



Neutral Citation Number: [2022] EWHC 272 (Pat)

Case No. HP-2021-000021

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
PATENTS COURT

7 Rolls Building
Fetter Lane, London,
EC4A 1NL

10 February 2022

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

Between:

(1) NEURIM PHARMACEUTICALS (1991)
LIMITED

Claimants

(2) FLYNN PHARMA LIMITED

- and -

(1) GENERICS (UK) LIMITED T/A VIATRIS
(2) VIATRIS UK HEALTHCARE LIMITED

Defendants

Andrew Waugh QC, David Scannell QC and Katherine Moggridge (instructed by **Gowling
WLG (UK) LLP and Pinsent Masons LLP**) for the **Claimants**
Piers Acland QC, Adam Gamsa and Daniel Piccinin (instructed by **Taylor Wessing LLP**)
for the **Defendants**

Decided on the papers, without oral argument

Provisional Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith

1. In a judgment in the above-referenced proceedings under Neutral Citation Number [2022] EWHC 109 (Pat) (the **Judgment**), Meade J determined that the case should hereafter be managed and heard by me (Judgment at [192](iv)), for the reasons given by Meade J in [182] to [191] of the Judgment.
2. The extremely unusual circumstances which gave rise to this determination are fully explained in the Judgment. I do not repeat them, but adopt the Judgment in its entirety. It follows that the Judgment should be read, and read with care, before this judgment is considered further by any reader. I adopt the terms and definitions used in the Judgment.
3. It is also appropriate to read and consider two other judgments, this time of mine:
 - i) The Main Judgment (described at [7] of the Judgment). The Main Judgment was the outcome of a trial that I heard over a number of days at the end of 2020 (the **Trial**).
 - ii) The Consequentials Judgment (described at [10] of the Judgment).
4. The short point is that the trial of these proceedings – which concern the Divisional – is for me, but on the basis only of the materials and arguments that were before me at the trial which culminated in the Main Judgment, and which concerned the Patent out of which the Divisional comes. Although, at [189] of the Judgment, Meade J made clear that the outcome of the trial was a matter for me, the only reason the matter was coming back to me was because the materials and arguments in these proceedings are the same as those in the proceedings that culminated in the Main Judgment.
5. Meade J was initially inclined to deal with these proceedings “(a) on the basis only of the materials and arguments before Marcus Smith J, (b) by adopting and giving effect to the Main Judgment, and (c) by refusing permission to appeal just as Marcus Smith J did on 16 December 2020” (Judgment at [182]). After further argument, Meade J took a different course, but one that was very much informed by his initial inclination. At [189], he said:

“In the unusual circumstances of this situation, I think I must tread especially carefully. Mr Acland [counsel for Mylan] accepts today – there can be no ambiguity about this, and Mylan will be held to it – that this can go back to Marcus Smith J. That seems to me to be a fair, proportionate and judicially appropriate way to proceed because if he decides, it being a decision for him and after he receives submissions, to adopt what he did before, he will be adopting his own findings, his own words and his own judgment. It will also eliminate the possibility of another judge having to deal with something uncomfortably halfway between an appeal and a fresh trial, and it best addresses the problem, which Mr Acland acknowledges, that the materials to which Mylan wants to refer include evidence from Professor Morgan, whom Marcus Smith J has the unique advantage of having heard at the first trial.”

6. Since the Judgment was handed down, and the matter remitted to me, I have received and considered various written submissions from the parties. Mylan, in written submissions dated 24 January 2022 sought, first, to challenge the validity of the Divisional and, secondly, sought permission to appeal if that validity attack was rejected.
7. It is common ground that – following certain amendments – the claims in the Divisional are “patentably indistinct”, i.e. indistinguishable, from those in the Patent considered in the Main Judgment. That being the case, given the basis on which the trial of these proceedings has been ordered, the same outcome ought to be expected: I ought to find the Divisional to be valid and infringed; and I ought also to refuse permission to appeal. Those are the dictates of consistency.
8. That being said, it is quite clear that Meade J transferred the matter to me because: (i) he did not consider it appropriate for the judge trying these proceedings to act as a “rubber stamp”, simply endorsing, without consideration, the Main Judgment; but (ii) he wanted – for reasons he fully explained – to avoid the costs and dubious benefits of a fresh trial that would – in effect – be a re-run of the Trial. My having heard the evidence and argument in full at the Trial, a trial on the merits could be had, without the costs and the dubious benefits of a “re-run”, by sending the matter to me, for me to re-consider my Main Judgment *de novo*.
9. That I propose to do. However, I must be very clear about the constraints under which I am operating. Clearly, it would be inappropriate to rely on new evidence not before me at the Trial. That is self-evident. But, equally clearly, given the volume of documentation before me at the Trial, I must be careful to avoid a re-run of the Trial, using documents and materials that were (technically) before the court, but not deployed at all or not deployed to make a particular point.
10. The same is true of argument. Obviously, new points – in the sense of points not pleaded at the Trial – cannot be taken. Again, that is self-evident. But, more importantly, I must be careful to avoid allowing new formulations and new arguments to be run now which, although they would have been open to Mylan at the Trial, were in fact not taken. To allow such new formulations and new arguments would, in effect, result in a new trial for Mylan (who lost first time round), whilst at the same time depriving Neurim of the ability to defend itself effectively (through the different questioning of the witnesses that might have occurred, and any different substantive submissions that might have been made in light of the totality of the evidence).
11. It seems to me that the approach I should take is to consider whether, in light of the points made by Mylan, these points persuade me that the Main Judgment was wrong, such that I should change my mind and reverse or alter the outcome. In considering these points, I should bear in mind the distinctions that I have articulated in the preceding paragraph, and only allow myself to be swayed by re-emphases or re-statements of points that were before me at the Trial, rather than new or fresh formulations of points that could have been taken, but were not taken, by Mylan at trial.

12. Approaching the matter in this way, I am not persuaded that the Main Judgment was wrong, even in light of the additional submissions Mylan has made. I am also satisfied that it would be an error, on my part, to seek to expand upon the Main Judgment, in order to explain why I am satisfied that it should stand as the judgment and outcome of these proceedings. It is trite that after judgment has been handed down, the judge has spoken, and further revision of the handed-down judgment impossible. That – albeit the circumstances are very different – is the case here. Either I am satisfied that the Main Judgment should stand – as I am – in which case further elucidation is unhelpful; or else I am satisfied that the Main Judgment is wrong – which is not my conclusion – but if it were, would necessitate (in my view) some kind of fresh trial, at which both sides could explore my perceived error in the Main Judgment further.
13. As I say, that is not the case here: I stand by the Main Judgment, for the reasons set out therein. I find the Divisional to be valid and infringed; and, for the reasons I gave at the time of the Main Judgment, I refuse permission to appeal.
14. For reasons that are obvious, given my reasoning, I have decided this matter on the papers and without oral argument. However, given the unusual circumstances, I consider that it is appropriate to offer the parties the opportunity, if either one of them wishes to take it, of appearing before me to persuade me to follow a different course. That is the normal course where a ruling is given on the papers, and without an oral hearing, which is the case here. For that reason, although I am circulating this judgment to the parties, and do so openly, I do so labelling it explicitly as a provisional judgment, from which I can resile if appropriate.