



Neutral Citation Number: [2019] EWHC 1597 (Pat)

Case No: HP-2017-000045

And HP-2019-00009

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, 19th June 2019

Before:

MR. RECORDER DOUGLAS CAMPBELL QC
(Sitting as a Judge of the Chancery Division)

Between:

TQ DELTA, LLC
(a company incorporated under the laws of the State of
Delaware, USA

Claimant

- and -

(1) ZYXEL COMMUNICATIONS UK LIMITED
(2) ZYXEL COMMUNICATIONS A/S
(a company incorporated under the laws of Denmark)

Defendants

DR. NICHOLAS SAUNDERS QC and MR. JAMES ST. VILLE (instructed by **Gowling**
WLG (UK) LLP) appeared for the **Claimant**

MR. JAMES ABRAHAMMS QC (instructed by **Pinsent Masons LLP**) appeared for the
Defendants

Approved Judgment

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MR. RECORDER CAMPBELL QC:

Introduction

1. This is an application by the defendant for the following relief:
 - "A. Permission to rely on a sector expert, Dr Michael Peeters, in the field of the DSL and broadband technology.
 - B. Permission to rely on the evidence of a financial expert, Dr Matthew Lynde, in substitution for Mr James Pampinella (for whom ZyXEL has permission).
 - C. Permission to amend its Statement of Case on RAND, in light of the evidence of Dr Lynde (i.e. to bring ZyXEL's pleaded case into line with its expert evidence).
 - D. The addition of two further individuals to the confidentiality club established in these proceedings.
 - E. An extension of time for the service of expert evidence."

The additional expert application

2. It is accepted that a number of these points are closely related. I am currently dealing with issue A, ie permission to rely on the sector expert, Dr. Michael Peeters, in conjunction with an application for extension of time for service of that report.
3. So far as the relevant legal principles are concerned, my attention was drawn to three cases which appear in the authorities bundle: *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm); *CIP Properties v Galliford* [2015] EWHC 1345 (TCC); and *Vilca v Xstrata* [2017] EWHC 2096 (QB). In fact, there is no dispute as to the correct legal approach. In short I have to assess this application in the light of the overriding objective and the lateness of the application is a factor I have to bear in mind.

Chronology

4. First of all, let me say something about the chronology. I borrow from a chronology produced by the defendants which was not disputed by the claimant.
5. These actions began on 14th July 2017. There was a CMC hearing order made by Henry Carr J on 21st November 2017, with directions for a technical and RAND trial. On 13th June 2018, it was ordered the technical trial was to be heard separately from the RAND trial and the RAND trial was to be determined in a 15-day trial in January-February 2019.
6. The parties served financial expert reports on 6th and 7th December 2018. ZyXEL served one from a Mr. Pampinella. The claimant served one from

Mr. Mark Bezant, which introduced an argument based on the “economic benefits approach”, or EBA.

7. I was shown some passages from Mr. Bezant's report by both sides. I have to say, it seems to me the passages in question seem to raise primarily questions of fact rather than expert evidence. I will return to that.
8. At a hearing before Arnold J on 20th December 2018, the claimant was put to an election, either to proceed with its pleaded RAND case or adjourn the RAND trial to proceed with what was called the "full width of the case", including the EBA argument. TQ Delta subsequently elected to adjourn the RAND trial and the technical trial took place on 24th January 2019 to 8th February 2019.
9. The application to re-list the RAND trial was heard on 19th February, before judgment was given in the technical trial, and Henry Carr J directed that the RAND trial should be heard at a ten-day trial in September 2019. Judgment was then handed down on the technical trial on 11th March. On 18th March, i.e. seven days later, ZyXEL elected not to enforce its rights to a RAND licence. My attention was specifically drawn to that by counsel for the claimant during this hearing, describing it as a major change of position.
10. The next development was on 21st March. ZyXEL filed an application for an order disposing of the RAND trial which, at that stage, was still going to take place in September 2019. On 17th April 2019, that application was dismissed by Birss J. That decision of Birss J is itself subject to appeal for which permission has been given.
11. Thus as things stand substantial amounts of evidence have been served by both sides in December 2018, for use at the September 2019 RAND trial. The defendants are unwilling litigants in the sense that they have already tried to vacate it, and that attempt is subject to an outstanding appeal next month. I should also say the damages inquiry for infringement of the '268 patent, which was held to be valid and infringed in the technical trial, is also to be heard at the September 2019 RAND trial. That forms the general background to all the applications before me today.

The parties' arguments on the additional expert application

12. That brings me back to the first specific application, which is the one for an additional expert. The order itself casts the permission in extremely general terms. In fact, it just says “the defendants have permission to rely on the expert evidence of Dr. Michael Peeters in relation to digital subscriber line technology and shall serve Dr. Peeters' report, comprising the evidence which he intends to give at trial, by the date set out in paragraph 5..”. That is extremely broad.
13. The areas to be covered were identified a little more precisely in Mr. Connor's first witness statement at 3.11. The wording used is slightly different to that used for the same subject in different places in the statement but in that paragraph it is said that Mr Peeters:

"... is able to comment knowledgeably as to the technology, regulatory situation, and infrastructure situation in at least the main markets throughout the world."

Again, this also seems to be extremely broad.

14. The defendants made it clear before me that they intend to serve fact evidence in reply, in any event. I do not propose to make any comment on that today, beyond observing that if the defendants do so, it seems likely to me, and I think the defendants accepted, that this fact evidence which they intend to serve may include at least some of the material it currently seeks to introduce via Mr. Peeters. The defendants' position is that they want to give the claimant as much notice as possible of this evidence.
15. The claimant does not want this notice, it wants to prevent the report coming in at all. The defendants themselves sees Mr. Peeters' report as going beyond fact evidence, hence this current application. It is not, therefore, surprising to me that the claimant might want to go beyond fact evidence in answer, once they see it.
16. The defendants say it is highly relevant to consider why we are having a RAND trial at all. The short answer to that is that Birss J made an order to that effect which is under appeal. The claimant also drew my attention to paragraph 39 onwards of Birss J's judgment of 17th April 2019, in support of its submission that the RAND trial still has value for a number of reasons. The defendants submit that these reasons have nothing to do with the defendants themselves, since given their recent change of position, they do not intend to take such a licence. However, the defendants did not go as far as to say that the RAND trial is worthless without inclusion of this new argument. It is certainly impossible for me to conclude the RAND trial is worthless without it. If the defendants want to say subsequently that this particular point or that particular point was not argued at a RAND trial, they can, in any event, do so.
17. More importantly, the defendants also submit that they need this evidence in order to answer the economic benefits approach arguments originally put forward by Mr. Bezant back on 7th December 2018. The first problem with this argument, and in particular with assessing the defendants' need for this evidence, is that the defendants still have not served the expert report on which they propose to rely. Their current proposal is that this should be served on 27th June, in eight days' time. In answer to questions from me, counsel for the defendant took instructions as to how the report currently stood. It is somewhere between 25 and up to about 50 pages, so it is not a trivial document. It is not clear whether that figure excludes annexes or how many further stages of review report that still has to go through, and whether it has been considered by anyone apart from Mr. Peeters himself. All I was given about Mr. Peeters was his CV. That CV was not relied on in oral submission, but it is not clear from that CV what sort of evidence he will be giving or how extensive it will be or what it will say.
18. All of these reasons make it difficult to assess the degree of necessity for the defendants to have this expert report and certainly if the defendants' argument

at the end of the day is that Mr. Bezant's report is fatally flawed, for all the reasons why the defendants say they need this additional expert evidence, those submissions can be made to the trial judge at the RAND trial.

19. Next I come to the important issue of timing. The claimant says the defendants have had six months' notice of the EBA argument in Mr Bezant's report. In their written submissions, the defendants said, and I agree, that the position is rather more complex than that. Having regard to the chronology which I just outlined, the pressure was off between 21st December 2018, when the claimant elected to adjourn the RAND trial in order to bring the EBA argument in, and 19th February 2019, when Henry Carr J directed it to be heard in September. I also accept both sides were busy at that time with the technical trial, assuming that the same people were involved. That is less than two months of the six.
20. The major development after that, in my judgment, was not so much 11th March 2019, when judgment was handed down on the technical trial, as the defendants' decision not to take a RAND licence after all. That decision was taken on 18th March 2019, which is three months ago. From that point on, the defendants presumably must have hoped that the RAND trial would go away, but they cannot have been sure about that. On the contrary, the defendants made an application on 21st March for an order disposing of that trial, and that was the application which was dismissed by Birss J. So, the defendants have known about the September trial for four months, and they have been trying to dispose of it for three months, but there was still no application for the new expert report until 5th June, and no actual report is available for the court even today, two weeks after that.
21. The defendants relied on two other points. I do not attribute much significance to either of them. The first was that the claimant served evidence late for the first trial. In my judgment, that is irrelevant at this stage. So is the fact that the defendants put down a marker of sorts in a witness statement of Ms. Bould, namely Bould 10, in February 2019. If anything, that perhaps put an obligation on the defendants to get on with it.
22. Finally, the defendants say this extra report will not involve the claimant in much work. It cites observations made by Mr. Adrian Speck QC on behalf of the claimant in the course of argument, back on 19th February. It seems to me the claimant has to see what the new report says in order to consider what impact it has. It would not be fair to hold the claimant to observations which were made back some considerable time ago in different circumstances and before they had seen a report.
23. I am also impressed by the fact that the defendants are not even having a guess at the impact on the trial timetable of incorporating an additional expert. The claimant also points out that even its existing experts have limited availability due to commitments made around the existing trial date before one starts to look into getting another expert to answer the defendants' new expert.
24. For all these reasons, I dismiss the defendants' application to allow an extra expert, namely the sector expert, Mr. Michael Peeters. In those circumstances, the question of extension of time does not arise for his report.

(For continuation of proceeding: please see separate transcript)

The expert substitution application

25. At the moment, I am dealing with the application for permission to rely on a financial expert, Dr. Matthew Lynde, in substitution for Mr. James Pampinella, and the related application for permission to amend the defendants' statement of case on RAND in the light of the evidence of Dr. Lynde. There may also be some issues about timetable, which I will address separately.
26. It seems to me there are two aspects to this. The first is about replacing the expert in the first place. So far as the relevant legal test is concerned, I was referred to *Allen Tod Architecture Ltd v Capita* [2016] EWHC 2171, which contains a relatively extensive quotation from the judgment of Edwards-Stuart J in a case called *BMG (Mansfield) v Galliford Try Construction Ltd* [2013] EWHC 3183 (TCC). . There is no dispute as to the principles generally. The only dispute of any kind was as to whether the court required "strong" or "very strong" evidence of expert shopping before imposing a term that a party discloses other forms of document than the report of the first expert in a case such as this, as a condition of giving permission to rely on the second expert. It appears that the original judgment of Edwards-Stuart J says, "very strong" whereas the quotation wrongly says "strong" evidence".
27. There was, before me, no actual suggestion of expert shopping, far less strong or very strong evidence of that. I will come to the conditions in due course, but first I will deal with the issue of whether the defendants can substitute their expert at all. Mr. Pampinella's evidence was served on 6th December. There is no dispute the defendant can rely on that report. However, the defendants have been candid with me today that they want to replace Mr. Pampinella with their new expert, Dr. Lynde, who has different qualifications. The consequence of refusing this application would, so far as I can see, be that the defendant is forced to use the expert they no longer want to use. It seems to me that would be a harsh result.
28. It is important to bear in mind that the parties are both permitted to rely on financial expert evidence by the order of Henry Carr J dated 18th March 2019, at paragraph 47, which was not restricted to any particular type of financial expertise. The defendant says that Dr. Lynde can deal with Mr. Pampinella's areas, plus more, in particular the EBA issues. Lynde 1 has already been served; Lynde 2 will deal with the EBA issues. Lynde 1 also deals with one new issue referred to variously as to the SSPU or SSPPU issue. I will consider that separately as well.
29. It is obvious that Dr. Lynde uses a lot of Mr. Pampinella's report. I was taken to some examples of Dr Lynde's use of Mr Pampinella's report, which are characterised by the claimant as repetition and embellishment. In particular I was taken to paragraphs 1.6.1, 2.1.3, 5.2.8 and 5.2.10. It was said in written submissions (though not in oral submission), that for Dr Lynde to use Mr Pampinella's report in this way was contrary to *The Ikarian Reefer* [1993] 2 Lloyd's Reports 68. I agree it is certainly leading. There can be nothing more

leading than putting Mr. Pampinella's evidence in front of Dr. Lynde and asking whether he agrees with it, but that is a matter for the trial judge.

30. I accept the defendants' submission that Dr. Lynde has been entirely transparent about his sources of information. I do not see the alleged problem with paragraph 2.1.3 either. The example on which most time was spent was paragraph 5.2.10, where Dr. Lynde says as follows:

"Mr. Pampinella understood from Mr. Pu that the spreadsheet containing ZyXEL's worldwide sales and cost of goods sold contains incomplete information for certain types of direct costs."

31. As it was explained to me, this is simply Dr. Lynde referring to a particular paragraph of Mr. Pampinella's evidence. The defendants made it clear that Mr. Pu was still going to be made available for cross-examination and, of course, Dr. Lynde can be cross-examined about these and all other points.
32. My attention was also importantly drawn to section 1.3.3, which sets out that Dr. Lynde's opinions and views are his own and there is a full explanation in 1.4 as to why Dr. Lynde started with Mr. Pampinella's report in the first place.
33. I do not see why the claimant should be able to test Mr. *Pampinella's* evidence in any way, shape or form, since he is no longer relied upon and there is no property in an expert witness. Nor do I see any reason why the claimant should be obliged to call both of them. This was not really pursued in oral submissions and I agree with the defendants that it is unrealistic.
34. It seems to me that in so far as criticisms of the type which I have just indicated are concerned, these are all matters which can be properly investigated in other ways, such as questions for experts, or in cross-examination at trial. If the claimant asks for material expressly stated in Dr. Lynde's report as having been supplied to him and the claimant is not supplied with it, that may go to the trial judge's assessment of Dr. Lynde's evidence. These are all matters, in my view, for the trial judge.
35. Leaving aside the specific point relating to SSPU, I see no reason why the defendant should not be allowed permission to use the expert it wants rather than being compelled to use the expert it does not want. Nor do I see why the defendants should be required to disclose any documents other than Mr Pampinella's report, which has already been disclosed (although I should make it clear that the defendants made it clear that they would do so if ordered).
36. I now come to the SSPPU point. This is addressed in section 5.3 of Lynde 1, which has, of course, already been served, so this does not suffer from the vice of Mr. Peeters' proposed evidence, in that we do actually have the report. Indeed the claimant has already indeed had it for several weeks. The argument is not yet pleaded in the RAND trial but the defendants seek to introduce it by amendment.

37. The SSPPU argument also appears to receive some support from a US authority to which I was referred, *Power Integrations v Fairchild Semiconductor* 2016-2691, 201717-1875 (US Court of Appeals for the Federal Circuit). I found that to have a useful description of how the argument works and it was not suggested to me by the claimant that the argument could not succeed or was strikable, so I proceed on the basis that it could succeed.
38. The question of whether to allow this part of the report is much more finely balanced. First, it seems to me that the argument could have been pleaded much earlier than it actually was - indeed, right from the outset of this aspect of the proceedings. It was not suggested to be responsive to anything in that sense. Secondly, the only reason as to why it is coming so late is that the defendant has changed to another expert, and the new expert has raised a point which the old expert did not.
39. It seems to me that the key thing here is just how much extra work would actually be involved for the claimant in dealing with the argument at this late stage when the parties are already working very hard on a large amount of other evidence. My attention was specifically drawn to 5.3.8 and also paragraph 5.3.9 of Dr Lynde's report, where Dr. Lynde refers in some detail to a lot of factual matters relating to Broadcom chipsets and other materials.
40. This evidence prompted the claimant to submit that the new case run in section 5.3 is an attempt to develop a separate 'top-down' analysis based on profits available in a different market, namely that of Broadcom DSL components which ZyXEL and its intra-group supplier purchase to include in ZyXEL's DSL equipment. The claimant went on to say that such a case involves completely different factual evidence, a completely different factual investigation and different expert evidence from the defendants' current case and would call for new disclosure, new fact evidence (in circumstances where one employee or representative of Broadcom, Mr. Ryan Phillips, already gives evidence of fact on another subject) and new expert evidence from the claimant.
41. This is much more marginal than my previous decisions, but the arguments put forward by the claimant, which I have just set out, were not answered in terms. It does seem to me that although this is on the margin it is too late to allow this argument to come in at this particular stage, in circumstances where it could have come in so much earlier.
42. One further argument was raised by the defendants as to why this new point should be allowed, and that was the fact that in the parallel damages inquiry for infringement of the '268 patent, which is being heard at the same time, this point is set out in a pleading which is already in that case. The argument is that directions were given for points of defence in relation to the damages inquiry; these points of defence rely on the SSPPU argument; and such points of defence were served without objection (eg in the sense that there has been no application to strike out). Therefore, say the defendants, we should be entitled to rely on the new point in the RAND trial since it is raised in the pleading in the '268 damages enquiry and both trial and enquiry are being heard at the same time. As against that it was not suggested that there was any order permitting expert

evidence in the ‘268 damages enquiry and indeed the defendants asked me for such permission during this hearing.

43. My attention was also drawn by the claimant to a transcript of the hearing before Birss J on 17th April 2019, in particular pp 126-128. Examination of this transcript shows it is somewhat equivocal and I accept the defendants’ submission that I should be guided by orders which were made, not by comments made in transcripts. It also seems to me that pages 126-128 do not, in terms, amount to any sort of order or even an indication from the court that no fresh evidence was to be permitted in the damages inquiry. At most, it is the court enquiring of the defendants’ then counsel, Dr. Nicholson, as to what his present intention was. The furthest one can take it is that, as at 17th April 2019, the defendants should have been on notice that if and in so far as they wanted to adduce any extra evidence in the damages inquiry, they needed to get on with it; and the evidence which I am now considering, relating to SSPPU, was not served until, I believe, earlier this month.
44. I accept the claimant’s submission that it would not be right to allow the matters which the defendant has recently sought to introduce into the damages inquiry, merely because of the timing there, to operate as a trojan horse whereby a substantial new argument should be allowed to come in at a very late stage into the RAND trial.
45. Therefore, on balance, I allow the defendants’ application, as I have said, for substitution of its expert with Dr Lynde, but I do not allow section 5.3, in other words the SSPU issue, to be incorporated. Those paragraphs would, therefore, be struck out.

(For continuation of proceeding: please see separate transcript)

The confidentiality application

46. This application by the defendants succeeds. The reasons are briefly as follows. My attention was drawn to the decision of Henry Carr J in *Evalve v Edwards Lifesciences* [2019] EWHC 955. I am satisfied on the evidence that Dr. Lynde has been hindered by the lack of individuals to help him with what is a substantial exercise. I also bear in mind that the people involved who are going to give him their assistance are responsible individuals who will be well aware of the obligations of confidentiality. The defendants also drew my attention to the nature of the confidential information, which it characterised as relatively low-level compared to other cases.
47. In those circumstances, I am satisfied I should give permission to expand the confidentiality club in the favour of Dr. Lynde. If and in so far as Mr. Bezant wants more people to help him, he can make an application in due course.

(For continuation of proceeding: please see separate transcript)
