Neutral Citation Number: [2024] EWHC 2138 (Pat)

Claim No. HP-2023-000037

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

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

Date: Tuesday, 30th July 2024

**Before**:

**SIR ANTHONY MANN**
**(Sitting as a Judge of the High Court)**

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**Between:**

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| **(1) FUJIKURA LTD**<br>**(a company incorporated under the laws of Japan)**<br>**(2) FUJIKURA EUROPE LIMITED** | **Claimant** |
| **- and -** | |
| **STERLITE TECHNOLOGIES LIMITED**<br>**(a company incorporated under the laws of India)** | **Defendant** |

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**MR. GEOFFREY PRITCHARD** (instructed by **Dehns**) appeared for the **Claimants.**

**MR. BRIAN NICHOLSON KC** (instructed by **A&O Shearman**) appeared for the **Defendant.**

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# APPROVED JUDGMENT

**SIR ANTHONY MANN :**

1. This is the occasion of the case management conference in this case. Various matters fell to be considered in order to take this matter forward, and I can call them standard case management conference matters in an action of this type. They have all been agreed, subject to some dates being altered as a result of my determination of the one disputed issue which arises in this CMC, which is one in relation to the listing of the trial.

2. The application before me is an application by the claimants to alter the listing which is currently operating in relation to the trial in this matter, pursuant to paragraph 12.12 of the Chancery Guide. That paragraph is an unusual one and not frequently referred to, and I will set it out briefly. Paragraph 12.18, to which I will come, deals with how matters are to be listed. Paragraph 12.12 reads as follows: "Any party dissatisfied with a decision of the Listing Officer may apply to the Judges' Applications List following the procedure set out in Chapter 14." The parties have not brought the matter before a judge in the normal applications list, but that is understandable in the circumstances, bearing in mind the CMC was coming up in this case.

3. Mr. Geoffrey Pritchard has appeared for the claimants and Mr. Brian Nicholson KC appeared for the defendant before me. The action in which this application is made is a conventionally-structured patent application for infringement, met with denials and claims for revocation. The patent in suit relates to a fibre optic cable, and since nothing at all turns on the nature of the patent, I need say no more about it.

4. The defendant and alleged infringer in this case is an Indian company with Indian-based executives, a matter which is of central importance to the application before me. The parties sensibly agreed an accelerated process for getting a trial date. They

invoked a procedure established within the Patents Court, pursuant to which parties can apply for a trial date before the CMC, thus bringing forward the potential windows available for trial. That was arranged pursuant to correspondence, which included a letter from Dehns, solicitors for the claimants, who wrote as follows on 13th June 2024:

> "As you will have appreciated, there are individuals associated with the case (whether those that instruct either side, or possible witnesses of fact/experts) who will be travelling from various countries to attend the trial in London. This will certainly be the case for our clients and we believe also yours (and so from Japan and India respectively).
>
> "To ensure that these individuals are able to attend, it is important that the respective UK lawyers handling the parties' cases have advance notice of when the trial date will be. To this end we invite you to agree with us the likely trial length, category etc., and then instruct our respective client's counsel's clerks to attend the Listing Office to fix the date.
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> "We appreciate that this is before the hearing of the CMC, but consider the attendance of clients and witnesses/experts is such that seeking an early listing is warranted. To this end we invite you to consider the Patents Court Practice Statement, paragraph 6, a copy of which is attached."

5. It is to be noted that in that letter the claimants themselves are acknowledging the need for, and the appropriateness of, clients attending the trial process.

6. That approach resulted in a consent order made by Bacon J on 24th June 2024, in which it was provided inter alia as follows:

> "IT IS ORDERED AS FOLLOWS:
>
> "1. The trial shall be set down before an assigned Judge in London with a technical difficulty of 4, estimated length of 7 days comprising one day for opening (half day for each side), a day for cross-examination of each side's expert, a half day for each side's witness of fact, a day for closing speeches, one day for pre-reading and an interval of one day for writing of final submissions at a date convenient to the parties and the Court in the current listing window being 1 July 2025 – 30 November 2025."

7. The window specified in that order was the window which was the one generally applicable to fixing trials where the fixing took place at the date of that order. It was not a bespoke window which the parties sought to agree or to operate. It was the standard court window at the time.

8. Neither party -- for these purposes, it is the claimants who are particularly significant -- was urging any expedition factors or any need for speed other than the need or appropriateness of speed which was inherent in the process of getting a trial window earlier than might otherwise have been the case.

9. The result of this activity was a listing appointment before one of the listing officers of the Chancery Division and the Patents Court, which took place on 27th June, 2024. Counsel's clerks attended on each side. The result of that exercise was that the trial was fixed in a window floating from 6th October 2024.

10. The evidence of what happened at the appointment is not particularly controversial. It emerges from witness statements provided by the parties in connection with this application and, in particular, a witness statement of Mr. Paul Andrew Harris, a solicitor at Dehns. It appears that the fixing process was not particularly difficult. There does not seem to have been any particular difficulties about the availability of counsel.

11. July, the first month in the fixing window, is a problem for fixing significant trials because the whole trial month is not treated as being available for those trials. Apparently, it is the case that the listing office is not likely to start a substantial trial, or certainly a trial taking seven days, such as this one, after about 14th July because of the risk of its overrunning into the vacation if the trial is started that late. It is, therefore, the case that only the first couple of weeks or so of July would be treated as

being available for this trial, if the parties could manage it; otherwise it would go off to the next available hearing date which was, indeed, 6th October, the date for which it was fixed.

12. There was no objection to a July trial date by the claimants in this case, but it was not actively pressed for either. Counsel were apparently available in July. However, the defendant's counsel's clerk said that it was not convenient for the defendant client to attend because of existing commitments throughout the month. That was in accordance with what the clerk had been told by the solicitors acting in the case. No particulars were given at that appointment and they were not sought. There was merely a statement, apparently accepted by all who attended the meeting, or at least not challenged by the claimant's clerk, that the relevant client representatives of the defendant were not available in July.

13. In the light of that, the listing officer determined that a trial would not take place in July, and she gave the October date. There was no apparent opposition to that date at the appointment. However, the next day the claimant began a challenge as to the date and, in particular, as to the unavailability of the defendant's client's representatives. Correspondence asked why they were not available. An answer did not emerge until witness statements were exchanged in connection with this application.

14. The two individuals concerned are a Mr. Deshpande and a Mr. Khanna. Mr. Deshpande is the company secretary and was said in the evidence to be needed in India for a board meeting in July, leading up to an AGM in August. The dates for those events were apparently not fixed and they were merely expressed as being in July and August. Mr. Khanna, who gives instructions on behalf of the defendant, is the chief technical officer of the defendant. He may be required for the board meeting

and may be required to sign disclosure documents, and thus be available as a witness, although that is only in the realms of a possibility rather than a certainty. Those are the two individuals who are now said, by the defendant, to be unavailable in July, and whose unavailability is still pressed in opposition to the July date which the claimants now seek.

15. Mr. Pritchard, for the claimants, seeks to revisit the question of the trial date, pursuant to paragraph 12.12 of the Chancery Guide, and in doing so he relies on the terms of paragraph 12.18, which is in the following terms:

> "12.18. In all cases, the court officer responsible for listing (whether within Judges' Listing or Masters' Appointments) will take into account, insofar as it is practical to do so, the times at which counsel, experts and witnesses are available. The officer will, though, try to ensure the speedy disposal of the matter by fixing a trial date as early as possible in the listing trial window. If, exceptionally, it appears to the officer responsible for listing that a trial date cannot be provided within the listing trial window, they may fix the trial date outside the listing trial window at the first available date."

16. Mr. Pritchard's approach to this provision in the Chancery Guide is to treat it as if it were a statute or a statutory instrument, and to lay particular emphasis on the words, "... the times at which counsel, experts and witnesses are available". He submits that that says nothing about facilitating the attendance of client representatives, although he accepts that that attendance would be a relevant factor to take into consideration, albeit merely secondary. It is right to observe that the letter from Dehns referred to above contained an acknowledgment of the need to accommodate the attendance of clients.

17. In the case of *DISH Technologies LLC v Aylo Premium Limited* [2024] EWHC 1310 (Pat), Meade J had cause to consider the relisting of a Chancery fixture, albeit in different circumstances to those applying in this case. He indicated that listing would

only be revisited if there was a "clear and pressing reason" to do so. That, as a matter of principle, is not disputed by the parties before me. Mr. Pritchard says that the clear and pressing reason to revisit the matter in this case is because it can now be seen that the reasons that the defendant were avoiding July, that is to say the need for the attendance of clients, can be seen to be based on inadequate reasoning and unconvincing.

18. Mr. Pritchard was at pains to point out, no doubt entirely properly, that no improper behaviour is alleged against any of the professionals. It is not said that, on the material available before her, the listing officer made the wrong decision. It is not said that any professional on either side, either clerks or solicitors standing behind them, deliberately misled the other side, by anything that was said or done. That sort of bad faith allegation can therefore be put on one side.

19. Mr. Pritchard also made it clear that the decision of the listing officer, on the material made available to her, was, itself, not challenged, if one confines oneself to that material. All she had before her, so far as the availability of client representatives was concerned, was the bald statement that clients were not available in July. It is that statement that is now challenged by Mr. Pritchard.

20. Also, when pressed by me, Mr. Pritchard accepted that if she had been told what has now emerged as to the reasoning behind that, that is to say the need for the gentlemen to attend or prepare for the various meetings, and Mr. Khanna's potentially being a witness, the listing officer would be likely to have made the same decision which, in my view, involves a concession that the presence of clients can be taken into account in relation to the fixing of trials. As I have observed, Mr. Pritchard accepted as much

in terms though he said it was a secondary factor. That seems to me to be an entirely correct and sensible concession.

21. It seems to me that those concessions by Mr. Pritchard are entirely correct and sensible. The listing officer is not a judge, and he/she does not have counsel attending the appointment. It is right that he/she should accept, and be able to accept, at face value what is said about matters relating to availability if it seems right to do so, subject to such limited probing as the officer might think fit to conduct to challenge obvious oddities, implausibilities or insufficiencies. It would not be for the listing officer to conduct the sort of probing that would have revealed the matters that Mr. Pritchard now complains about.

22. It is also right at this stage to make this observation. Mr. Pritchard now relies on the need of his clients to have an earlier rather than a later trial, based on the undesirable period of commercial uncertainty that would result if the October trial date were maintained and a July trial date were not afforded. As I will indicate in due course, this was not a matter that was particularised by Mr. Pritchard, and it is certainly not a matter that was deployed before the listing officer in this case.

23. Mr. Pritchard's case is that the listing officer made her decision on the basis of what has turned out to be inadequate and, to an extent, inaccurate information. It is said it has not been demonstrated that the two individuals whose attendance is said to be necessary really have to be in India for the whole of July, or the part of July when the trial could otherwise come on. The board meeting and AGM dates have not been fixed, and it is not apparent why they cannot be prepared for at a time which does not conflict with a potential July trial date.

24. Furthermore, Mr. Khanna's status as a potential witness is said to be questionable. At a time when he was thought to be a lawyer, not a technical man, Mr. Pritchard pointed out that the PPD, which would need to be signed in this case, would need to be signed by someone with technical expertise. Mr. Nicholson met that particular point on instructions by confirming that, actually, Mr. Khanna was a technical man and not a lawyer, or not just a lawyer, but certainly a technical man who might well appropriately sign some of the disclosure documents in this case, bearing in mind, in particular, that some of the disclosure documents will go beyond the traditional PPD.

25. Mr. Nicholson, for his part, submitted that there was no reason to upset the listing. What happened started with co-operation to get the consent order. By consent, there was a window which extended from July to November, with no suggestion of urgency or the need to have July. It refers to the convenience of the parties and not just the convenience of the lawyers and witnesses, and that was what was taken into account by the listing officer when she rejected July as a trial date and opted for October.

26. Mr. Nicholson said his client would not have agreed a trial date in July if that had been specified as the actual target month at the outset. As it was, the point did not arise, and when his client accepted a window which included July, it was just agreeing to the standard window and not necessarily accepting that a July trial date would be appropriate. The window allowed trials in October and November, and that is what, indeed, has happened, that is to say, October.

27. The need for the client representatives of the defendant to attend was both true and reasonable. He analysed the matter in such a way as to seek to demonstrate that, for a seven-day trial, client representatives would need to be here for some time before the trial, and not just the odd day during the trial, or not even just the duration of the trial.

That would mean the best part of two weeks, if not more, and that would be basically the July trial window. They would need to travel from India. All that would make July a very difficult month to fit all the trial activity and preparation for important meetings into. I have already indicated the point that he made about the potential need for Mr. Khanna to sign disclosure documents and, therefore, to be available as a witness for cross-examination.

28. It is undesirable for this sort of application to become commonplace. Listing is an everyday activity and it is carried out by officers who are experienced in the art. They should be left to fulfil their duties and the parties have to be satisfied with how apparent conflicts are resolved. The instances where a party can have a second bite at the listing cherry should be rare. I echo the remarks of Meade J in the *DISH* case, although they were made in a different factual context. If something clearly went wrong in the actual process, or if a manifest unfairness has resulted, or if there is evidence of bad faith, then the intervention of a trial judge may be justified. Otherwise the listing officer's decision should stand and the listing process should not be allowed to become an area of satellite litigation or and area of tactical posturing and manoeuvring.

29. For their part, the parties would be expected to approach the process in good faith, advancing genuine and honest cases about availability. As I have indicated, an absence of good faith might found a challenge to a judge. So, generally, the listing officer will resolve any conflicts on the basis of submissions and cases that are assumed to be made in good faith. Conflicts are usually resolved by finding dates that can accommodate the needs of both parties, though I am told that if that is not

possible then the listing officer will often find a date which is at least suitable to the court.

30. In the present case, the date that has been chosen does indeed accommodate both parties in terms of their legal representation and in terms of the attendance of clients. What has now happened is that one party perceives that a poor case has been made out for the need to accommodate the attendance of clients and seeks to accelerate the trial date back to an earlier period. I do not consider that in this case that attempt should succeed. It is an attempt to invoke at least two arguments which should have been deployed before, if they are going to be deployed at all, both of which would have failed anyway in my view.

31. The first is an argument about the accuracy of assertions about the requirements of clients. The claimant mounts a serious challenge as to whether the defendant's clients really do need to be in India across a likely July trial date. It is accepted that the listing officer would have accepted the professed need, so the challenge would need to go deeper than the present assertions and require more particulars and, theoretically at least, cross-examination. That is not appropriate in the listing process in the present case, or probably in most cases. There is no challenge to the generalised assertion at the appointment. The point was not pursued.

32. The second argument which is inherent in Mr. Pritchard's submissions is an urgency argument. It is now said that the claimant needs the earliest possible date in the window in order to resolve "commercial uncertainty" as soon as possible. This is a point which requires elaboration if it is to be made, and I did not really receive any. A point about a lost tender evaporated when it became apparent that the tender was lost some time ago. A generalised point about the possibility of future tenders was just

that, a generalised point about possibilities. No other commercial uncertainty, other than the normal uncertainty which will attend unresolved patent litigation, was specified. That is not enough to inject an urgency into the fixing procedure which was not apparent when Bacon J made her consent order, and which is inconsistent with the consent order which might have produced a date as late as November, about which the claimants could not have complained if that was the earliest date which was convenient, for example, for counsel.

33. In those circumstances, I reject Mr. Pritchard's case to hasten the listing back to July. I also reject Mr. Pritchard's attempts to approach paragraph 12.18 of the Chancery Guide as if it were a statute. The Chancery Guide is just what its name suggests; a guide. The fact that the Chancery Guide does not refer to the attendance of clients does not mean that that need is necessarily subordinate to all other needs. It is just that it is not referred to in the guide. As Mr. Pritchard himself accepts, it is a relevant factor when considering the listing of cases, and particularly trials.

34. In the circumstances, I find that this is not a case in which the court should get involved in the listing process as contemplated by the Chancery Guide. The listing officer fixed a date which was fixed in accordance with the apparent requirements of the parties at the time, and further probing and a further unparticularised urgency case do not justify interfering with that decision. I therefore dismiss the claimants' application.

[Further Argument]

35. Mr. Nicholson seeks indemnity costs in this case. Mr. Pritchard does not resist paying costs but he says that whatever else can be said about this case, it was not beyond the norm in terms of any undesirable qualities that it might otherwise have had.

36. Mr. Nicholson focuses on an apparent allegation of lack of bad faith in one paragraph of a letter between solicitors. It is true that the temperature may have been raised a little by that, and while the application is not of the sort that should be encouraged, and in fact it should be positively discouraged, I do not consider this application falls on the wrong side of the "beyond the norm" line which the authorities have established as being the boundaries of indemnity costs cases. While this may not be a particularly worthy application, I do not think it is so bad as to merit an award of indemnity costs.

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