



Neutral Citation Number: [2023] EWHC 2163 (Pat)

Claim No: HP-2022-000007

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES

PATENTS COURT (ChD)

The Rolls Building
7 Rolls Buildings

Fetter Lane
London EC4A 1NL

Date: 30 August 2023

Before:

Mr CAMPBELL FORSYTH

(SITTING AS A DEPUTY HIGH COURT JUDGE)

BETWEEN:

COOK UK LIMITED

Claimant

- and -

(1) BOSTON SCIENTIFIC LIMITED

(2) BOSTON SCIENTIFIC MEDICAL DEVICE LIMITED

Defendants

- and -

(3) BOSTON SCIENTIFIC SCIMED INC

Part 20 Claimant / Third Party

- and -

(4) COOK MEDICAL EUROPE LIMITED

(5) COOK NEDERLAND B.V.

(6) WILSON-COOK MEDICAL INC

(7) COOK IRELAND LIMITED

Part 20 Defendants / Fourth to Seventh Parties

IAIN PURVIS KC and TOM ALKIN (instructed by Powell Gilbert LLP) appeared for the Claimant and Fourth to Seventh parties

JAMES ABRAHAMS KC and **MICHAEL CONWAY** (instructed by **Simmons & Simmons LLP**) appeared for the **Defendants and Third party**

Hearing dates: 21, 22, 23, 24, 27 February and 1 March 2023

APPROVED JUDGMENT

I direct that pursuant to CPR 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

DEPUTY JUDGE FORSYTH:

1. This is a patent action. It was originally commenced under the Shorter Trials Scheme as a revocation claim by Cook. Matters developed to incorporate a second patent, counterclaims for infringement and additional parties. As a result, the action was transferred out of the Shorter Trials Scheme. For the purpose of this short judgment I shall refer to the Boston Scientific companies bringing the patent infringement claims as Boston and the Cook companies defending and claiming for revocation of the patents as Cook.
2. Boston claims infringement of two patents; European Patent (UK) 3 023 061 (the 061 Patent) entitled "Endoscopic device for causing hemostasis" and European Patent (UK) 3 443 915 (the 915 Patent) entitled "Apparatus for deployment of a hemostatic clip" (together "the Patents"). The Patents both concern the use of clips deployed using endoscopes for the treatment of gastroenterological conditions, in particular to reduce bleeding by mechanical haemostasis.
3. Cook denies infringement and claims the Patents are invalid.
4. The 061 Patent expired on 20th September 2022. The application for the 915 Patent was filed on 30th September 2004 and granted on 24th March 2021.
5. Both the Boston and Cook companies are part of corporate groups which develop, manufacture and supply medical devices, including, of relevance here, in the field of gastroenterology and haemostatic clips.
6. The trial was conducted in the Patents Court over 6 hearing days and was followed by the provision of a number of post-trial submissions.
7. Prior to the judgment being completed the parties concluded a settlement of the proceedings. It is positive news the parties have been able to reach a resolution to the dispute. In the circumstances, it would be usual for the court to make an appropriate order at this point without the need for any judgment. In this case there was one issue before me at trial which, as it turned out, I did not need to determine but where I would like to comment.
8. During the trial there were various arguments about whether the trial witness evidence complied with PD57AC. Those issues are now resolved along with the proceedings.
9. Boston also took issue with a Cook application dated 9th November 2022 under paragraph 4.4 of PD57AC ("the Application"). The Application was for the certificate of compliance required by paragraph 4.3 of PD57AC to be varied.
10. Dealing with the application, Mr Justice Mellor made an Order dated 16th November 2022 ("the Order"). The Order provided that the Cook witness statements of Dr Neil Hawkes, Dr Srisha Hebbar, Dr Imdadur Rahman and Mr Michael Brecht may be modified, "...so as to include reference to those provisions (and specific parts thereof) of the Statement of Best Practice with which it was not possible to comply during the preparation of the witness statement.". As envisioned by paragraph 4.4 of PD57AC, the Application was without notice and the decision made on the papers without an oral hearing. Reasons were set out at the end of the Order.
11. Boston argued in relation to the Application that it should be provided with Cook's application notice and supporting evidence. It referenced CPR rule 23.9. Cook denied Boston was entitled to see these documents. In the end, Boston made no formal application on the point and Boston was not provided with these documents.

12. At its core, the issue that was argued between the parties was whether, upon an order being made pursuant to a without notice application under paragraph 4.4 of PD57AC, the application notice and any supporting evidence are required to be provided to the other parties to the case. In other words, does the granting of such an order trigger the requirements of CPR rules 23.9 and 23.10.
13. The relevant application notice and supporting evidence here was included as part of the trial bundles. As this material was not provided to Boston, I explained to the parties that I would not read the material. In the end, as noted, I was not required to make a determination on the issue.
14. However, this is an important point on a new practice direction where I heard and read argument. I have therefore commented below on the issue.
15. There is an obligation, where an application is made without notice, for the application notice and supporting evidence to be served with any resulting order "...on any party or other party or person - (a) against whom the order was made;" CPR rule 23.9(2). The order must contain a statement of the right of the party against whom the order was sought to make an application to set aside or vary the order (CPR rule 23.9(3)).
16. Boston's position was that CPR rule 23.9(2) operates where an application is made under PD57AC paragraph 4.4. Cook's view was that an application under paragraph 4.4 of PD57AC is neither sought nor made against Boston. Further, that the supporting evidence for the application discloses the process by which the witness statements were prepared. This last point appeared to be mainly a concern over privilege.
17. Rules 23.9 and 23.10 are designed to give protection to a party where a court order is made which impacts that party and where such an order has been made without it having an opportunity to understand the basis for the order or present any arguments to the court. The issue is whether any order made under paragraph 4.4 of PD57AC allowing a certificate of compliance on trial fact evidence to be varied is an order made 'against' the other party to the proceedings.
18. The result of any such order of the court is that the applicant is permitted to rely on evidence which is prepared outside the requirements of PD57AC and the Statement of Best Practice. The admission of such evidence into the case clearly has a potential impact on the other parties in the case. In my view, the wording of rule 23.9 'against whom an order was made' applies to a without notice application made under paragraph 4.4 of PD57AC.
19. In considering this point, it was also briefly discussed at the hearing whether the determination of the Order by Mr Justice Mellor was a public hearing. This is a point related to, but distinct from, the above noted rule. There may be other reasons why documents may be disclosed in this or similar situations but I do not consider these and limit my comments on this further point to the situation noted below.
20. The Application was made without notice and without a hearing under paragraph 4.4 of PD57AC. The matter was therefore dealt with by a Judge on the papers. In this situation the Judge is making a substantive judicial determination, exercising their public judicial function and giving reasons, but no judgment. The Judge will read the relevant documents and rely on these as part of their decision making on what order should be made. The materials have therefore been read by the Judge. The question is, was that done in public.
21. In my view there can be no general basis (there may be exceptions) for a distinction between the situation where a Judge performs this function in open court or in private. The supporting evidence to such an application should therefore be made available whether this is in accordance with the rules for providing witness statements referred to in open court, basic principles of

common law or the right to a fair hearing. It is important that a party to a case is in a position to understand how justice works, why a decision was made and to understand the evidence used to support the decision. This promotes the public policy in the administration and transparency of justice and provides the opportunity for a party affected with the ability to criticise the process, reasoning or decision. There is no apparent issue of proportionality, practicality or countervailing balance of prejudice. If these were issues, promoting a fair approach should be a significant hurdle to overcome. For example, if such evidence contained legally privileged material, this is a matter that the court is capable of managing.

22. I am very grateful for the assistance of the parties and their representatives in the conduct of these proceedings. I will make the order.