
(2) AYLO FREESITES LTD
(a company incorporated under the laws of Cyprus)
- and -

Claimant

(1) DISH TECHNOLOGIES LLC
(a company incorporated under the laws of Colorado,
USA)

Defendant

MR. TOM MOODY-STUART KC and **MS. KYRA NEZAMI** (instructed by **Allen & Overy LLP**) appeared for **DISH**.

MR. IAIN PURVIS KC and **MS. ISABEL JAMAL** (instructed by **Mishcon de Reya LLP**) appeared for **Aylo**.

Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MR. JUSTICE MEADE:

1. This is an application in relation to the trial date for these actions. I have to consider two closely related procedural regimes, as I will explain in a moment. The patentee I will refer to as “DISH” and the other party, the defendants to the UK action that was first in time, I will refer to as “Aylo”. Aylo is the applicant today for expedition of the trial. Alternatively, Aylo says that I should put the trial in the slot of its preference under the Patent Courts Practice Statement without the need for expedition. I will need to explain why that is so in a moment.
2. The patents relate to adaptive rate video streaming. That is relevant because Aylo is in the business of providing adult content streamed over the internet, in a business which is international and certainly Europe-wide.
3. There are two patents for consideration, both from the same family, one referred to as ‘680 and one referred to as ‘805.
4. The need for expedition, or at least a prompt trial date, urged by Aylo, arises from the fact that there are parallel proceedings in Germany, a fact pattern familiar to this court, although the present situation is an unusually complex one, and in particular, as is usually the case, it relates to what is sometimes referred to as the “German injunction gap”.
5. There are, in fact, two actions in issue in the UK proceedings. The first was begun by DISH on the '680 patent in proceedings in this Court, issued on 11th December 2023, and on the same day DISH issued proceedings in Munich on the '805 patent and in the UPC also on the '680 patent. There are various minor matters of detail surrounding the timing of that which are not relevant to my decision today, but Aylo does rely on the fact that DISH did not reveal to Aylo the existence of the proceedings. Aylo found out about the UK proceedings in short order because it had been keeping a watch on the initiation of UK proceedings, but it did not know about the German or UPC proceedings until the end of January this year when it found out about that, I think, from the evidence that it saw about service out. In any event, exactly how it found out does not matter.
6. The German trial on '805 is due for a hearing on 6th December 2024. It will be observed therefore that the initial proceedings started in December last year by DISH, and the Munich proceedings, concern different patents, the '680 patent versus the '805 patent, but in the meantime, since the initiation of DISH's proceedings, Aylo has started a claim to revoke the '805 patent by proceedings begun on 12th March 2024.
7. The proceedings as to both patents involve a dispute as to infringement and an allegation that the patents in suit are invalid for anticipation and obviousness over a single piece of prior art, referred to as “Leaning”, and for added matter and insufficiency. I have not been told very much about either the added matter or the insufficiency allegations, but I do not have any reason to think that they will be any more difficult or time-consuming to try than is usual, and from what I have seen in the pleadings, the insufficiency allegations are primarily a squeeze.
8. Aylo's request today is that I should set the trial to be heard in November this year so that there is an opportunity for the trial to take place and for judgment to be given in

time for it to be put before the German court at the trial in December. However, Aylo emphasises that whilst it would be ideal to have the judgment of this court (assuming, of course, that it is in Aylo's favour) for the hearing of the German trial, there still remains a procedural opportunity to put it before the German court in post-hearing submissions. So it is not a completely black and white question of whether judgment can be given in the UK trial if it is moved to November or put in December prior to the German trial.

9. It is agreed by the parties, sensibly, that the two UK actions should be heard together, and it is agreed by the parties that the trial estimate is six to seven days, with a technical complexity of 4. That is, I observe, a different question from what is involved in getting ready for the trial. I mention that because DISH says that it would be prejudiced by a trial in November, or might be, in terms of being ready. So the bone of contention is whether the trial date should be in November. When I say November, in fact I think Aylo say November or December, but primarily contend for November.
10. The two procedural regimes that I referred to earlier, which overlap in this case, are the practice of the Patents Court about listing in the absence of expedition, which is governed by the Practice Statement of 1st February 2022, which I issued, and which replaced the almost identical Practice Statement put in place by Arnold J (as he then was) some years before that. That deals with the situation without expedition. Secondly, an application, as I have said already, by Aylo for expedition, which falls to be considered under principles that have been set out in the case law.
11. I will deal with the expedition case law first and then come on to the Practice Statement.
12. The widely cited decision of the Court of Appeal setting out the high level parameters for expedition is *Gore v Geox* [2008] EWCA Civ 622. In that case the Court of Appeal set out four parameters which have been widely cited since then and which are summarised in a very pithy form in a later decision, also of the Court of Appeal, *Petter v EMC Europe Limited* [2015] EWCA Civ 480, where I was referred to paragraph 17:

“17. Thus, as the judge was well aware from the authorities that had been placed before him, expedition will only be justified on the basis of real, objectively viewed, urgency. It is against that background that Neuberger LJ’s four factors from *W.L. Gore, supra*, are to be considered, namely (1) whether the applicants have shown good reason for expedition; (2) whether expedition would interfere with the good administration of justice; (3) whether expedition would cause prejudice to the party; and (4) whether there are any other special factors.”
13. Those authorities both cover expedition generally, although as it happens *Gore v Geox* was a decision taken in an IP case. However, there are various other decisions of the Patents Court considering how to proceed where the reason for expedition, or a particular trial listing slot put forward, is the interrelationship with proceedings in Germany. I was referred to the decision of Henry Carr J in *Takeda v Hoffmann-La Roche* [2018] EWHC 2155 (ChD) [sic]. That was not in fact, formally speaking, a

case about expedition but rather fell under the general patent court regime, the Practice Statement. There, as has often been the case, the pattern was that the party attacking the patent wanted a decision before German proceedings. At paragraphs 11-13, Henry Carr J said the following:

“11. In my view, it is important to give Takeda at least the opportunity of obtaining a judgment from the UK court, which may have some influence on the Düsseldorf court hearing the infringement action. By a decision of the Bundesgerichtshof, dated 15th April 2010, Xa ZB 10/09, Roll-Forming Machine, the Federal Supreme Court held that:

"The German courts are required to consider decisions rendered by organs of the European Patent Office and courts in other EPC contracting states and pertaining to a largely similar issue and, where appropriate, address the reasons leading to a diverging result in the earlier decision. Insofar as points of law are concerned, this also applies, for instance, to the question of whether the subject-matter of a property right was obvious in the light of prior art."

12. The UK courts are always very interested to see decisions of our German colleagues and judges of other EPC Contracting States pertaining in particular to equivalent patents. If I were hearing an infringement case in the UK, I would be very interested to see what decision the German courts had reached.

13. I give no guarantee that the UK court will be able to render judgment before the German court reaches its decision. Indeed, it may well not be possible to do so in what appears to be quite a complicated case. It may be, given the state of the court's diary, that the parties in this case will be given a deputy judge. That is a matter for listing. Furthermore, it may be that a judge will consider this is an appropriate case in which to give a result, plus relatively brief reasons for the result, and to give a full judgment later.”

14. I was also referred to the decision of Birss J (as he then was) in *Nicoventures v Philip Morris* [2020] EWHC 1594 (Pat), one of the heat not burn cigarette cases, where he said the following at paragraphs 9-21:

“9. The case to start with is the decision of the Court of Appeal in *James Petter v EMC Europe Limited* [2015] EWCA Civ 480. That case considered a previous judgment of Neuberger LJ in the well-known (in this context) *Gore v Geox* litigation. The *James Petter* judgment put it into some context and also restated with approval the principles in *Gore v Geox*, which came down to four factors which the court will take into account when considering applications for expedition. Also notable in *James Petter* was that the court reviewed a number

of earlier authorities. That included, at paragraph 11, the decision of Lloyd J in *Daltel Europe Ltd (In Liquidation) v Makki* [2004] EWHC 1631 (Ch) in which the judge had identified a need for real urgency as the justification for expedition.

10. The four factors in *Gore v Geox* are set out in *James Petter* at paragraph 12 and I refer also to paragraphs 15, 16 and 17, where the Court of Appeal discuss them.

11. There are three particular matters which I want to pick up. First, an observation by Warren J at paragraph 52 of *Eli Lilly & Company v Human Genome Sciences* [2012] EWHC 2857 (Pat), cited in *James Petter* at paragraph 14. The point is that there are likely to be a large number of litigants in the Business and Property Courts who would like their cases to be tried earlier, therefore granting expedition involves an inevitable degree of queue-jumping and therefore there has to be a good reason for it. What I want to add is that the way the court takes this point into account is by deciding this applications according to the relevant principles and not simply by approaching them on the basis that someone who happens to come to the court wishing for their case to be speeded up will get it.

12. That takes me to the second point, something I said in a previous case and I maintain. I do not believe it is really controversial, but it bears repetition that a mere wish for commercial certainty is not enough to justify expedition. The phrase that is used in *Gore v Geox* and in *James Petter* is that there needs to be a “good reason”. That has to be established in evidence.

13. The third factor is specific to patent cases. A common situation is that there may be with parallel proceedings concerning the same patent family. In Europe, the parallel proceedings may well concern the other designations of the same European patent itself. A frequent occurrence is that there is a parallel German infringement claim. In Germany patent actions are bifurcated whereas they are not in many other European states, including the United Kingdom. Bifurcation refers to the idea that the infringement aspect of the dispute is decided at a different time and a different place from validity. In Germany, as is well-known, patent infringement claims are decided at the regional courts, whereas validity is decided at the Federal Court.

14. A party who has sued for infringement in Germany often seeks to schedule the UK validity action or, rather, to be accurate the UK action which will involve both validity and infringement, in such a way that the outcome relating to

validity is likely to be available and public before the German infringement court decides the matter.

15. There have been different words used by different judges of the Patents Court over the years relating to the emphasis that this factor bears in the context of listing decisions and expedition. In a number of decisions between 2011 and 2017, and I refer in particular to *HTC v Europe Ltd v Apple Inc* [2011] EWHC 2396 (Pat), *ZTE (UK) Limited v Telegonaktiebolaget LM Ericsson* [2011] EWHC 2709 (Pat), and *Garmin (Europe) Limited v Koninklijke Philips N.V.* [2017] EWHC 8165 (Pat), Arnold J consistently expressed the view that it was a factor to take into account, however as he put it, it is not a strong factor and will never be sufficient on its own, but it is a factor.

16. In the *Takeda UK Ltd v F Hoffmann-La Roche Ag* [2018] EWHC 2155, Henry Carr J said at paragraphs 11 and 12:

“In my view, it is important to give Takeda at least the opportunity of obtaining a judgment from the UK court, which may have some influence on the Düsseldorf court hearing the infringement action. By a decision of the Bundesgerichtshof, dated 15th April 2010, Xa ZB 10/09, Roll-Forming Machine, the Federal Supreme Court held that:

‘The German courts are required to consider decisions rendered by organs of the European Patent Office and courts in other EPC contracting states and pertaining to a largely similar issue and, where appropriate, address the reasons leading to a diverging result in the earlier decision. Insofar as points of law are concerned, this also applies, for instance, to the question of whether the subject-matter of a property right was obvious in the light of prior art.’

The UK courts are always very interested to see decisions of our German colleagues and judges of other EPC Contracting States pertaining in particular to equivalent patents. If I were hearing an infringement case in the UK, I would be very interested to see what decision the German courts had reached.”

17. An important point of detail is that the decision of Henry Carr J was not about expedition as such but with the decision to list the case within the listing window, but nevertheless, in my judgment, he was making an important point that is generally relevant.

18. Despite what was suggested in argument, albeit it was never put quite as starkly as this, there is no conflict between the various statements by these judges. I agree with what was said by Henry Carr J and I also agree with what Arnold J said. As Arnold J said, this factor on its own is not enough. If a party did simply come to court and raised that as the only reason, no doubt they would get short shrift.

19. A party should, if it wishes to seek expedition, put forward evidence of the commercial context in which the dispute arises in order to establish why there is a good reason in commercial terms, if true, that the UK validity trial should be timetabled in the way that is sought. In other words, and I am probably repeating myself, if a party seeks expedition it will always need to support its application with evidence of a commercial context to explain why, in the words of *James Petter* and *Gore v Geox*, there is a good reason for expedition.

20. Mr. Speck mentioned comity and a concern about whether taking this factor into account involved the UK court expressing some sort of implicit view about the way patents were litigated in other countries such as Germany. That is not right and is not the position at all.

21. It is clear in this jurisdiction that the courts will take this factor into account as a factor, but it is never enough on its own for the reasons I have already explained. Doing this is not in any sense a criticism of any other legal system.

15. These authorities are familiar ground for the Patents Court, and I do not need to spend much time on them, but I must deal with the discrete submission made by Mr. Moody-Stuart that in the first sentence of paragraph 17 of the Court of Appeal's *Petter* decision, the Court of Appeal was setting a threshold standard of there having to be real, objectively viewed urgency, on the basis that if an applicant for expedition did not meet that, there was no need to go on to consider the subsequent factors in *Gore v Geox*.
16. I accept this submission at a general level, but at the same time, it follows from the decision in *Nicoventures*, which cites *Petter*, that in the right case, interaction with German proceedings can give rise to real, objectively viewed urgency. One can see that from other statements by Birss J in his decision. At paragraph 15 he states that the use of a UK decision as a persuasive factor abroad is a factor, but not a strong one, and will not be sufficient on its own, but when coupled with commercial considerations it can be. I will come back in a moment to the evidence that is put forward in relation to commercial considerations by Aylo in this case.
17. I think I can safely proceed on the basis of the approach of Birss J in *Nicoventures*, not that it is really out of line with any other decision. In fact, it certainly is not, and the Judge said as much.

18. That is how I propose to proceed in relation to the application for expedition. I will ask whether there is real commercial urgency established on the facts to the standard that I have just outlined and then I must apply the four factors.
19. Also falling for consideration in connection with that aspect of the law, there is a question which I suppose, strictly speaking, is an evidential question on the facts of every case, but which has been considered so many times by the Patents Court that it is almost a legal fact in itself, which is how the German courts will approach a decision of the UK court when they come to consider validity themselves (in their bifurcated system the infringement court only decides infringement, but may decide to stay relief if it is persuaded that there is a sufficiently strong doubt over the validity of the patent). One can see the consideration given to that in paragraph 16 of *Nicoventures* and as is then summarised by Birss J in paragraph 22 in the following way:

“22. There was argument about the details of German law relating to the utility of foreign judgments. It is not necessary to get into the detail of that issue. The position is adequately summarised by Henry Carr J in paragraphs 11 and 12 above. All contracting states of the European Patent Convention take a similar view. They are interested in the decisions of their colleagues in other EPC States. Precisely how these decisions are taken into account does not matter. What does matter is that we are all applying a common law -- common with a small c -- to patents, based on a common legal framework, and it is of interest to courts in the EPC how other courts have taken a decision on the very same patent. The claims are usually identical and the patent specifications will be identical.”
20. The parties have, as usual, felt that they needed to put that approach in evidence before this court, and I have been directed to what they say in the parties' skeletons, but the picture which emerges is nothing different from the usual one, and I feel well equipped to consider what the German courts' approach is, although I have to say that it has been, in my experience, a rare case where a German court has departed from its own initial inclination so as to withhold an injunction where the decisive factor is a UK judgment. However, plainly it could happen, and the German courts are not only able, but required, to consider such a decision if it comes along.
21. The Practice Statement on listing of cases for trial in the Patents Court is the other procedural regime I have to consider, and that says that the Patents Court endeavours to bring patent cases on for trial, where possible, within 12 months of the claim being issued. Pausing there, in the present case there is room for a discussion about when the claim was relevantly issued, because DISH's claim under the '680 patent was issued in December 2023, but that is not the patent in issue in Germany, and Aylo's claim, which brings into these proceedings the '805 patent, was not issued until March this year. The relevance of that being the establishment of the time point from which to measure the 12 months goal which the Patents Court sets itself in the context of this case.
22. I am sure, when the Practice Statement was originally drafted, the drafter did not have in mind this sort of complication, and the paradigm being considered by the Practice

Statement, I think, is quite clearly the ordinary situation of a single patent case. However, in any event, I think the point of initiation of the proceedings, and indeed the 12 months, both have to be approached practically and with an eye to the overall goal of the Practice Statement. In the present case, taking that sort of realistic approach, I think it is quite clear that the clock started running on the 12 months when DISH initiated its proceedings in December 2023. From that point on, the wheels were in motion for a trial about the validity of DISH's position on the '680 patent, and infringement of it, and although, by definition, any divisional would have different claims, I think it is unrealistic to set back when the trial would have been by reference to quite a modest addition, and I have to say quite a predictable addition to the proceedings by the institution of Aylo's claim in March. However, as I say, I do not think it was ever intended that the Practice Statement would work by identifying to the day when the proceedings were initiated in the way that one would have to do with a limitation claim. It is much more practical than that, as one can see, for example, from paragraph 3 of the Practice Statement, which refers to a case being tried within 12 months or shortly thereafter.

23. I also observe whilst the Practice Statement sets a target of bringing cases on for trial within 12 months, real-world complications make that sometimes easier and sometimes harder to do, because whether 12 months is achievable depends on a lot of moving parts, including the time of year when the claim is issued, the relationship of the time of issue of the claim to the vacation and the relationship of the time of issue of the claim to the way that matters stand somewhat later on, when the debate about trial listing takes place. So, in paragraph 2 of the Practice Statement, the basic starting point for listing trials is the current applicable trial window in three different categories, depending on trial length, and the state of the diary inevitably moves on between the time of issue of the claim and the time when the debate about trial date takes place.
24. Furthermore, it can be an important factor, an important part of the background when an argument takes place about the trial date, as to whether the party seeking, relatively speaking, the earlier trial date is asking for a time which has already filled up in the court diary, and potentially which has already had some fixed hearings put into it. As I say, sometimes that makes 12 months easier to achieve, sometimes it makes it harder, and sometimes it enables a slightly shorter time, sometimes a little bit longer. Therefore, as I said, at the risk of repeating myself, it has to be done practically and not formulaically or with an eye to absolute mathematical precision.
25. Paragraph 3 of the Practice Statement says:

"Where it will enable a case to be tried within 12 months, or shortly thereafter, the Court may list a trial up to one month earlier than the applicable Trial Window without the need for any application for expedition."
26. That is of some relevance in this case because the trial windows currently would begin in very early 2025. I was told that the current listing window for a trial of this length, which is to say the agreed estimate of six to seven days, begins on 13th January 2025. Therefore, I could, at a formal level, list a trial one month earlier than that without the need for any application for expedition.

27. Mr. Moody-Stuart submits, and I agree, that many of the factors which are relevant to expedition will also apply to the application of the Practice Statement, and this must be a sliding scale.
28. The other evidence which I found important in considering what to do on this application is the evidence of Mr. Marra of Aylo, who explains the commercial context and significance of a German injunction, if one were granted. He explains that Aylo has an international business, that the UK is one of its biggest markets, that its business in Europe is not divided up geographically, so that, for example, a user in Germany has the ability to access the same video content as a user in the UK, and that if there was an injunction in Germany, which was enforced, Aylo may have to switch off its video streaming services in Germany completely, but that that would lead to a period of disruption to its services, which might also affect the UK. Those, I think, are primarily technological issues. However, he also explains the business context, which I need not go into in the greatest detail, but revolves around the fact that Aylo operates a model programme which allows models to upload content to Aylo's adult websites and those models might find it unattractive to stick with Aylo if there was an injunction in Germany, and so might, at a human level, move to a different provider and not come back.
29. Mr. Marra also says at paragraph 22 that if Aylo was injuncted, it would likely face a period of significant disruption to its video streaming services, as it attempted to modify its existing system in ways that would avoid the injunction while offering the same streaming experience. He refers to brand loyalty, and says that if the worst happened, it was highly likely that as a result of the disruption, to which I have referred, many of Aylo's customers would develop loyalty to its competitors and not switch back.
30. Mr. Purvis makes the point, which I accept, that this takes Aylo well out of the category of a litigant who seeks expedition of a UK trial to seek to affect the decision of a German court but who has no business in the UK; Aylo clearly does. He also submits that the evidence justifies the conclusion that not only does Aylo have a business in the UK, but that it might be adversely affected by the grant of a German injunction if that happened.
31. Mr. Moody-Stuart attacked Mr. Marra's evidence, primarily on the basis that it did not adequately cover whether Aylo had contingency plans already in place, either to geo-lock the German market, or to provide a technological solution to allow it to carry on streaming with a different technology, or simply if it had to turn off its German streaming to minimise disruption to the UK market.
32. I think there is something in the point that Mr. Marra's evidence is rather vague and general, but Mr. Purvis was also right to point out in reply that no point had been taken on these purported deficiencies in Mr. Marra's evidence in any evidence from DISH, whose commercial people could presumably have commented, so Mr. Marra has not had the opportunity to get into this in any more detail.
33. My conclusion is that it is somewhat uncertain what would happen if a German injunction were granted, but there is a real risk, which is hard to quantify, of an adverse effect on its UK business. It is possible, but cannot remotely be predicted,

that a well thought out design around planned out in advance would lead to no disruption, but that is an unknown.

34. That is the commercial context. To the extent that the decision of the Court of Appeal in *Petter* means that there is some objective need for urgency, if that is a threshold test, then my conclusion is that Aylo clear it. Mr. Moody-Stuart contends that if Aylo has cleared the hurdle, it has not done so by much, and he goes on to submit that the utility is marginal. For that purpose, I have to focus on the relationship between these proceedings and any judgment from them, and the situation in Germany.
35. For Aylo to get the benefit it seeks, the trial would first of all have to be listed at the time of its preference, which is to say November, or at the very worst December. Then the court would have to move swiftly to give a judgment. Then that would either have to be put to the German court in time for the hearing, or, I infer, with reduced impact in the post-trial phase, and then the German court would have to decide that it was the decisive factor in the grant or withholding of an injunction.
36. This, as with other things on this application, is familiar territory. It is quite possible that the German court would look at the decision of this court and if that were different from its own inclination, it might still go ahead with its own analysis, because of course it is well-equipped to apply its own standards, so it may be that even if a decision went in Aylo's favour in the UK, it would not be of utility in Germany. On the other hand, it might be. Mr. Moody-Stuart sought to take a point that there were as yet no Opposition Division proceedings on foot on the '805 patent, which I reject, because quite clearly Aylo is going to put in an opposition; and, secondly, on the basis that there might be more in issue in the UK or in the EPO than will be critical to the German decision, another submission which I reject, because it is obvious to me that Leaning is going to be central to Aylo's defence in all of the proceedings.
37. The fact remains that there must be real uncertainty about whether even a favourable decision would be of critical weight in the German proceedings. I think it is also important to take into account that whilst this is not black and white, effectively what Aylo seeks is not merely an order that the trial be held in November or December, but that whichever judge hears it gives judgment really quite swiftly, more swiftly than normal, even having regard to the three-month target that the Court sets, so as to provide the judgment in time for its consideration by the German court.
38. Of course, I cannot order another judge, were I to put this trial in November, to do their judgment within any particular time, and if I turned out myself to be the trial judge, I could not promise that now, because other calls on judicial time might come along. However, although formally Aylo does not seek to mandate it, the utility of that which it seeks is heavily dependent on the proposition that not only must the time for the trial be found in the court diary, but that the judgment must be given swiftly, which I think cannot be taken for granted.
39. Mr. Purvis softened the impact of this point by referring back to what Henry Carr J said in *Takeda v Hoffmann-La Roche* about the possibility of a judge giving the result, or the result with brief reasons and a fuller judgment to follow later. I do not in any sense disagree with the Judge that those are possibilities, but in the time since then that has not happened in any patent case that I am aware of, and, furthermore, with all

due respect to the Judge, I strongly doubt if the German court would be assisted merely by a result without any reasoning.

40. That is why DISH submits that the utility of putting the trial in November would be marginal, and then DISH relies on prejudice to other court users and to DISH itself. I will deal with the prejudice to DISH itself. This is said to reside in the fact that there is doubt over whether the trial can be brought on whilst giving it appropriate preparation time so as to be ready for a hearing in November 2024. I will not go into the detail of exactly why that may be so, I just say at a high level that I find that extremely unconvincing, both overall and in the detailed reasons that were submitted. When DISH initiated proceedings on the '680 patent in December 2023, it ought to have expected that it would be at a trial one year later on, at least of those matters, in accordance with the Practice Statement. If it had been a typical patentee, wanting a swift decision in the UK, it would no doubt have prepared for that from the outset. I am completely unpersuaded by various references to the potential of more prior art, or a broad-ranging dispute on infringement. These are all no more than possibilities, and I think I should operate on the normal basis of taking a high-level view of the issues in the case, which do not seem to be particularly extensive, and not be of a mind to jump at shadows, which is all that there is in relation to the possibility of more prior art or a complex infringement dispute. In my view, every indication at the moment is that this is an action that could be brought on for trial in that sort of time.
41. I turn to consider prejudice to other court users, and as a matter of the factual picture, even if it is analytically slightly different, this overlaps substantially in *Gore v Geox* with the good administration of justice, factor two. It is always difficult on these expedition applications for the party making the application, and for the party opposing it, to know what the state of the court's diary is, and sometimes an application for expedition, or for application of the Patents Court Practice Statement, is very easy, either because the Court's diary has plenty of room, or because it is completely congested and it is quite difficult for parties to know that in advance, although many of them take the step of asking Chancery listing, which gives some indication, but is something of a noisy channel, if I can put it that way.
42. In the present case, the Michaelmas term in the Patents Court is a busy one, with a number of high category cases and a number of long FRAND-type cases, some of which have already been given at least provisional dates, and some of which have got windows but have not been given dates. These court users are, to put it colloquially, firmly ahead of Aylo in the queue. Whilst this is not a case where one can say that it is simply impossible to provide that which Aylo seeks, there is a significant risk that it would disrupt the arrangements of other court users, it might even conceivably involve some of them losing a date which they would otherwise have had, although Mr. Purvis says that Aylo would not seek that, a sentiment which I am grateful for, and it would make the task of Chancery listing very much more complicated in that term. I think that falls to be considered both in relation to expedition and the application of the Practice Statement.
43. If I can just recap, Mr. Moody-Stuart first of all submitted that Aylo has not met the good reason threshold, which I reject on the facts, if indeed it is a discrete, binary decision, but he submits that Aylo has barely done so. Then he says that the utility is marginal because of the question of whether the judgment will come in time, and whether it will, in fact, have an effect in Germany. Then, as I say, he relies on

prejudice to DISH, which I reject, and prejudice to other court users/the administration of justice, where there is a significant issue for consideration. I would also point out that the organisation of the Patents Court diary in the autumn term, which I have referred to as getting more difficult with the application, would inevitably be heightened if the listing had to take place with a firm eye to giving the judge in question time to write the judgment immediately after the conclusion of the trial, as is of great importance to the utility which Aylo urges.

44. None of these things is black and white. They all live on a sliding scale, but I agree with Mr. Moody-Stuart that the objective reason is quite modest. Mr. Marra's evidence does show a genuine connection to the UK which could be affected, but not a high risk of a grave impact. The utility is marginal, taking into account both the timing factor and the likelihood of a decision, which is such as to tilt the balance in Germany.
45. Thirdly, and most importantly, the impact on other court users, and the organisation of the Patents Court list, would be really quite severe, potentially.
46. Taking all these factors in the round, I decline to order expedition.
47. The same factual assessment would justify an identical conclusion about trial timing under the Practice Statement, but so far as it matters, the ordinary listing window in January is not very far on at all from one year from the initiation of the proceedings by DISH. It seems to me that, in any event, to bring that forward from January to November is more than is envisaged by paragraph 3 of the Practice Statement, whatever view one takes about the exact start and end points of the measurement. I am being asked to put the trial in two months earlier on Aylo's preferred date. In any event, the case can be tried within 12 months or shortly thereafter without varying from the trial windows.
48. Whilst there is a deal to be said on both sides, my conclusion, balancing all the factors together, is not to put the trial into November or December of this year.

[Further Argument]

49. DISH has been successful in resisting the application for expedition. I did say in my judgment that there were factors going both ways. That in itself is not a reason for disapplying the rule that where there is a short hearing with a clear result, costs should follow the event. However, I think there is force in Mr. Purvis's submission that a critical matter to my judgment was the state of the lists, which is not a matter in the parties' control, although, as I said in the course of my judgment, parties do quite often ask, and I am not sure if a request was put in in this case. It does not really matter, because what I think is important on costs is that DISH could have said at any point that they would not resist the trial going into November if the court could accommodate it. Had that been so, I doubt if there would have been a need for a hearing at all.
50. I think DISH has advanced on the widest possible front, taking every conceivable point, and I have rejected a very large number of those points, and on issues which occasioned, I suspect, very considerable expense, such as Mr. Marra's evidence, I have largely accepted Aylo's position. I think DISH's approach of fighting every

single point is all of a picture with its, shall I say, forensically unsparing attitude to keeping its powder dry about when it had started the proceedings and where. That is perhaps a digression, but I think that the need for this hearing and its length, complexity and cost have been very largely caused, and certainly very considerably contributed to, by DISH not just being sensible from the off and saying that it would not oppose the application, for what would indeed have been a relatively modest amount of expedition if the court could accommodate it.

51. I decline to make any order for costs today.
