Neutral Citation Number: [2023] EWHC 2394 (TCC)

Case No: HT-2021-000478

IN THE HIGH COURT OF JUSTICE
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 September 2023

Before :

MR JUSTICE CONSTABLE

- -

Between :

INNOVATE PHARMACEUTICALS LIMITED

Claimants

- and -

UNIVERSITY OF PORTSMOUTH HIGHER EDUCATION CORPORATION

Defendants

- -
- -

Thomas Roe KC and Katharine Bailey (instructed by JMW Solicitors LLP) for the Claimants
Clare Dixon KC and Nick Zweck (instructed by Eversheds Sutherland (International) LLP) for the Defendants

Hearing date: 25 September 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 13:00 on Thursday 28th September 2023.

Mr Justice Constable:

1. This is an application to adjourn a trial heard by the Court on an urgent basis. The application is brought by the Defendant, University of Portsmouth Higher Education Corporation ('the University') in relation to the upcoming trial of a claim brought against it by the Claimant, Innovate Pharmaceuticals Limited ('IPL'). The trial is listed for a hearing commencing 2 October 2023, a week today. IPL contests the application. The University relies upon the tenth and eleventh witness statements of Mr James Hyde, a solicitor at Eversheds Sutherland (International) LLP ('Eversheds'). IPL relies upon the tenth witness statement of Philip Partington of JMW Solicitors LLP ('JMW'). This is a finalised version of the judgment I gave orally at the end of the application.

2. The Claim arises out of an agreement between IPL and the University pursuant to which the University agreed to carry out a programme of laboratory research in a liquid formulation of aspirin known as IP1867B ('the Drug'), the patent for which is held by IPL. The claim centres upon a representation made in a text message from a Dr Hill on 10 August 2018 which stated that data from the Research Programme indicated that the Drug had the effect of suppressing the IGF receptor thereby alleviating resistance to inhibitors of EGFR in a proposed treatment of glioblastoma ('the Representation'), and an Article and Corrigendum, published in Cancer Letters in August 2019 and later retracted. The issues for the Court relate to the correctness of the Representation and, if not correct, whether Dr Hill had good reason to consider that the Representation was correct, such that his conduct did not constitute fraudulent misrepresentation; whether the Article constituted a breach of contract, and/or contained misrepresentations, or fraudulent misrepresentations. The investigation of the dishonesty related allegations are important as they may affect the application of a limitation clause. Causation and loss are in dispute. The quantum dispute is significant, relating in particular to lost projected profit (ranging between £0.5m and £94m on based on the evidence of the respective experts). There are set to be 9 witnesses of fact, and 2 sets of experts dealing with liability issues and with patent value.

3. The principles to be applied in an application of this sort are not in dispute. They were set out by Coulson J (as he then was) in *Fitzroy Robinson v Mentmore Towers* [2009] EWHC 3070 (TCC). Considering the decision of the Court of Appeal in *Boyd and Hutchinson (a firm) v Foenander* [2003] EWCA Civ 1516, his Lordship identified that the court must ensure that the parties are on an equal footing; that the case is dealt with proportionately, expeditiously and fairly; and that an appropriate share of the court's resources is allotted, taking into account the need to allot resources to other cases. More particularly, a court when considering a contested application at the 11th hour to adjourn the trial, which this undoubtedly is, should have specific regard to:

   a) The parties' conduct and the reason for the delays;

   b) The extent to which the consequences of the delays can be overcome before the trial;

c) The extent to which a fair trial may have been jeopardised by the delays;

d) Specific matters affecting the trial, such as illness of a critical witness and the like;

e) The consequences of an adjournment for the claimant, the defendant, and the court.

4. I have also been directed to a further observation by Coulson J in *Elliot Group v GECC UK* [2010] EWHC 409 (TCC), in which he said that the court is faced with a balancing exercise between, on the one hand, the obvious desirability of retaining a fixed trial date (which promotes certainty) and avoiding any adjournment (which can only add to the costs of the proceedings) and, on the other, the risk of irredeemable prejudice to one party if the case goes ahead in circumstances where that party has not had proper or reasonable time to prepare its case.

5. I therefore turn to consider the issues by reference to the foregoing, and the Defendant's submission that, were the trial to proceed, it would suffer irredeemable prejudice.

The Parties' conduct and the reason for the delays

6. At the heart of the application to adjourn is a complaint about the timing and content of the trial bundle.

7. By Order of Adrian Williamson KC, sitting as a Deputy Judge of the High Court, made at the PTR, the Claimant was to send to the Defendant a draft trial bundle index 7 weeks before the trial date. That would have been 14 August 2023. A week later, comments were to be provided by the Defendant, and a week later (28 August 2023) the trial bundle was to be provided.

8. Ms Dixon KC on behalf of the University points to delays, in particular, to bundles C2-C10, containing exhibits to the expert reports (although these complaints were not central to her oral submissions), and, to the 'D' bundle, which contains the parties' disclosure documents, which her submissions did focus upon. These bundles were not delivered until Friday 15 September 2023, and even then were subject to revision. That is 10 days ago, just less than three weeks after they were due to be served under the Order made at the PTR.

9. The Defendant also complains that, contrary to paragraph 15.2.3 of the TCC Guide, Bundle D contains all disclosure. Paragraph 15.2.3 states:

> '*Documents should only be included if they are relevant to the issues in the case or helpful as background material. There is no need to include every disclosed document in the chronological bundle and parties should seek to agree a chronological bundle of documents likely to be referred to or required for context.*'

10. At the PTR, both parties gave estimates of the size of the trial bundle (Claimant 3,500-5,000 and Defendant 4,500-6,500). However, on 11 August 2023, JMW informed

Eversheds that the trial bundle would contain all disclosure documents in chronological order. The letter stated that, further to a previous letter dated 8 June 2023, the Defendant's disclosure list was not in chronological order because the dates of numerous documents were in 'American' date format, in which the month and date were transposed when compared with British format. A revised disclosure list was therefore sought.

11. Given that the draft index was to be provided by 14 August 2023, there is no doubt that this communication was regrettably late. It does appear that the Defendant's criticism that JMW seemed only to be putting its mind to the creation of the trial bundle index at the last minute is justified. This may be the explanation for the decision simply to include all disclosure in the trial bundle index. It is the experience of the Court that this is, all too often, the default position particularly in circumstances where, as is often the case nowadays, the trial bundle is electronic. The fact that the bundle is not always printed is, however, no reason whatsoever to take what is a lazy approach to the compilation of a trial bundle by simply including all documents.

12. The trial bundle should contain, and contain only, those documents which are likely to be referred to at the trial. It is not difficult to prepare and it is a source of amazement how often parties are unable to co-operate constructively over the preparation of an appropriately relevant set of documents for trial. The starting point for inclusion within a chronological run of documents within a trial bundle will be those documents referred to within the pleadings, witness statements or expert reports. This is likely to contain the majority of documents that will be referred to at trial (indeed, it could contain substantially more, but where they have been referred to by a witness, factual or expert, the default position is that their inclusion should generally be unobjectionable). In addition, each side may wish to rely upon some documents from their own disclosure (although it is likely that such documents will already have been included in one of the foregoing categories if it is probative) and, more likely, some documents taken from the other sides' disclosure which are considered to be helpful to their own case and which are likely to be deployed in cross-examination. No proper criticism can be made that such an assessment may be conservative, and it is inevitable that the trial bundle will contain some documents that will never be referred to. However, in a case lasting 3 weeks, it is improbable that more than a few hundred documents will in fact be referred to in Court, whether by way of submission or in examination of witnesses, and a well prepared chronological trial bundle should reflect this.

13. In their response, Eversheds justifiably pointed out that the trial bundle need not contain all disclosure. Eversheds also said that whilst they would provide a revised index, the order within their list was correctly chronological notwithstanding the format issue, so no difficulty would arise. It is not necessary for me to recite the correspondence which followed, but disagreement continued, with Eversheds complaining about JMW's approach, and JMW continuing to complain about the difficulty with producing a chronological run with Eversheds' list of documents given the format issue. An updated version of the list was provided on 25 August 2023. Whilst still disagreeing with the approach, Eversheds considered that it was no longer sensible to continue

debating the issue. A draft 'D' bundle index was provided on 29 August 2023, and a draft bundle was planned to be prepared by 8 September 2023.

14. A disagreement then arose about the removal of duplicates, which following the Claimant's review may have numbered as many as 1000 documents. The Defendant's solicitors thought the better approach was, given the lateness at which this was happening, rather than reviewing and agreeing de-duplication, that all documents should go in. No bundle was in fact prepared by 8 September 2023, and the Claimant blamed the Defendant in part the inclusion of duplicates in causing the problem. It is clear that whilst the inclusion of duplicates extended the scale of the bundle, the primary reason for the extended preparation was a function of its size, comprising as it did all disclosure. As at 14 September, the Defendant was reporting that the absence of the completed trial bundle was raising significant concerns. A PDF bundle was eventually provided on 15 September. Some parts were incomplete or corrupted which would, in time, require replacement. On 20 September 2023, 33 of 39 PDF files were replaced, and there may be more replacements to come. On 17 September 2023, the application to adjourn was filed.

15. The provision of the index and in due course the bundle was undoubtedly later than it should have been. I consider that the primary reason for the lateness of the bundle is a combination of the approach taken by JMW, namely incorporating all documents, and the lateness of commencement of this task. However, I accept that some difficulty was added by virtue of the format issue for which the Defendant is responsible, and the Defendant's refusal to engage (albeit later than it should have been required of them) in de-duplication. The correspondence between the parties demonstrates what seems to be a regrettable lack of constructive co-operation on both sides.

The extent to which the consequences of the delays can be overcome before the trial /

The extent to which a fair trial may have been jeopardised by the delays

16. Ms Dixon contends that a number of steps have been taken in order to overcome the difficulties caused by the late trial bundle. These include a division of responsibility between the counsel team, pushing back the date for opening notes, and adding a junior counsel. It is said that, even with this additional resource, the ability to prepare remains fatally compromised.

17. I do not consider that the matters complained of, whilst regrettable and whilst not primarily the fault of the Defendant, should remotely compromise the ability to have a fair trial. I do not, in coming to this conclusion, take any account of the submission urged upon me by Mr Roe KC, for the Claimants, that there is a tactical imperative on the part of the Defendant to have the trial stood down, given the impending scrutiny of the Court on the conduct of some of those working for the Defendant, about which I form no view.

18. In relation to the C bundle, namely the exhibits to the expert reports, these have obviously been in play since provided with the experts' reports. The fact they were

not in a bundle ready for trial plainly has no critical bearing on Counsel's ability to prepare. It is always preferable to prepare cross-examination on the basis of the final bundle, with pagination, as it will be at trial, but experienced counsel can be expected to cope if this apple-pie order is not attained in time (as, indeed, is regularly and unfortunately the case). Whilst it may be that some additional time is required for cross-referencing either submissions or cross-examination notes into the new bundle references in due course, this is a task which can be undertaken by a paralegal or the like concurrently with Counsel's ongoing preparation.

19. In relation to the D bundle, it is claimed that the University's legal team will have been denied the opportunity to review and analyse the disclosure documents placed before the Court at the trial, and as Counsel will be deprived of the opportunity of putting documents before the court, the Defendant's ability to test the evidence is greatly undermined.

20. I do not accept that this is the case. The asserted prejudice does not come from *new* documents not previously seen by the Defendant's legal team. Late disclosure of significant quantities of new documentation may well disrupt trial preparation and the inability to review them can cause prejudice justifying in some cases the adjournment of a trial. Whilst there has been some late disclosure, this was not the basis of the application which focussed simply on the size and timing of the D bundle. No details have been provided linking the impact of new documentation to an inability to prepare the case or other consequences.

21. The majority of documents within the bundle have been in play since disclosure in February of this year. Those documents should have been reviewed by the Defendant's legal team long before the immediate run up to trial, and I have no basis for thinking that they have not been. It is a matter for their allocation and use of resources whether counsel does or does not play a part in that review. Implicit in the Defendant's criticism of the Claimant's approach to the trial bundle is the contention that Eversheds would, on the basis of their own review of both their disclosure and that of the Claimants, have had their own list of documents which they considered would need to be in the hypothetical slimmer D bundle in order to comment on the index (and as required by the Order made at the PTR). If they did not have such a list in mind, their criticism of the Claimant's approach is misplaced as they would not have been in a position to make their own contribution to what ought to have been the slimmer version of the D bundle. If they did have such a list following their review of disclosure, as one would expect, then that information can simply be used by Counsel to direct and prioritise their review of the D bundle for trial preparation (or, indeed, the underlying disclosure prior to the provision of the D bundle). Put another way, if it was never the intention of the Defendant's legal team that counsel would review all the disclosed documents as part of trial preparation, then counsel would never have seen those documents which the Defendant legal team regards as irrelevant; Counsel would only have seen and prepared for trial on the basis of those documents which the solicitors' earlier review of disclosure identified. The inclusion of irrelevant material in the trial bundle, whilst highly regrettable, does not of itself prevent the same thing from happening: Counsel's review can be limited to (or prioritised by reference to) those parts of the trial bundle

that contain the documents the Defendant's legal team's earlier review of their and the Claimant's disclosure has identified as relevant or likely to be used in trial. If it is not relevant, it can be ignored. If, on the contrary, it was the intention of the Defendant's legal team that counsel was to review all disclosure, then leaving that to just before the trial date is the Defendant's own fault and has not been caused by issues relating to the trial bundle.

22. Either way, in circumstances where the Defendant's own team either do or should know what relevant documentation they would have in the slimmer, hypothetical bundle D, Counsel has the same ability as would otherwise be the case to review that documentation (and just that documentation) and prepare for trial. It is undoubtedly the case that some inefficiency is created by not having a bundle limited to such material. It is also unsatisfactory that the final version of this is provided later than it should have been. Whilst this will have caused some disruption, it will not of itself have prevented meaningful preparation of large parts of (for example) expert cross-examination. The expert evidence, both liability and quantum, is important and it is not obvious how the inclusion of irrelevant material in the trial bundle will have affected the preparation of the examination of these witnesses. Disruption caused by the late finalisation of the bundle undoubtedly therefore exists, but it is not of the scale that could remotely warrant the adjournment of this trial at the 11th hour.

Specific matters affecting the trial, such as illness of a critical witness and the like

23. There are no matters relied on by either side.

The consequences of an adjournment for the claimant, the defendant, and the court

24. Adjournment will lead to a significant delay to the resolution of the claim, as well as obvious disruption to the administration of the court's resources. If the matter was adjourned, a re-listed trial could probably take place in the spring of 2024 depending on the availability of a Deputy High Court Judge. Whilst likely, this cannot be guaranteed. On any view the delay to the resolution of the matter is a minimum of 4-5 months. The existing Deputy to which this case was reserved will no longer be needed, causing disruption to their practice at very short notice. A Courtroom will stand empty. Both parties will incur disruption and costs, including ongoing disruption to their businesses. Any adjournment of a trial at the last moment should, it goes without saying, be avoided if at all possible.

25. Whilst Mr Roe refers to elements of the claim which will change and require further amendment following a change to the dates from which losses are calculated, this of itself does not add significantly to the analysis.

26. For the reasons set out above, I do not consider that the situation surrounding the trial bundle will cause irredeemable prejudice to the Defendant and the trial should not be adjourned. Notwithstanding the fact that the Claimant has 'won' the application, costs

should be ‘in the case’ given my views about the inadequate features of the trial bundle preparation.