

Neutral Citation Number: [2020] EWHC 892 (Pat)

Case No: HP-2018-000027

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

Date: Thursday, 9<sup>th</sup> April 2020

Before:

**DAMIEL ALEXANDER QC**  
**(Sitting as a Judge of the Chancery Division)**

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Between:

<b>HEINEKEN SUPPLY CHAIN B.V.</b> (a company incorporated under the laws of the Netherlands)	<b><u>Claimant</u></b>
- and -	
<b>ANHEUSER-BUSCH INBEV S.A.</b> (a company incorporated under the laws of Belgium)	<b><u>Defendant</u></b>

Claim No. HP-2019-000027

<b>ANHEUSER-BUSCH INBEV S.A.</b> (a company incorporated under the laws of the Belgium)	<b><u>Claimant</u></b>
- and -	
<b>(1) HEINEKEN UK LIMITED</b> (a company incorporated under the laws of Scotland)	<b><u>Defendants</u></b>
<b>(2) BEERWULF B.V.</b> (a company incorporated under the laws of the Netherlands)	
<b>(3) HEINEKEN N.V.</b> (a company incorporated under the laws of the Netherlands)	

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MR. IAIN PURVIS QC and MR. THOMAS ALKIN (instructed by  
Bird & Bird LLP) appeared on behalf of Anheuser-Busch.

MR. ANDREW LYKIARDOPOULOS QC and DR. JAMES WHYTE (instructed by Bristows  
LLP) appeared on behalf of Heineken et al.

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**APPROVED JUDGMENT**

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

**MR DANIEL ALEXANDER QC:**

**Introduction**

1. This is the Pre-trial Review in the trial of a patent claim, which is scheduled to begin in a five-day window, commencing on 27th April 2020. The case concerns so-called bag-in-bottle (“BiB”) or bag-in-container technology which, in general terms, involves a drink, such as beer, being squeezed out of a collapsible inner bag, housed in a pressure-resistant outer container, using compressed air for dispensing the drink into a glass.
2. The patents-in-suit, namely EP UK 2148770, EP UK 2152486 (which is proposed to be unconditionally amended, and EP 3296076) relate to BiBs that are integrally blow-moulded, a process whereby both layers are blow-moulded simultaneously from a two-layer “preform”.
3. In this judgment I will refer to the patentee as "ABI" and the relevant companies in the Heineken group collectively as "Heineken". ABI asserts infringement by Heineken's dealings in threecommercially available BiB products, so-called Blade, Brewlock and Torp. Heineken denies infringement and challenges the validity of the patents. Heineken also advances a defence of so-called “deemed consent” which is alleged to arise from the judgment of the Belgian court in previous proceedings involving ABI and the manufacture of the Torp product, AFA Dispensing Group BV (who I will refer to as "AFA").
4. At an earlier hearing, on 5th March 2020, I ordered that one of the issues in the dispute, namely a claim for a declaration for non-infringement in respect of one of Heineken's proposed designs (“Alternative 3”), be tried separately at a short hearing in September, with that timing partly determined to take account of the availability of ABI’s leading counsel, because the parties would not be ready with their expert and experimental evidence on that issue by the end of April for that to be fairly determined with the main case.
5. The parties are agreed that this main trial should go ahead, despite the current circumstances, but a dispute has arisen as to the start date, consequential upon an application by ABI to extend time for the service of its evidence in reply. That application is supported by evidence from Ms. Macdonald, ABI's solicitor, and partner at Bird & Bird, in charge of the case, and resisted by Heineken on the basis of evidence from Mr. Bowler, Heineken's solicitor and partner in charge at Bristows. Although the question of the start date and evidence are formally separate, it is convenient to address them together.
6. At the earlier hearing on 5th March, I ordered that evidence-in-chief should be served on 13th March, which it was, and that reply evidence of an expert on Belgian law was to be provided on the 8th and 9th April respectively. ABI has applied to have the deadline for both of these aspects of the evidence put back to 23rd April. This issue has arisen relatively recently in the context of the discussions or arrangements for this PTR. The proposed extension of time of

approximately two weeks and the consequences of that extension as proposed by ABI creates a problem, in that 23rd April is only two working days before the start of the trial window.

7. Recognising, therefore, that it would be unfair to provide its evidence that shortly before trial, if the trial commenced right at the start of the window, ABI has proposed delaying the start of the trial to commence in the week commencing Monday, 11th May. Heineken's leading counsel is however otherwise committed from 13th May and potentially losing its leading counsel for this main trial would be prejudicial. Heineken therefore resists the application.
8. In its skeleton application and orally, ABI has now put forward an alternative proposal, namely effectively to start the trial in the week of 4th May, with three days of evidence and submissions largely in writing in the following week, and a question and answer session dealing with written reply submissions thereafter, dispensing with oral openings.
9. Heineken contends that the trial should go ahead as originally contemplated on its original proposed starting date of 29th April.
10. In ordinary circumstances, an application for a two-week extension of time for reply evidence at this stage, coupled with putting back the trial to start outside the trial window, would be hard to justify. However, these are not ordinary times and I must therefore consider whether the reasons put forward for an extension of time and the consequential delay in the start of the trial are justified in the light, particularly, of the current pandemic crisis.

### **Approach**

11. It is first necessary to consider the principles upon which the court should act in the light of the recent guidance. The general approach to adjournments was recently summarised by Mr. John Kimbell QC, sitting as a Deputy High Court Judge, in *Re Blackfriars Limited* [2020] EWHC 845, a judgment of 6th April 2020 (albeit in that case the adjournment sought was for a considerable period). At paragraphs [25]-[34] the deputy judge there summarised the guidance given on the approach to dealing with cases in the light of the coronavirus pandemic. That guidance included, amongst other things, the message from the Lord Chief Justice to the Civil and Family Courts published by the Judicial Office on 19th March 2020, which emphasised the importance of doing "what can be done safely"; the first version of the Protocol regarding remote hearings dated 20th March 2020; the further message from the Lord Chief Justice dated 23rd March 2020, concerning court arrangements, which stated that arrangements had been put in place to continue as many hearings as possible remotely. The Deputy Judge summarised the effect of the guidance at paragraph [32] saying:

"There is, in my judgment, a clear and consistent message which emerges from the material I have referred to, the messages that as many hearings as possible should continue

and they should do so remotely as long as they can be done safely."

12. He also referred to the decision of Teare J on 19th March 2020 in *National Bank of Kazakhstan and ors v Bank of New York Mellon and ors*, in which an application had been made to adjourn the trial. In that case, Teare J referred to the need to "keep the service of public resolution of disputes going".
13. In my view, there is a corollary of that approach, namely that it is desirable where cases have been listed, that attempts are made to keep to the directions timetable where it is realistically possible to do so, without prejudicing safety or risking injustice as a result. It is against that background that paragraph 4 of PD 51ZA should be approached. That provides:

"In so far as compatible with the proper administration of justice, the court will take into account the impact of the COVID-19 pandemic when considering applications for the extension of time, for compliance with directions, the adjournment of hearings and applications for relief from sanctions."

#### **Extension of time for reply evidence**

14. I turn then to the reasons given by ABI for seeking the extension of time and the consequential delay of the start of trial, which were developed in the evidence of Ms. Macdonald and which I summarise here, dealing first with the expert evidence.
15. That proposed reply evidence consists of a report of Mr. Stefan Bock, who is based in Switzerland and is currently required to work from home.
16. First, it is said that Heineken's expert evidence in chief of Mr. Janssen (to which Mr. Bock's evidence would reply) is lengthy and concerned primarily with validity of the patents. It was only served by e-mail at about 11 p.m. on the day it was due, which, it is said, meant that work could only start on it after the weekend. However, in my view, that cannot have provided a significant obstacle to ABI dealing with the evidence since it was provided electronically to all concerned. That could not justify an extension of time of the length sought and the point was not really pressed in oral submissions by Mr. Purvis on behalf of ABI this morning.
17. Secondly, it is said that Mr. Janssen's reports was marked confidential, which meant that Bird & Bird was not able to share the report with the persons from ABI from whom Bird & Bird received its instructions and that a redacted version was only received some time later. However, there was a confidentiality club in place, pursuant to which the entirety of that report could be seen rapidly by the team at Bird & Bird, by ABI's counsel, by Mr. Bock and by two individuals at ABI, so that confidentiality, again, cannot justify an extension of the time sought. Again, that point was not pressed.

18. Thirdly, it is said that there has been disruption as a result of the lockdown. Ms. Macdonald draws attention to the difficulties in preparing reply evidence caused by the impossibility of face-to-face meetings and difficulties in not being able to consider relevant documents when in the same room, as well as the fact that solicitors at Bird & Bird have been working remotely from 18th March. Those difficulties, it is said, are increased by the fact the evidence is both long and develops the case on invalidity in detail for the first time. However, Heineken points out that it is ready to exchange its expert evidence in reply on time, notwithstanding it has been subject to the same general disruption.
19. Nonetheless, I consider there is some substance in ABI's point. While it is true that the evidence is not very specific as to why the disruption means that compliance with the original timetable would be impossible, the impact of the crisis has been to require individuals to re-organise aspects of their lives, professional and personal. Preparing documents and evidence has been made somewhat harder in the manner suggested by Ms. Macdonald.
20. As against that, however, the proposed evidence in question is directed to a relatively straightforward set of patents. It involves consideration of two items of prior art and does not involve co-ordination of the evidence of numerous technical witnesses. Moreover, Mr. Bock's evidence-in-chief has already considered the prior art in considerable detail with over 30 pages of analysis of one prior art document known as Keisuke and some nine pages of analysis of the prior art known as Richter.
21. Accordingly, the degree of additional time required for evidence in reply is inevitably more modest and the corresponding need for more time as a result of coronavirus-related disruption is correspondingly limited.
22. Finally, it is said that one member of the solicitors' team at Bird & Bird has been ill, having suffered symptoms of Covid-19, and that the solicitor in questions was unable to work on reply evidence for several days. That is, of course, regrettable and fortunately the solicitor concerned is now better.
23. However, Bird & Bird has a large solicitor team working on this case, which may involve as many as four qualified lawyers as well as counsel. The absence of one member of a substantial and experienced team for a few days since the evidence-in-chief was served on 13th March cannot, in my view, justify an extension in the timetable for service of reply evidence for two weeks. There are other solicitors available and this reply evidence ought in any event to require less involvement of lawyers in drafting since, by this stage, an expert should be up to speed on the manner in which reports need to be prepared and should require less outside assistance in drafting. However, I take the absence of the senior member of the Bird & Bird team into account as justifying a modest element of extension of time in addition to the matters to which I have already referred.
24. I turn then to the proposed reply evidence of Belgian law. This is said to go to how the court should interpret a judgment of the Belgian court in a dispute

between ABI and AFA, the manufacturers of one of the products in dispute. Heineken served a report from its Belgian law expert, a retired judge, Mr. Verougstraete, on 6 March 2020. It was not lengthy (11 pages) of which seven are substantive material. It is said on the behalf of ABI that it has become apparent that it is necessary to refer to arbitral awards between ABI and AFA and that ABI is in the process of contacting AFA to do this.

25. However, as Heineken submits, this is not said to have been prompted specifically by Mr. Verougstraete's report. To the extent that these awards are said to have been relevant, Heineken suggests that this would or should have been apparent at an earlier stage, including from Heineken's defence served in September 2019. I think there is some substance in that point, in that the question of permission from AFA seems to me an independent issue from questions of disruption caused by the current crisis.
26. Moreover, it is not adequately explained why ABI is only now in the process of contacting AFA, which is more than a month after the original expert report was served on behalf of Heineken. Heineken points out also that ABI has served a substantial brief in proceedings in the Netherlands, of which a significant proportion covers this issue and that that was done in February 2020.
27. In relation to the evidence of Belgian law, it is also said that there has been general Covid-19-related disruption, with difficulties in working from home and constraints in dealing with the physical documents, as well as the isolation of a partner in the Belgian office of Bird & Bird, who has been assisting on this evidence. It is, however, unclear that this has had an impact on the ability to attend to relevant matters. It has been said that, on occasion, a degree of self-isolation can increase productivity, avoiding some of the distractions of office life. That said, I am here also prepared to accept that the impact of the changes required in professional and personal life merits a degree of accommodation in deadlines, where that can be done without causing undue difficulty.
28. In considering this issue, it is, however, necessary to bear in mind, particularly in current circumstances, that while lawyers are preparing expert evidence, some of their often much less well-remunerated compatriots may be putting themselves and their families at risk in saving lives, working long hours in inhospitable conditions. The guidance to which I have referred strongly suggests that, where it can be safely done and without risks to the integrity of the legal process, the wheels of justice should keep turning at their pre-crisis rate. It is not unreasonable to expect that lawyers concerned in keeping cases on track may need on occasion to push a little harder to enable that to be achieved. I also bear in mind that the nature of the proposed expert evidence is such that what may be lost in polish as a result of having fewer hours devoted to it by lawyers may be gained in raw authenticity, as well as the fact that a more limited time encourages confining the evidence to that which is truly essential.

29. Taking all those matters into consideration, I am satisfied that a two-week extension for reply evidence has not been justified on the evidence and that to push the trial back as far as ABI's original proposal would cause prejudice to Heineken.
30. However, I am also satisfied that a modest extension of time, to Friday, 17 April, for this reply evidence, principally to take account of the general disruption and distractions caused to some as a result of the coronavirus crisis and the unavailability of one of the solicitors at ABI's lawyers, would not have a significant impact on the trial or the parties, and would be in accordance with the requirements of Practice Direction 51ZA.

### **Timing of trial**

31. That then brings me to the consequence of that on the timing of the trial. In this case, given the nature of the issues, although it is desirable for there to be a more lengthy period between reply evidence and skeleton arguments, this is not a case in which it is likely that the contents of the skeleton arguments will significantly develop the case beyond that in the evidence. Although skeletons are bound to be of assistance in drawing the court's attention to points that are of primary relevance in the evidence, this is not a case in which, for example, it is likely that there will be extensive need for legal submissions in advance of hearing the evidence. That is partly because the focus of this case in the evidence has been on validity and, in particular, arguments of obviousness.
32. In those circumstances, it does not seem to me unduly prejudicial to either side to require skeletons to be provided on 27th April and for evidence to be heard over three days, starting on 29th April and ending on 1st May.
33. It is also, in those circumstances, appropriate for there to be a slightly more extended time for provision of closing submissions and I will direct provisionally, subject to further debate at the conclusion of the evidence, that written closing submissions should be provided at the end of Tuesday, 5th and that there be oral closings, which may take the form of a question and answer session, but may be more substantial, depending on the nature of the evidence in question, either on Wednesday, 6th May or Thursday, 7th May, and possibly both, depending on what is required at that time.
34. The advantage of that course is that it will be possible not only to ensure that there is no clash with the constraints of leading counsel on one side, but that the envelope for the case, at least so far as the parties are concerned, will conclude before the 2020 May Bank Holiday (8th May).
35. In my view, extending the time for written closings after the evidence is also likely to provide a greater advantage in this case than having a more extended period before the trial commences to develop the arguments that need to be developed.

### **Further matters**

36. In relation to the other matters as to how argument should go, in my judgment, it is, at the moment, too early to say that no oral opening will be permitted. In my view the trial ought to start with a view to it getting to evidence as rapidly as possible on 29th April, but if it appears as though applications need to be made in relation to any aspect, they can be heard at the commencement of the case and, if absolutely necessary, I would also entertain an application on Tuesday, 28th April, if required, in order that the three-day window can be maintained for completing the evidence in this case.

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