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Case No: IP-2023-000104

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY ENTERPRISE COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 7 February 2024

Before :

HIS HONOUR JUDGE HACON

Between :

CLOUD CYCLE LIMITED

Claimant

- and -

(1) VERIFI LLC

**(2) GCP APPLIED TECHNOLOGIES (UK)
LIMITED**

Defendants

Richard Davis KC and Becky Knott (instructed by Potter Clarkson LLP) for the Claimant
James Abrahams KC and Maxwell Keay (instructed by Powell Gilbert LLP) for the Defendants

Hearing date: 31 January 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 7 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Judge Hacon:

Introduction

1. There are two applications. The first chronologically is by the first defendant (“Verifi”) for an interim injunction. The second, made shortly afterwards, is by the claimant (“CCL”) for summary judgment in its claim for a declaration of non-infringement of European Patent (UK) No. 1 720 689 (“the Patent”) and by extension summary dismissal of Verifi’s counterclaim for infringement of the Patent.
2. For reasons which will become apparent, at the start of the hearing Verifi applied to join its exclusive licensee under the Patent, GCP Applied Technologies (UK) Limited (“GCP”), as a second defendant joining in the counterclaim for infringement against CCL and to become a joint applicant for interim relief. CCL was content to have GCP added to the proceedings in this way and I gave permission.
3. Richard Davis KC and Becky Knott appeared for CCL, James Abrahams KC and Maxwell Key for the defendants.

One test

4. In *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, the threshold test for the grant of an interim injunction was characterised by Lord Diplock as the court being satisfied that “there is serious question to be tried” (at 407) and that the material before the court must disclose that the claimant has “[a] real prospect of succeeding in his claim ... at trial” (at 408). These state the same test, see *Smith v Inner London Education Authority* [1978] 1 All ER 411 (CA) at 419. It implies that the threshold test in *American Cyanamid* is the same as the test of “no real prospect of succeeding on the claim or issue/successfully defending the claim or issue” in CPR Part 24.3(a). Morris J treated them as the same in *Create Financial Management LLP v Lee* [2020] EWHC 1933 (QB), at [53], as will I. CCL’s application for summary judgment is determinative of the threshold test in the defendants’ application for interim relief.

The law on summary judgment

5. The law on summary judgment is well established, see *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], endorsed by the Court of Appeal more than once, first in *AC Ward & Sons Ltd v Catlin (Fire) Ltd* [2010] Lloyd’s Rep I.R. 301 at [24].
6. There are further matters to consider which arise where the application is for summary judgment in a patent action. They can be summarised this way:
 - (1) It is frequently not appropriate to grant summary judgment in a patent case because the court must generally consider issues of claim construction and infringement through the eyes of the skilled person. That perception is not possible without the benefit of expert evidence at

trial and cross-examination, see *Nampak Plastics Europe Ltd v Alpla UK Ltd* [2014] EWCA Civ 1293, at [4]-[6] and [9].

- (2) Issues arising under the doctrine of equivalents, including identification of the inventive concept, are also liable to require expert evidence, see *Shenzhen Carku Technology Co, Ltd v The Noco Company* [2020] EWHC 2104 (Pat), at [29] and [75].
- (3) However, where the words of the claim which are relevant to the issues of construction and/or infringement arising in a case are susceptible of interpretation according to their ordinary meaning, requiring no expert guidance, summary judgment may be appropriate, particularly where the technology is simple to understand, see *Virgin Atlantic Airways Ltd v Delta Airways Inc* [2011] EWCA Civ 162 at [13]-[14], cited in *Nampak* at [7].
- (4) A party which argues that the court cannot decide one or more relevant issues without expert evidence must provide sufficient reasons why that is. In *Nampak* Floyd LJ said at [11]:

“It follows from what I have said that, on a summary judgment application such as this, it is necessary for a party who claims that the court is inadequately equipped to decide an issue of construction to identify, perhaps in only quite general terms, the nature of the evidence of the common general knowledge which he proposes to adduce, and to be in a position to explain why that evidence might reasonably be expected to have an impact on the issue of construction. If that party is not able to do so, it is open to the court to conclude that he is simply hoping that ‘something may turn up’ and that his defence does not have the necessary ‘reality’ to avoid summary judgment under Part 24.”

- (5) Even in the absence of issues of construction and/or infringement which require expert evidence, the overall principle in an application for summary judgment applies just as much to patent cases as any other, including a simple patent case, namely that where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available and so affect the outcome of the case, summary judgment is not appropriate, see *Nampak* at [8], citing *Khatri v Cooperative Central Raiffeisen-Boerenleenbank BA* [2010] EWCA Civ 397 at [6].

The Patent

7. The invention in the Patent is entitled “Method and system for calculating and reporting slump in delivery vehicles”. The vehicles in question are concrete mixing trucks. “Slump” is a characteristic of concrete mix; the greater the slump, the more fluid is the mix. When the mix is delivered by the vehicle to the site where the concrete is to be used, its slump must be within the tolerance required, i.e. fluid enough to be workable but not too fluid such that the concrete will not dry in a satisfactory way.

8. The Patent explains that it was part of the prior art to install in the vehicle a means to measure slump. The slump of the mix is related to the driving force required to rotate the barrel on the vehicle containing the mix. Thus, measuring the torque required to rotate the barrel permits measurement of the slump. If the slump is too low, water can be added at the site to achieve the correct level. If the slump is too high, the Patent states, the truck has to return to the depot in order to add particulate concrete ingredients to fix the problem. Information taken from sensors measuring the torque loading on the barrel can be stored. Later retrieval and use with other such data permits better measurement of the slump.
9. The specification identifies the invention claimed as an improved means for calculating and reporting slump. The specification then explains the invention by quoting claim 1. This is claim 1 as divided by CCL into integers, along with integer numbers, but here omitting the reference numbers contained in the claim:

“[A] A system for calculating and reporting slump in a concrete delivery truck having a concrete mixing drum and hydraulic drive for rotating the mixing drum, the system comprising:

[B] a rotational sensor mounted to the mixing drum and configured to sense a rotational speed of the mixing drum,

[C] a hydraulic sensor coupled to the hydraulic drive and configured to sense a hydraulic pressure required to turn the mixing drum, and a processor computing a slump value using the sensed hydraulic pressure required to turn the mixing drum from the hydraulic sensor,

characterised in that the processor is operative to:

[D] (i) compare current pressure and speed measurements to previously stored pressure and speed measurements,

[D] (ii) determine if the speed and pressure are stable,

[D] (iii) erase the stored pressure and speed measurements if the speed and pressure measurements are not stable,

[D] (iv) store the current pressure and speed measurements,

[E] continue said steps (i) to (iv) until pressure and speed measurements have been stored for a full drum rotation, and then calculate a current slump value using the stored pressure and speed measurements.”
10. The Patent expires in February 2025.

The arguments on real prospect of success

11. The defendants argued that they had a real prospect of establishing that CCL’s system infringes claim 1 for two reasons, both turning largely on integer [D](iii).

The first is a point of construction, namely whether “the stored pressure and speed measurements” to be erased if the speed and pressure are unstable requires erasure of all stored measurements or whether the erasure of just some would satisfy the integer. The defendants said that a purposive meaning must be given to the requirement which would suggest the latter. They filed evidence from Nathan Tregger who is Director of Data Analytics at GCP Applied Technologies Inc. He said that it would be beneficial to erase only some of the previously stored data, such as outliers, and that the skilled person would not expect the patentee to limit the scope of the Patent by requiring all stored data to be deleted. Thus, the defendants argued, the correct construction must turn on expert evidence at trial.

12. I need not explore this first argument because CCL, while disputing the defendants’ construction, was content for the purposes of this application to rely solely on what it called one fundamental difference between its own system and that of claim 1. So fundamental that unarguably its system cannot infringe.
13. CCL submitted that whether integer [D](iii) requires deletion of at least some or alternatively all previously stored measurements, CCL’s system cannot infringe because its operation is such that no previous measurements whatsoever are deleted in the event that speed and pressure are not stable.
14. The defendants had two responses to this. The first was that CCL’s claim that its system deletes no previous measurements is based solely on an assertion to that effect in evidence from Richard Roberts who is a partner at Potter Clarkson LLP, the solicitors acting for CCL in these proceedings. Unlike Mr Tregger, Mr Roberts has no background in this technical area, so his assertion can be given little weight. Even more to the point, if in the relevant circumstances CCL’s system deletes no previous measurements, that ought to be clear from the product and process description (PPD) filed by CCL and it is not.
15. The defendants’ second response, supported by Mr Tregger, concerned their proposed argument on infringement by equivalence. The system claimed in claim 1 deletes previously stored data (integer [D](iii)) and calculates a slump value using recently obtained data (integer [E]). The court at trial may be satisfied, having heard expert evidence, that the deletion of previously stored data is incidental and wholly or largely irrelevant to the way in which the Patent system works. Recent data is used and previously stored data is not, but deletion of old data is neither here nor there. That being so, a system which does not delete previously stored data would be an equivalent according to the analysis of the Supreme Court in *Actavis UK Limited v Eli Lilly and Company* [2017] UKSC 48.

Discussion

16. I consider first Mr Roberts’ assertion that in CCL’s system no previously stored measurements are deleted. CCL’s PPD is confidential so I will not quote it. However, I have to say that I find the relevant paragraphs, 14-17, opaque. I asked for clarification during the hearing and was not much enlightened. It does not follow that they are wrong or misleading. It does follow that they do not self-evidently support Mr Roberts’ assertion. At best they would require expert

evidence to expand on what they say before the trial judge could safely conclude that Mr Roberts is correct.

17. On that ground alone, I take the view that this is not a case suitable for summary judgment.
18. My view is reinforced by the second point. The argument on equivalents will require the parties to state with appropriate clarity their respective cases on the inventive concept disclosed by the Patent, not so far done. Without in any sense making a finding now about the inventive concept, I think it will probably be along the lines of the idea that a process having stated steps taken from the characterising portion of claim 1 will provide an improved means of obtaining data for calculating slump in a concrete delivery truck. Although the defendants' argument was not developed in this way by Mr Tregger, who is not a lawyer, I think it is fair to say that the point being made by the defendants is that expert evidence may lead the trial judge to conclude that deleting previously stored data plays no part in the inventive concept, as opposed to the invention as claimed.
19. I have no means of reaching any conclusion about the correct characterisation of the inventive concept and state no view save this: it seems to me that the defendants have a real, as opposed to fanciful, prospect of establishing the characterisation they propose, subject of course to a clearer PPD and to expert evidence. They therefore have a real prospect of persuading the trial judge that the CCL system infringes claim 1 as an equivalent.
20. The application for summary judgment is dismissed.
21. As indicated above, my finding on summary judgment means that the defendants have established that they have a real prospect of succeeding at trial in showing that CCL infringes the Patent.

The law on interim injunctions

22. The parties adopted the usual principles set out by Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. The most important of these are (here stated on the assumption that, as in *American Cyanamid*, it is the claimant applying for the interim injunction):
 - (i) whether there is a serious question to be tried; if so
 - (ii) whether the claimant could be adequately compensated in damages if it were to succeed at trial; if not
 - (iii) whether the defendant could be adequately compensated in damages if it were to succeed at trial;
 - (iv) if the outcome of the balance under (ii) and (iii) is uncertain, where the balance of convenience lies.
23. The defendants submitted that Lord Diplock recognised in *American Cyanamid* that maintaining the status quo is often the safest course. I do not think that is

an accurate characterisation of what Lord Diplock said. He did refer to the status quo as something that could be taken into account, but only if the factors I have numbered (ii) to (iv) above result in an even balance. It is also my impression that in the very many cases following *American Cyanamid*, only rarely has the grant of an interim injunction depended on the status quo.

24. I have already decided that there is a serious question to be tried. As sometimes happens, the parties drew no real distinction between the balance of irreparable harm and the balance of convenience. So assuming that the defendants would suffer at least some irreparable damage if no injunction were to be granted, the issue boils down to that stated by Lord Hoffmann in *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd (Jamaica)* [2009] UKPC 16 at [17]:

“The basic principle is that the court should take whichever course seems likely to cause the least irreparable prejudice to one party or the other.”

The relief sought

25. The defendants wanted to promote the status of the status quo because the relief sought in their draft order is directed to maintaining the position as of the date that a letter was written on behalf of Verifi to CCL asking for undertakings, i.e. 21 December 2023. In broad terms, the defendants seek an order that CCL is restrained from dealing in its allegedly infringing system in the UK, excluding any dealings with “existing customers”, defined as CCL’s customers for the system before 21 December 2023. There was argument about whether this was the correct date but none that made any practical difference.
26. A point made by CCL was that such an order could only be policed if CCL handed over a list of its existing customers which would be a commercially sensitive list. The defendants conceded that they would not press for such a list and would rely on the honesty of CCL in complying with the order should it be granted. A further difficulty was what sort of dealings would qualify a customer as an existing customer – at least one completed sale or something less?
27. As discussed, maintaining the status quo would only be central in the event that the balance of irreparable prejudice were to be finely balanced. That said, the nature of relief sought also has a bearing on the potential prejudice to CCL were an injunction to be granted.

The relevant period

28. I told the parties that a trial date in mid-July of this year was possible. Both sides agreed to this. Realistically, there is unlikely to be a judgment before September 2024. The period in which either side could suffer irreparable prejudice is therefore the 7-8 months, ending sometime in September.

Irremediable damage to GCP – GCP’s arguments

29. Since 8 January 2024 the patented system has been exploited by GCP pursuant to a written exclusive licence under the Patent granted by Verifi, the owner of the Patent. Verifi and GCP are both members of the Saint Gobain group. Before 8 January 2024 it seems that GCP was acting under an informal unwritten licence, but what matters is the state of affairs going forward. GCP's current written licence is royalty free, so Verifi will not suffer any damage no matter what happens. The only party which could suffer prejudice in the event of there being no injunction is GCP. GCP relied on five heads of potential damage.
30. The first was price depression. There was evidence from Russell Elfenbein who is CEO and co-founder of CCL. He explained that CCL has been installing systems in a modest way since 2020, increasing in numbers slowly up to the end of last year. It appears that the first quarter of 2024 marks the beginning of CCL's hope for sales at a much greater level. Mr Elfenbein projected sales at a spectacularly higher level in 2025. He stated figures for these expected sales but they are confidential. It is sufficient to say that if Mr Elfenbein's projections prove accurate, by September of this year, though sales will remain in the foothills relative to the heights projected for 2025, CCL will have a considerable market presence.
31. Another confidential figure in the evidence was the difference in the price charged by GCP for its system and the market price for CCL's system. I can say that CCL's price is much lower. Mr Elfenbein's unchallenged evidence was the GCP system is more sophisticated in its nature and performance than CCL's. Oral submissions expanded on this. CCL's system informs the operator of the slump level. GCP's system goes further, allowing the operator to add water from a source within the vehicle if the slump of the mix is too low, and if the slump of the mix is too high, GCP's system allows addition of particulates to remedy the problem. In other words, GCP's system allows the operator of the vehicle not only to know the slump level but also to correct it when required.
32. GCP argued that in order to compete, in the absence of an injunction it would have to offer its system at a dramatically reduced price. The reduced price would become known in the industry, forcing GCP to offer its system at the lower price to all customers. Even if GCP were to win at trial, as a matter of commercial reality it would be impossible to return to the current price. This would also apply to the US market where customers would learn of the lower UK price.
33. GCP offered an example of this. It said that one of its biggest customers, the Tarmac group, had said that they would not renew their contract to buy GCP's system unless GCP offered it at a much reduced price.
34. CCL's counsel told me on instructions that although CCL had been in discussions with Tarmac, Tarmac had returned to GCP as its preferred supplier for the next two years. GCP's counsel, also on instructions, said that this was not right, no new contract has been signed by Tarmac but that Tarmac had been using CCL's price to pressure GCP on price.
35. GCP's second argument was that up to now GCP has been the only significant supplier of in-transit slump monitoring technology, that the market is in an early

stage of growth and the losses caused by CCL's sales in the next 7-8 months would be difficult to quantify.

36. Third, the process of bidding for contracts to supply the technology for large infrastructure projects can take years and last several years more. The revenue that GCP would lose by entering into contracts over the next months at a lower price could not be established until many years later.
37. Fourth, CCL's system is unproven and if it were to be unsatisfactory, that would tarnish the reputation of slump monitoring in concrete mixer vehicles generally. GCP said that the BBV group had been supplied with concrete by a large supplier called Cemex, that BBV were not satisfied and had informed Cemex to replace the CCL system with GCP's technology.
38. Fifth, and though last it was given the strongest emphasis by GCP's counsel, GCP said that the financial figures for CCL showed that CCL would not be able to compensate GCP in damages in the event that there was no injunction and that the defendants were to win at trial. The only publicly available accounts are contained in the financial statement for the 6 months of April to September 2022 inclusive. Over that 6 months the figure for cash in bank declined from £1,136,836 to £244,811 and the figure for total assets less current liabilities went from £1,444,566 down to £779,772. GCP's counsel suggested that the direction of travel suggested imminent bankruptcy, reinforced by CCL's failure to provide any more recent figures to dispel that impression.

Discussion

39. Mr Elfenbein's projections for sales of the CCL system, which GCP accepted as plausible to emphasise the potential damage that such sales could cause, only make sense if to date only a small part of the potential market for such systems has taken up the technology. And this was common ground. There was evidence from Peter Lawrence, Managing Director for concrete and cement additives and speciality binding materials in the Saint Gobain group. He said that around 75% of the UK market for the delivery of ready-mix concrete by truck remained to be exploited.
40. GCP's system has been on the market since 2014. On its own account, GCP has had the field to itself for 10 years, either entirely or more recently largely, but in that time the inroads it has made into the potential market have been modest, about 5% (Mr Lawrence's evidence was that total market penetration of the technology would probably be around 80% of concrete delivery vehicles). The likelihood therefore is that even if GCP were to return to being the monopoly supplier between now and September, sales would probably continue at a low level relative to Mr Elfenbein's projections for CCL. Looking at this another way, it seems likely that if those projections prove to be accurate, they will be made possible because the market is for the most part willing to pay CCL's prices but not GCP's. Whether or not this would be the reason, in effect CCL would be opening up the market.
41. It is difficult to know the probable price that GCP will be able to charge over the next 7-8 months if there is no injunction. It could well be that it will be

forced to reduce its price. It could equally be that most customers will continue to pay more for an established and more sophisticated system. One factor that is likely to work in GCP's favour is the fact, which GCP acknowledged will become known in the industry, that CCL may lose at trial and be unable to supply its system from September. That uncertainty could stop potential customers buying from CCL for the time being.

42. With regard to Tarmac, assuming, as currently seems likely, Tarmac signs a new 2 year contract with GCP at a reduced price, GCP's financial hit on its profit because of a price reduction should be capable of calculation by way of damages. If this were to be repeated with other customers over the next 7-8 months, the same should be true. Whether it is repeated will depend in part on (a) whether the market expects GCP to return to its monopoly position after September (which will follow on the hypothesis in this part of the *American Cyanamid* analysis) and (b) the willingness of potential customers to wait until February 2025 when the Patent expires and with the expiration the introduction of lawful price competition.
43. I am left with the impression that GCP is at some risk of enforced price depression over the next 7-8 months but on balance, because that period is quite short, GCP's product is more sophisticated and because potential customers may be reluctant to buy from CCL when it is at risk of an injunction in September, the risk of large losses is probably quite low. I also believe that in the event that the effect of an enforced price reduction turned out to be significant, the court could arrive at appropriate compensation in an inquiry or account. I doubt that such compensation would be such as to exceed the cap on damages applied in this court.
44. I do not include any potential effect on the price which GCP could charge in the United States. Even assuming that it is GCP, a UK company, that markets in that country, apparently it has patent protection in the United States. I think that comparisons done by US customers with UK prices and any likely effect of such comparisons for different markets are too speculative to be taken into account.
45. GCP's second argument does not add much. For reasons I have explained, the market for this technology may be in an early stage of growth but it is doubtful that GCP was ever likely to exploit that growth even if it maintained a monopoly. Moreover, the monopoly could not continue beyond February 2025.
46. As to the third argument, given the slow pace of GCP's business to date and other factors I have mentioned, the long term effect of negotiations over the next 7-8 months is likely to be limited. I doubt that this will be a significant head of damage.
47. I also find the fourth claimed head of damage too speculative to be given any weight. I would need to know more about BBV's change of heart to be able to say that it was related to the performance or reliability of CCL's system as opposed, say, to some other commercial consideration. Mr Elfenbein's evidence was that it was connected with the downsizing of the HS2 project and the consequent ending of a pilot being run by CCL. Either way, it seems that BBV did not conclude that the technology generally was suspect.

48. As to the fifth head, I am satisfied on the evidence that CCL's financial position is precarious. The projection towards bankruptcy suggested by GCP seems not to have come about because CCL is still trading, but the lack of more recent figures from CCL implies that its current financial health is not robust. This is not unusual in a small start-up company like CCL in its early years of trading.
49. However, GCP was willing to adopt Mr Elfenbein's growth projections in order to support its other arguments. If those are indeed accurate, by the time that CCL is ordered to pay any sum on an inquiry or account, should there be one, it could be well able to afford to pay.
50. Any prediction about the likely irreparable harm that GCP would suffer in the absence of an injunction is going to be uncertain. The best I am able to make on the evidence available is that on balance such irreparable harm is likely to be limited and calculable.
51. Not so limited, though, that an interim injunction should not be granted on that ground alone. I move on to consider the likely irreparable harm to CCL if an injunction were to be granted.

Irremediable damage to CCL – CCL's arguments

52. CCL's evidence on the harm that an interim injunction would cause came down to variations on a single theme. CCL is a start-up business. On the hypothesis relevant to this part of the *American Cyanamid* analysis, it is pushing to develop a potentially lucrative market that is not protected by the Patent. Mr Elfenbein stated, unsurprisingly, that it is reliant on investor funding to pay its staff and otherwise stay in business. In particular it has to maintain investor support and to that end there are milestones to meet in respect of revenue and development of the project. This makes it vulnerable to an injunction which would severely limit its trading between now and September, being restricted to "existing customers" however that may be defined. Mr Elfenbein's evidence was that CCL would be liable to go out of business.

Discussion and the balance of irremediable prejudice

53. Even though CCL's evidence was not as detailed as it might be, I find its central argument on the irremediable harm that an injunction would cause broadly persuasive. A severe loss of sales for 7-8 months would be difficult for a company in CCL's financial position. A loss of investor confidence is liable to be a good deal more serious and possibly fatal to a start-up company such as CCL.
54. The risk to GCP if there is no injunction is there, but not very great and under no circumstances does it represent a threat to GCP's ability to continue in business. The risk to CCL if an injunction is granted is by contrast more likely to be an existential threat, raising the possibility of seriously affecting CCL's ability to trade at a vulnerable stage in its development.
55. In my judgment the balance favours no injunction. The defendants' application is dismissed.