



Neutral Citation Number: [2022] EWHC 504 (Pat)

IN AN INTENDED ACTION
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
PATENTS COURT
SHORTER TRIALS SCHEME

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

Date: Tuesday, 8th March 2022

Before:

MR. JUSTICE MEADE

Between:

COOK UK LIMITED

Intended
Claimant

- and -

(1) BOSTON SCIENTIFIC LIMITED
(a company incorporated under the laws of
Bermuda)

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

Intended
Defendants

MR. MICHAEL TAPPIN QC and MR. ANDREW SCOTT (instructed by **Powell Gilbert**
LLP) for the **Intended Claimant**

THE INTENDED DEFENDANTS did not appear and were not represented

Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Tel No: 020 7067 2900 DX: 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MR. JUSTICE MEADE:

1. This is an *ex parte* application by Cook UK Limited (“Cook”) in an intended patent action concerning medical devices. The application is for directions for service out and/or substituted service on one of the defendants in circumstances which I will describe shortly and for an interim anti-suit injunction over until the hearing of a substantive application which Cook seeks to have listed for next week.
2. To explain the background to this application, I need to go into a little bit of procedural detail, but I should make it explicitly clear, in case it is not already, that the intended defendants to the proceedings and respondents to the intended application, who are both companies in the Boston group, were not represented before me today and were not given notice of this hearing. I heard the argument in private out of caution but in the light of the way the hearing went this judgment is public and so is the transcript of the hearing before me.
3. The claims concern a European patent, referred to before me as EP '061, which is alleged by the intended defendants to cover the claimant's product, called the Instinct Clip, which is a surgical clip for treating gastrointestinal bleeding.
4. The '061 patent was granted in 2017 and has been the subject of EPO opposition proceedings leading to its being upheld in amended form by the Opposition in December last year. There have been proceedings by companies in the Boston group against another entity called Micro-Tech in Germany, which led to a judgment in 2020, followed by a settlement which the evidence before me says involved a licence to Micro-Tech and that is said by the claimants to be of importance, because it indicates that, ultimately, damages for infringement of the '061 patent, if any is found, will be an adequate remedy.
5. '061 is designated for a number of Member States of the EPC, including the UK, France, Germany and Ireland, but it is not designated for the Netherlands where, as I understand, it the designation lapsed for non-payment of fees.
6. In the immediate recent past, companies in the Boston group have brought proceedings on the German designation of EP '061 in Düsseldorf where there is to be a return date on 22nd March, but where the merits will not be determined until after expiry of the '061 patent, which is in September this year.
7. Then in February, on 8th February, two companies in the Boston group, Boston Scientific Limited, which is a Bermuda company and referred to before me today as “Boston Bermuda”, and Boston Scientific Medical Device Limited, an Irish company referred to as “Boston Ireland before me”, instituted what are called *kort geding* proceedings in the Netherlands which, as I understand it, were served on defendant companies in the Cook group, of whom the intended UK claimant is a member, on 16th February.
8. The complaint alleged infringement of the UK, French and Irish designations of EP '061, and also alleged "unlawful involvement" in the infringement alleged of the German designation, but there was not a claim for an injunction against infringement of the German patent as such because, of course, that is the subject of the Düsseldorf proceedings.

9. I ought, also, to mention by way of completeness that there have been some unsuccessful mediations between the Boston companies and the Cook companies.
10. *Kort geding* proceedings are well-known to patent practitioners in Europe, but for the sake of understanding of this judgment, I should explain that they are interim proceedings in which the Dutch court tends to look in detail at issues of infringement, but in less detail on questions of validity. For all that, they remain very definitely interim proceedings because a party that brings *kort geding* proceedings is normally committed to bringing full proceedings on the merits in due course and, indeed, the Boston companies in the Netherlands have said that they will do that, although that they have sought an extension of the time within which they must do that. In any event, proceedings on the merits in the Netherlands, whatever their scope, cannot possibly conclude until after expiry of the '061 patent.
11. Proceedings are moving swiftly in the Netherlands. I need not go into all the details of the timetable set by the Dutch court, which has been varied at one stage, but pleadings are ongoing through the rest of the month of March and there is to be a hearing on 5th April.
12. It is accepted on behalf of Cook, by Mr. Tappin QC who appears today, that the courts of the Netherlands when considering *kort geding* proceedings can consider whether or not there is a squeeze between validity and infringement and that is of some significance, for reasons that I will come on to.
13. I should explain that the relative involvement of Boston Bermuda and Boston Ireland in the proceedings in the Netherlands is somewhat complex and unclear. Since Boston Ireland is only the proprietor of the German patent, which is not directly in issue, it is hard to understand what real role it plays in the Dutch proceedings. It may well be that it has only been involved as a claimant to support the allegation of involvement by the Cook companies in supporting what is said to be infringement in Germany. The involvement of Boston Bermuda is much clearer, because it is the proprietor of the relevant designations of the '061 patent for which relief is sought.
14. Mr. Tappin took me carefully through the summons in the proceedings in the Netherlands and my overall conclusion, having done that, is that the involvement of Boston Ireland is not clear, but it is certainly participating in proceedings in which infringement of the UK designation of the '061 patent is alleged. That will become material when I come to consider the question of service on Boston Ireland.
15. Cook is extremely concerned by the bringing of the proceedings in the Netherlands. It emphasises that there is no designation of the '061 patent there at all and it argues, in Mr. Tappin's skeleton argument and through the first witness statement of Mr. Powell of Powell Gilbert in support of the application, that the proceedings in the Netherlands are artificial and intended to put the Boston companies in the position of getting an interlocutory injunction affecting the UK market in circumstances where the parallel interlocutory relief would be refused in the UK. In outline, the basis for that is the passage of time, the fact that the patentee has been willing to license the patent, and the impact on patients and doctors which Cook says all individually and collectively mean that there is no chance that the Boston companies could obtain an interlocutory injunction in the UK.

16. It would be inappropriate for me to express any concluded view on that today, in the absence of hearing from Boston, but that is my understanding at a very high level of detail about Cook's concern.
17. Cook intends to initiate proceedings in the UK for a declaration of non-infringement of the '061 patent by its Instinct product and the revocation of the '061 patent, for anticipation and/or obviousness over a single piece of prior art called Komiya, which was run unsuccessfully in the Opposition Division, and it intends to bring those proceedings in the Shorter Trials Scheme. Cook's position is that that is the natural home for this dispute and that, against that background, it is unconscionable and abusive for Boston to have begun the proceedings in the Netherlands, hence the application for an anti-suit injunction.
18. Cook seeks to make the full application for such an anti-suit injunction at the end of next week, which is to say on the 17th or 18th March, but before me today it seeks interim relief to prevent Boston bringing any anti-anti-suit injunction in the courts of the Netherlands and for an order that either it can proceed with service out of the jurisdiction on Boston Ireland by alternative means or, alternatively, that it will serve by post on Boston Ireland under the Hague Convention and I should then truncate notice of next week's hearing. In either instance, the intention is to make sure that there is an effective hearing next week at which Boston Ireland is present or at least has notice so that it can be present if it wants to be.
19. In my view, the logical sequence to consider the issues in is, first of all, what I should do about anti-suit relief and then to consider the position of Boston Ireland.
20. The principles applicable to the grant of anti-suit injunctions have been considered in a number of cases, but today I am only concerned with holding the ring until a hearing next week and I, for those purposes, do not need to go into the authorities in any great detail. I think, for present purposes, the principles are adequately set out in the decision of *Deutsche Bank v Highland Crusader Offshore Partners*, [2009] EWCA Civ 725 where Toulson LJ said as follows:

"[50] Leaving aside the provisions of the Brussels 1 Regulation and previous conventions, which are not relevant in this case, I would summarise the relevant key principles as follows:

(1) Under English law the court may restrain a defendant over whom it has personal jurisdiction from instituting or continuing proceedings in a foreign court when it is necessary in the interests of justice to do.

(2) It is too narrow to say that such an injunction may be granted only on grounds of vexation or oppression, but, where a matter is justiciable in an English and a foreign court, the party seeking an anti-suit injunction must generally show that proceeding before the foreign court is or would be vexatious or oppressive.

(3) The courts have refrained from attempting a comprehensive definition of vexation or oppression, but in order to establish that proceeding in a foreign court is or would be vexatious or oppressive

on grounds of forum non conveniens, it is generally necessary to show that

(a) England is clearly the more appropriate forum ("the natural forum"), and

(b) justice requires that the claimant in the foreign court should be restrained from proceeding there.

(4) If the English court considers England to be the natural forum and can see no legitimate personal or juridical advantage in the claimant in the foreign proceedings being allowed to pursue them, it does not automatically follow that an anti-suit injunction should be granted. For that would be to overlook the important restraining influence of considerations of comity.

(5) An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court. An injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity, because it merely requires a party to honour his contract. In other cases, the principle of comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention.

(6) The prosecution of parallel proceedings in different jurisdictions is undesirable but not necessarily vexatious or oppressive.

(7) A non-exclusive jurisdiction agreement precludes either party from later arguing that the forum identified is not an appropriate forum on grounds foreseeable at the time of the agreement, for the parties must be taken to have been aware of such matters at the time of the agreement. For that reason an application to stay on forum non conveniens grounds an action brought in England pursuant to an English non-exclusive jurisdiction clause will ordinarily fail unless the factors relied upon were unforeseeable at the time of the agreement. It does not follow that an alternative forum is necessarily inappropriate or inferior. (I will come to the question whether there is a presumption that parallel proceedings in an alternative jurisdiction are vexatious or oppressive).

(8) The decision whether or not to grant an anti-suit injunction involves an exercise of discretion and the principles governing it contain an element of flexibility."

21. To deal with matters today, I have only to decide whether Cook's position to seek an anti-suit injunction at a hearing next week is sufficiently strong that I should allow it to go ahead and what, if anything, I should do in the meantime.
22. This substantive application for an anti-suit injunction is an unusual one in a number of ways. For a long time it would have been impossible to bring an application of this kind, and the reason is that the Court of Justice of the European Union decided in a line of cases including *Turner v Grovit* C-159/02 that anti-suit injunctions directed to restraining the prosecution of proceedings in other Member States were not permitted under the Brussels regime. That position has changed following the European Union (Withdrawal) Act 2018 and the expiry of the transitional period, as Mr. Tappin points out in his skeleton. None the less, whilst that clearly means that there is no longer a prohibition on the grant of anti-suit injunctions against the continuance of proceedings in other European territories, it still has to be considered with care, especially in cases that are not brought based on jurisdiction clauses, which this one is not and, in my view, it is very important that I should have the strongest consideration for comity identified, for example, in paragraph 50(5) in *Deutsche Bank*.
23. This is also an unusual situation, because the intended proceedings in the United Kingdom, which I have identified that Cook will bring, are substantive proceedings concerned with patent infringement and patent validity, whereas the proceedings in the Netherlands are interim proceedings, as I have already identified.
24. Many of the criticisms levelled by Cook at the *kort geding* proceedings may be subject to the argument that they simply amount to saying that the courts of the Netherlands do things differently from the way that the courts of this country do. For example, the fact that no cross-undertaking is required in *kort geding* proceedings generally simply reflects the fact that in the Netherlands, if it turns out in substantive proceedings that a *kort geding* injunction has been wrongly granted, the defendant has to bring a separate claim for damages.
25. I think on the hearing of Cook's application, a great deal of care will be needed to look in detail at the nature of the proceedings in the Netherlands and whether Cook's contention that they are inherently unfair can be made good, or whether it is simply the sort of thing referred to in paragraph 50(5) in *Deutsche Bank*, that different judges in different courts with different legal systems operate differently. I am far from saying that Cook is wrong; I am simply saying this is a case where great caution is needed.
26. I am sure in saying this that, in due course, if and when the courts of the Netherlands look at the current case, they will want to take comity into consideration as well and I note that in the case of *Solvay v Honeywell* Case C-616/10, a reference to the Court of Justice which took place when the UK was still a Member State, the indication from the Dutch referring court was that it would stay interim proceedings and refuse to grant interim relief if there was "a reasonable, non-negligible possibility ... that the patent invoked would be declared invalid by the competent

court”, by which it meant the court of the patent, in this case the UK court. If the *kort geding* injunction does come before the Dutch court, which of course Cook seeks to avoid, I am sure that that is a principle that will need to be considered in the different procedural landscape where the UK is no longer a member of the European Union. I am sure comity will also be important if the Dutch court ever comes to consider the application for *kort geding* relief in relation to whether it would be appropriate to grant an injunction which would affect the choice of medical practitioners in the UK as to what device they would want to use and, indeed, potentially, therefore, the interest of patients. I am sure that if the parallel situation ever arose in the UK, our courts would exercise the same care and restraint.

27. All of that may turn out to be hypothetical, of course, because Cook may succeed in its anti-suit injunction application next week, but I mention it to stress, in my view, the need for the greatest possible care in the exercise of the anti-suit injunction jurisdiction.
28. I should say before moving on to consider what I should do today that Mr. Tappin took me very carefully through the ‘061 patent, the amended claims upheld by the Opposition Division, the Komiya cited prior art and the alleged infringing product, his intention being to demonstrate that there is a real attack to be made on the patent and to demonstrate that there is the real prospect of a squeeze being mounted.
29. I have to be careful not to express any firm view about this, given that I have not heard from the patentee, but the technology is not difficult to understand and I was satisfied by what I was shown that there is at least an arguable squeeze which, for all the usual reasons, was not considered, and could not be considered, by the European Patent Office.
30. For all that this is an unusual situation, I have reached the conclusion that it is at least arguable that there may appropriately be granted an anti-suit injunction against the Boston companies in due course, but it will require very careful consideration by this court and I have no doubt Boston will have much to say in opposition to it, including, in all likelihood, points that have not been envisaged by Cook or by me today. The making of such an injunction cannot be taken for granted at all, and even if Cook makes good its claim on the basis of balance of convenience arguments, there will be a real argument to be had about whether considerations of comity stand in the way of the grant of any such injunction, bearing in mind that the Dutch proceedings are only for interim relief, that there is a form of procedure by which Cook could be compensated if it turns out that the patent is invalid or not infringed at the end of the day and also bearing in mind that the Dutch court, on the evidence before me, will be able to consider the squeeze to which I have referred, and will be pressed by Cook with the argument that it should refuse to interfere with the provision of medical devices in the UK.
31. None the less, I think I must proceed today on the basis that it is possible that Cook will make out its case for an anti-suit injunction at a full hearing next week and the question for me is what to do in the meantime.
32. I have referred to the fact that the Boston parties are not before me today. The reason for that is that Cook's evidence says that there is the possibility within the

procedure of the courts of the Netherlands for the grant of anti-anti-suit relief and that if the Boston parties had been told about this application, there is a danger that they would have sought it and thereby snuffed out the possibility of the anti-suit injunction intended by Cook.

33. I did not think that the evidence of the availability of that relief was extremely strong and, despite the arguably tactical nature of what Boston has done so far, I did not think that the likelihood of their seeking that relief was especially great, but neither can be ruled out and, therefore, at one level, I can understand Cook's apprehension that giving notice of this hearing would have given rise to the risk of an anti-anti-suit application by Boston in the Netherlands.
34. That was not, I have to say, sufficient to satisfy me that it was right to make this application without giving any notice at all to Boston and, in my view, it is an extremely important principle of any urgent application, that if it is possible to give any notice, however short, without destroying the purpose of an application, then it must be done. I think it is not optimal that Cook did not turn its mind as to whether it was possible to give at least very short notice to Boston, sufficient for it to be represented today, but short enough to avoid any risk of Boston seeking relief from the Dutch court in the form of an anti-anti-suit injunction.
35. Although that gives me some hesitation, I think that I can achieve a just result with the absolute minimum of interference with the conduct by Boston of the proceedings in the Netherlands, indeed with, I think, no interference, and while recognising that Boston has not had a chance to be heard today, by making an order that Boston, and by that I mean both the Boston intended defendants to the application, must give Cook at least 72 hours' notice of any application to any court in the Netherlands to restrain or interfere with Boston's intended action here in relation to validity or infringement of the '061 patent, or with Boston's intended anti-suit application.
36. I think the requirement being limited to giving notice is both symbolically and practically more restrained, by which I mean limited, than granting an injunction actively to prevent any steps in the courts of the Netherlands. Taking this course simply means that some notice has to be given, so Boston is not prevented from doing anything; it just means that Cook can make an emergency application here if it turns out to be urgently necessary. So far as considerations of comity go, being as careful as I possibly can, I think that there is minimal, and probably nil, interference with any process or potential process of the court in the Netherlands. For example, the timetable towards its hearing is completely unaffected, as is the conduct of that hearing on 5th April, unless, of course, Cook is successful in its application next week.
37. That is what I intend to do substantively against both of the Boston companies, which is to say Boston Bermuda and Boston Ireland, and having said that I do intend to grant that very limited relief, I can turn to the question of service on Boston Ireland. There is no difficulty in relation to service on Boston Bermuda, because as the proprietor of the UK designation of the '061 patent, it has to have an address for service in the UK and it does, at the firm Marks & Clerk.

38. Boston Ireland is in a different position, because it is not the proprietor of the UK designation of the '061 patent or, indeed, the exclusive licensee. Indeed, so far as I am aware, it has no interest in the UK designation of the '061 patent and this takes me back to the description I gave earlier of its involvement in the proceedings in the Netherlands.
39. I have to consider, first of all, whether there is an applicable gateway. Mr. Tappin relies on gateway (3) as follows:
- "A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and
- (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
- (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."
40. It is argued that Boston Ireland is a proper party to the claim, on the basis that if both parties, i.e. Boston Ireland and Boston Bermuda, would have been within the jurisdiction, they both would have been proper parties and reference is made to *Altimo Holdings* [2012] 1 WLR 1804, in the speech of Lord Collins. This is a peculiar situation, because Cook's primary position is that Boston Ireland is not involved in the UK patent, but none the less it has made itself a party to a claim which relies on the UK patent in the Netherlands.
41. I think by a narrow margin I should deal with this on the basis that Boston Ireland is maintaining some sort of claim to an interest in the proceedings in the Netherlands as they involve the UK patent and that that makes it a proper party within the meaning of gateway (3). It may transpire, I recognise, that when matters are clarified, Boston Ireland sets out its stall that it is only involved in the Netherlands proceedings because of its ownership of the German designation of EP '061, in which case this may well fall away, but as matters stand, I consider that it is a proper party and that gateway (3) is satisfied.
42. As to serious issue to be tried in relation to the question of service out, I think that is covered by what I have said already. As to appropriate forum, again, that will no doubt be contested in due course, but I recognise the strength of Cook's argument, on that front, at least for present purposes, and what is absolutely clear is that the squeeze argument to which I have referred can be ruled upon in these courts far better than anywhere else, and possibly these courts are the only place where it can be adequately considered.
43. I then have to consider the question of service. This is a Hague Convention case since Boston Ireland is an Irish company and it would be possible to serve Boston Ireland by sending documents by registered post which ought only to take a few days. That is one option that I could take, although it would need to be coupled with a direction that Boston Ireland can be given short notice of the hearing next week.

44. Cook's preferred course is that I should permit service by alternative means on a defendant outside the jurisdiction, despite this being a Hague Convention case, and it relies, in particular, on two recent decisions of Calver J, in particular in *Griffin Underwriting Limited v Varouxakis* [2021] EWHC 226 (Comm), the judge said at 57, the following:

"In my judgment, in a case such as this where a party seeks a freezing injunction, because the court is making a number of coercive orders with the risk of committal for contempt, as well as the claimant giving an undertaking in damages, it is important that the proceedings be constituted formally as soon as possible which, in my judgment, fully justifies an order for alternative service, despite this being a Hague Convention case."

45. He said that the same approach applied in relation to interim anti-suit injunctions and that was in *Corporate Capital UK II Limited & Ors v ABSA Group Limited & Ors* [2021] EWHC 225 (Comm) 104.

46. Since I am granting relief, albeit the most restricted relief that I consider can do justice in the light of the considerations, including comity, that I have outlined, I think it is open to me to take the course indicated by Calver J, because although it must be unusual to permit service by alternative means in these sort of circumstances, the necessity to make sure that the return date is effective and unproblematic is an adequate reason.

47. Taking all of those considerations together, I will direct that alternative service can be made on Boston Ireland and I will direct that that take place by the means sought by Cook, which is by service via Marks & Clerk who, as I have indicated already, are the address provided in connection with Boston Bermuda's proprietorship of the UK designation of '061.

48. I will also direct that the anti-suit injunction hearing come back for a hearing next week. That will be towards the end of next week. I am not going to set a specific day, because it ought to be fixed with reference to Boston's representation, as well as Cook's, and that will enable a determination of the application in a time which is appropriate, given the timetable as it moves on in the courts.
