[2018] CAT 2

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1263/5/7/16
Case No. 1273/5/7/16

B E T W E E N:

LABINVESTA LIMITED

Claimant

- v -

(1) DAKO DENMARK A/S
(2) DAKO (UK) LIMITED
(3) AGILENT TECHNOLOGIES LDA UK LIMITED

Defendants

ORDER

UPON Case No. 1263/5/7/16 having been disposed of by Order of 30 November 2016 ("the 1st Order"), giving the Claimant permission to withdraw that claim, which had not been served on any of the Defendants, with no order as to costs

AND UPON Case No. 1273/5/7/16 having been disposed of by Order of 12 June 2017 ("the 2nd Order"), giving the Claimant permission to withdraw that claim, which had not been served on any of the Defendants, with no order as to costs

AND UPON reading the letter from the solicitors to the 3rd Defendants dated 10 November 2017 seeking permission to apply for the 3rd Defendants' costs caused by the notification of the above two claims, and the letter dated 19 December 2017 from the Claimants in response

IT IS ORDERED THAT:

The application made by the 3rd Defendant to vary paragraph 2 of both the 1st Order and the 2nd Order is refused.

REASONS:

1. I will assume, without deciding, that the Tribunal retains jurisdiction pursuant to rule 115(2) of the Tribunal Rules 2015 to vary or revoke these two Orders notwithstanding that the two proceedings in which the Orders were made have terminated. The letter from the 3rd Defendants' solicitors will accordingly be treated as an application under rule 115(2) to vary the two Orders with a view to substituting an order for costs in the 3rd Defendants' favour.

2. However, any application under rule 115(2) to revoke or vary an order of the Tribunal must ordinarily be made promptly. If exceptionally such an application is not made promptly, there must be a good explanation for the delay.

3. As regards the 1st Order, the application is made much too late. The 3rd Defendants were well aware of the termination of the first set of proceedings at that time. There is nothing in the application to suggest that it could not have been made shortly after the 1st Order was made.

4. As regards the 2nd Order, the period of five months before the application was made also constitutes material delay. Moreover, given that no application had been made to vary the 1st Order in the period of over six months between the making of the 1st Order and the Claimant's application to the Tribunal for the 2nd Order, it could reasonably be assumed that the 3rd Defendant had not suffered costs by reason of the issue of the second claim, which was materially the same as the first claim, for which it would seek compensation.

5. Further and in any event, only exceptionally will the Tribunal award costs to a defendant in connection with proceedings where the claim has never been served on it. The Tribunal will follow the practice of the High Court of England and Wales, where costs incurred by a defendant in persuading a claimant to abandon a particular claim are not normally recoverable even when other claims are subsequently pursued against that defendant: *McGlinn v Waltham Contractors Ltd* [2005] EWHC 1419 (TCC). The fact that there is no formal pre-action protocol as regards claims brought before the Tribunal is not a reason for adopting a different approach. In the present cases, no proceedings were pursued against the 3rd Defendant (or indeed any of the Defendants) at all. I note that the 3rd Defendant contends that it demonstrated in correspondence that the claim against it would not succeed. But even if that is correct (and it is strongly disputed by the Claimant), the approach of the normal rule is designed to encourage a prospective claimant not to commence a claim which in pre-action correspondence a defendant contended would not succeed. Having regard to what is said in the Claimant's letter of 19 December 2017, there does not appear to have been any unreasonable conduct by the Claimant amounting to exceptional circumstances which would justify departing from the normal rule.

The Hon. Mr Justice Roth
President of the Competition Appeal Tribunal

Made: 15 February 2018
Drawn: 15 February 2018