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Case No: HP-2021-000041

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

Rolls Building,
Fetter Lane, London EC4A 1NL

Date: 27th June 2022

Before :

MR JUSTICE MELLOR

Between :

LISA DRÄXLMAIER GMBH
- and -
BOS GMBH & CO. KG

Claimant

Defendant

Douglas Campbell QC (instructed by A.A. Thornton LLP) for the Claimant
Mitchell Beebe (instructed by Powell Gilbert LLP) for the Defendant

Hearing date: 21st June 2022

Approved Judgment

I direct that pursuant to CPR PD 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.

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on the National Archives website. The date and time for hand-down is deemed to be Monday 27th June 2022 at 10.30am.

THE HON MR JUSTICE MELLOR

Mr Justice Mellor :

1. On 21st June 2022, I heard this application to expedite the hearing of an application to expedite the trial in this action, in which the Claimant or Dräxlmaier seeks a Declaration of Non-infringement of EP(UK) 3,266,631 (EP(UK)631). The Defendant or BOS is the proprietor of the Patent which concerns sun blinds for vehicles.
2. At the conclusion of the short hearing, I announced that I refused the application. I declined to give judgment then and there because I did not wish to delay the ongoing closing submissions in a trial. This judgment contains my reasons for refusing the application.
3. Each of the parties is incorporated in Germany, they manufacture their respective products in Germany and supply them to German car manufacturers. BOS brought a claim for infringement of the German designation of the Patent which was filed on 16 August 2021 at the Landgericht Düsseldorf which has listed the trial for 8 December 2022.
4. This UK action was commenced on 16 November 2021, but progress so far has been slow. Service of the claim was effected on BOS in Germany on 31 March of this year.
5. Since then four applications have been issued. In chronological order they are as follows.
 - i) On 5th May this year, BOS issued an application for an extension of time in which to serve its defence (the EOT application (also referred to in some of the evidence as the Defence application));
 - ii) On 27th May, BOS issued an application to strike out this action alternatively for summary judgment (the Strike Out application).

These two BOS applications have relatively recently been listed in a 3 day window starting on 17 October 2022.
 - iii) On 14th June, Dräxlmaier issued two applications; in the third application overall, Dräxlmaier seeks an Order for an expedited trial of this action (the Expedition Application).
 - iv) The fourth application in time is a Dräxlmaier application for a combined hearing of those three applications, also seeking expedition of the combined hearing so that it is heard before the end of July (this is the Combined Hearing Expedition Application). Dräxlmaier's ultimate aim is to obtain an expedited trial and a decision in the UK before the German infringement trial. This can only happen if the application to expedite the trial is heard before the end of July.
6. I should also add this important point: validity is not in issue either in this UK action or, as I understand the position, in Germany in that Dräxlmaier has not launched a nullity action in the Bundespatentsgericht challenging the validity of EP(DE) 631.
7. Although I have outlined the procedural position, some more explanation is required as to how it came about.

8. The Patent was granted on 27 March 2019 and originally designated at least Germany and the UK. However, BOS allowed EP(UK) 631 to lapse on 12 June 2021 by non-payment of the renewal fee.
9. Just a few days later, on 17 June 2021, the first communication took place from the Defendant to the Claimant concerning an allegation of infringement of the German designation of the Patent.
10. This prompted the Claimant's lawyers in the UK to write to the Defendant requesting, under s.71 of the Patents Act 1977, a declaration of non-infringement of EP(UK)631, requesting a response by 16 August 2021.
11. On that day (ie 16 August 2021), BOS issued its claim for infringement in Germany.
12. In order to ensure a foundation for or to bolster its s.71 claim, the Claimant paid the renewal fee for EP(UK)631 on 12 November 2021 and then issued this claim on 16th November in the Shorter Trial Scheme. As I have already mentioned, progress has been slow. Upon service of the claim being effected on 31 March, on 19th April 2022, BOS wrote to the Claimant indicating it intended to apply to the UK IPO to surrender EP(UK)631 and invited the Claimant to discontinue the proceedings in light of that surrender.
13. The following day, 20 April 2022, BOS wrote to the UKIPO offering to surrender EP(UK) 631 under s.29 of the Act.
14. The day after that, BOS acknowledged service of the claim, indicating it intended to contest all of the claim. The Defence was therefore due on 5th May.
15. On 28 April 2022, the Claimant indicated (without giving reasons) that it intended to oppose the surrender of EP(UK)631.
16. On 4th May the Defendant invited the Claimant to agree to (a) a stay of this action pending completion of the surrender application and (b) a 28-day extension for filing of the defence to allow the Defendant sufficient time to prepare its application to stay this action. In that same letter, the Defendant confirmed that it does not intend to enforce EP(UK)631.
17. By letter the following day, the Claimant indicated it was prepared to agree a 14 day extension of time for the Defence (which is the maximum allowable by agreement under PD57AB para 2.33), and that resulted in BOS issuing the EOT application I mentioned above, supported by the first witness statement of Mr Wilson of D's solicitors. The application was originally sought to be decided on the papers and without a hearing.
18. On 9th May the UKIPO indicated it intended to advertise BOS's offer to surrender the Patent in the Patents Journal to be published on 1 June 2022. Following advertisement, there is a four-week period for the filing of any opposition to the surrender.
19. On 13th May 2022, the Claimant served its evidence in response on BOS's EOT application, being the first witness statement of Mr Hussey from the Claimant's solicitors. On 18th May, the Defendant's solicitors wrote to the Court explaining that in the light of the Claimant's evidence, it considered the EOT application was not

suitable to be decided on the papers and the application should be listed for a 2-hour hearing. For its part, the Claimant wrote to the Court indicating its preference for a decision on the papers.

20. The next relevant event was the issue of the Strike Out application supported by Mr Wilson's second witness statement.
21. Subsequently, the Strike Out Application was given the listing I have already mentioned i.e. in a 3 day window from 17 October 2022 and, slightly later, Marcus Smith J., after various communications from the two sides, on 10th June 2022 directed that the EOT application should be heard with the Strike Out Application, as the Defendant had requested.
22. That led to the Claimant issuing its two application notices on 14 June 2022, supported by the Third witness statement of Mr Hussey. His witness statement contained the first explicit statement of the Claimant's purpose: that those two applications are brought *'in an effort to put in place a timetable to trial which would yield a decision in time to be of use in the parallel proceedings in Germany.'*
23. In that witness statement, Mr Hussey accuses BOS of a deliberate campaign of delay in order to defeat the purpose of the claim and he continues:

'10. To that end it has initiated two unfounded applications, the substance of which I have addressed in my previous witness statements. The Defendant's conduct in issuing first the Defence Application, and then some weeks later when it became clear that the Defence Application might be resolved quickly on the papers, the Strike Out Application, was a transparent and self-serving attempt to delay the progress of my Client's claim.

11. S.71 allows the potential infringer to seek a declaration from the court that their product or process does not infringe a patent, in circumstances where the proprietor has not provided, when asked, an acknowledgement to that effect. That is the remedy to which my client is entitled and seeks.

12. Per Arnold J in *TNS Group Holdings v Nielsen Media Research* [2009] EWHC 1160 (Pat) and *HTC Corporation v Yozmot* 33 [2010] EWHC 1057 (Pat), it is permissible for a party to seek a judgment in order to export it to a court in another EPO jurisdiction.

13. My client is therefore entitled under s.71 to seek a declaration of non-infringement from this court, and to put that decision before the German court seized of the parallel infringement proceedings.'

24. To conclude this already overlong recitation of the commercial and procedural context, I should refer briefly to the explanation given in Mr Wilson's Second Witness Statement as to the Defendant's position.

'5. The Defendant's overall position has been clear from the outset - it has no interest in the UK part of the 631 Patent which is why it took no

steps to prevent it from lapsing due to non-payment of the renewal fees. When the Claimant paid those fees, the Defendant confirmed in correspondence that it will not assert the 631 Patent in the UK.

6. The effect of this confirmation by the Defendant was clear and provided certainty to the Claimant in the UK for past and future acts. While the Claimant has not engaged with this confirmation at all, in order to try to pre-empt any future objections which the Claimant may develop, the Defendant is prepared to formalise the confirmation in the form of an undertaking. The Claimant's indication that it will actively oppose the surrender of the 631 Patent in the UKIPO (and the potential procedural delays in the UKIPO I have mentioned in paragraph 4 above) is a further reason for providing a formal undertaking. The Defendant provides an undertaking in the following form as reflected in the draft Order filed with the Strike Out Application (the "Undertaking"):

"The Defendant undertakes irrevocably not to enforce EP (UK) 3 266 631 B1 against any person, whether for an injunction, damages, an account of profits or any relief howsoever, for acts in the United Kingdom under s.60 of the Patents Act 1977, whether such acts occurred before or after the date of this undertaking."

7. The consequence of the Undertaking is to the same effect as the surrender of the 631 Patent under s.29 of the Patents Act, namely that the Defendant is foregoing any past or future entitlement to enforce the 631 Patent in an infringement action against a third party in the UK. In those circumstances, where the only substantive relief sought by the Claimant in these proceedings is a declaration of non-infringement, that declaration is entirely moot and serves no useful purpose. This undertaking is provided purely as a precautionary measure and to formalise the confirmation not to enforce the 631 Patent which the Defendant had previously given in correspondence on 4 May 2022.'

25. I should also mention the further explanation in Mr Wilson's third witness statement where, at the end of his paragraph 6 he says he summarises '*some key aspects of these proceedings which make it highly unusual and which are relevant to the Claimant's present application.*' He continues:

'7. The Defendant very deliberately validated the 631 Patent in a small number of countries excluding the UK. The validation in the UK occurred automatically upon the grant of the European Patent, and the Defendant did not intend to maintain the 631 Patent in the UK. Indeed, as the UK is not a significant market for the Defendant or its competitors, it allowed the 631 Patent to lapse in this jurisdiction by not paying the first renewal fee in respect of the 631 Patent. After some pre-action correspondence between the parties and their German representatives, proceedings for patent infringement were commenced by the Defendant in the Dusseldorf District Court based on the German part of the Patent on 16 August 2021. Germany is the jurisdiction in which the parties manufacture their products and the relevant car manufacturer customers are located. As a part of this pre-action

correspondence, the Claimant wrote to the Defendant and sought an acknowledgement of non-infringement in respect of the 631 Patent under s.71 of the Patents Act. As the Defendant intended to commence proceedings in Dusseldorf and correctly believed that it did not hold a UK patent², it did not respond specifically to the s.71 request.

8. The Claimant then waited some 3 months, paid the renewal fee in respect of the Defendant's lapsed patent in order to revive it, and 4 days later commenced these proceedings on 16 November 2021. Once served with these proceedings in Germany, over 4.5 months later on 31 March 2022, the Defendant promptly took steps to surrender the 631 Patent with the UKIPO and offered assurances and ultimately undertakings to the Court that, as it had never wanted the 631 Patent, it would of course not enforce the 631 Patent against anyone.

9. The UKIPO has advertised the Defendant's intention to surrender the 631 Patent. The Claimant has indicated that it will oppose the surrender of the 631 Patent but has not been prepared to explain on which basis.'

26. As is hinted at in some of these extracts, there has been a good deal of manoeuvring by both sides in this dispute, but I have concentrated on just the manoeuvring which is relevant to the decision I have to make.

Applicable principles

27. The principles I have to apply are not in dispute. I summarised them in *Abbott v Dexcom* [2021] EWHC 2246. Whilst normally I would not lengthen a judgment by setting out those passages again, I consider it is helpful to do so in this case because of the particular point which arises. In that case, as I explained in [1], expedition was sought 'to avoid the problems caused by the so-called injunction gap (as it is known) which often arises in patent proceedings in Germany.'

'Applicable legal principles

6. These are not in dispute. The leading case on expedition is *Gore v Geox* [2008] EWCA 622 at [25], in which the CA identified four factors. I was also referred to the slightly wider discussion in *James Petter v EMC Europe* [2015] EWCA Civ 480 at [10]-[14] and these paragraphs which include an endorsement of the *Gore* factors:

16. ... The correct principles have been debated between the parties but do not seem to me to be much in doubt. The court exercises its discretion to expedite proceedings against the backdrop that the courts are busy and that expediting once case will often slow the progress of others. For that reason, the overriding objective requires that there should be a good reason for expedition. But the categories of case in which expedition is appropriate are not closed. There may be many and varying situations in which expedition will be held to be just and appropriate, taking into account all aspects of the overriding objective and the court's resources, and the interests of other court users in particular.

17. Thus, as the judge was well aware from the authorities that had been placed before him, expedition will only be justified on the basis of real, objectively viewed, urgency. It is against that background that Neuberger LJ's four factors from *W.L. Gore supra* are to be considered, namely (1) whether the applicants have shown good reason for expedition; (2) whether expedition would interfere with the good administration of justice; (3) whether expedition would cause prejudice to the party; and (4) whether there are any other special factors.

7. At [22] of *James Petter*, Vos LJ (as he then was) emphasised that “the need for commercial certainty needs to be evaluated in its proper context” in each case.

8. Expedition of a patent claim to avoid the injunction gap in Germany has been considered many times, most recently by Birss J (as he then was) in *Nicoventures Trading Limited v Philip Morris & or* [2020] EWHC 1594 (Pat). To the *Gore* factors, Birss J added three particular points:

(i) First, in [11] he noted that “*There are likely to be a large number of litigants in the Business and Property Courts who would like their cases to be tried earlier, therefore granting expedition involves an inevitable degree of queue-jumping and therefore there has to be a good reason for it,*” such that the Court decides applications for expedition “*according to the relevant principles and not simply by approaching them on the basis that someone who happens to come to court wishing for their case to be speeded up will get it.*”

(ii) Second, in [12] he emphasised that “*a mere wish for commercial certainty is not enough to justify expedition.*” Rather, he said, there needs to be a “*good reason*” which must be “*established in evidence.*”

(iii) Third, in [13] he considered reliance on the German ‘injunction gap’ as a basis for expedition. He concluded (in [21]) that “*the courts will take this factor into account as a factor, but it is never enough on its own*”.

9. He explained this third point in these paragraphs:

‘14. A party who has sued for infringement in Germany often seeks to schedule the UK validity action or, rather, to be accurate the UK action which will involve both validity and infringement, in such a way that the outcome relating to validity is likely to be available and public before the German infringement court decides the matter.

15. There have been different words used by different judges of the Patents Court over the years relating to the emphasis that this factor bears in the context of listing decisions and expedition. In a number of decisions between 2011 and 2017, and I refer in particular to *HTC v Europe Ltd v Apple Inc* [2011] EWHC 2396 (Pat), *ZTE (UK) Limited v Telegnaktiebolaget LM Ericsson* [2011] EWHC 2709 (Pat), and *Garmin (Europe) Limited v Koninklijke Philips N.V.* [2017] EWHC 8165 (Pat), Arnold J consistently expressed the view that it

was a factor to take into account, however as he put it, it is not a strong factor and will never be sufficient on its own, but it is a factor.

16. In *Takeda UK Ltd v F Hoffmann-La Roche AG* [2018] EWHC 2155, Henry Carr J said at paragraphs 11 and 12:

"In my view, it is important to give Takeda at least the opportunity of obtaining a judgment from the UK court, which may have some influence on the Düsseldorf court hearing the infringement action. By a decision of the Bundesgerichtshof, dated 15th April 2010, Xa ZB 10/09, Roll-Forming Machine, the Federal Supreme Court held that:

'The German courts are required to consider decisions rendered by organs of the European Patent Office and courts in other EPC contracting states and pertaining to a largely similar issue and, where appropriate, address the reasons leading to a diverging result in the earlier decision. Insofar as points of law are concerned, this also applies, for instance, to the question of whether the subject-matter of a property right was obvious in the light of prior art.'

The UK courts are always very interested to see decisions of our German colleagues and judges of other EPC Contracting States pertaining in particular to equivalent patents. If I were hearing an infringement case in the UK, I would be very interested to see what decision the German courts had reached."

17. An important point of detail is that the decision of Henry Carr J was not about expedition as such but with the decision to list the case within the listing window, but nevertheless, in my judgment, he was making an important point that is generally relevant.

18. Despite what was suggested in argument, albeit it was never put quite as starkly as this, there is no conflict between the various statements by these judges. I agree with what was said by Henry Carr J and I also agree with what Arnold J said. As Arnold J said, this factor on its own is not enough. If a party did simply come to court and raised that as the only reason, no doubt they would get short shrift.

19. A party should, if it wishes to seek expedition, put forward evidence of the commercial context in which the dispute arises in order to establish why there is a good reason in commercial terms, if true, that the UK validity trial should be timetabled in the way that is sought. In other words, and I am probably repeating myself, if a party seeks expedition it will always need to support its application with evidence of a commercial context to explain why, in the words of *James Petter and Gore v Geox*, there is a good reason for expedition.'

28. I will also add these further paragraphs from *Abbott v Dexcom*:

‘20. As is well known, the German courts operate a bifurcated system. It is not possible to raise invalidity of an EP(DE) directly as a defence in the infringement proceedings. If the infringement claim succeeds, there are then the following possibilities:

(i) First, a defendant may request in his Defence that the infringement proceedings are stayed on the ground that the patent in suit is likely to be found invalid in pending nullity proceedings either before the German Federal Patent Court or in EPO Opposition proceedings. Abbott assures me that each of its defences will include a request for a stay.

(ii) If there is no stay, then an order for an injunction usually follows.

(iii) In order to enforce an injunction the successful claimant must serve the judgment and put in place financial security as ordered by the Court, typically a bank guarantee, which is designed to cover the defendant’s losses in the event the injunction is later lifted and usually amounts to the profits the defendant makes on the enjoined product for a period of 18 months going forward.’

...

28. In spite of the available procedures in Germany (summarised in paragraph 0 above), in theory the injunction gap problem in Germany is capable of producing some very unfair results. If a patent is pretty clearly invalid, there is no problem because the infringement court grants a stay. If a patent is weak but no stay is granted (because invalidity is not clear enough) and ultimately is declared invalid, it may suit a competitor to put up the required security. As I understand matters, the security does not amount to a cross-undertaking in damages. The competitor may calculate that he can inflict far more damage on his rival through an injunction than the value of the security he will lose. Whether such unfairness can occur in practice lies in the hands of the German courts, who I am sure are aware of the scourge of weak patents which turn out to be invalid when scrutinised.’

29. In the particular circumstances of that case, involving a number of patents owned by each side, I concluded no expedition was feasible.
30. Counsel for Dräxlmaier drew my attention to the two cases mentioned in Mr Hussey’s witness statement. Although these cases do not say anything different to the caselaw I summarised in *Abbott v Dexcom*, due to the specific reliance on those cases I will cite the relevant passages. Both were decisions of Arnold J, as he then was.
31. The first case is *TNS v Nielsen* [2009] EWHC 1160 and the relevant passage is as follows:

‘22. Counsel for the defendant submits that paragraph 22 of Mr. Johnson’s witness statement, and in particular the words “Such a

decision may be 'exported' to other national Courts", demonstrates that the claimant's true purpose in commencing these proceedings is to obtain a judgment for use in other Contracting States of the European Patent Convention and, possibly, in the EPO. He submits that that constitutes an improper or collateral purpose as described by Pumfrey J., and accordingly an abuse of process.

23. In my judgment, what Mr. Johnson says in paragraph 22 of his statement is not evidence of any improper or collateral purpose. There is a clear line of authority which demonstrates that it is perfectly legitimate for a party to proceedings in the United Kingdom concerning the validity of a European patent to seek to rely upon what has been referred to as the "spin-off value" of a judgment of this court.

24. In *Unilever plc v. Frisa N. V.* [2000] F.S.R. 708, 713 Laddie J. said this: "Furthermore, there is an advantage of proceedings being conducted here in accordance with the fairly tight time tables which are now imposed, namely that judgments obtained from this court, or obtained from this court and then from the Court of Appeal on issues of infringement and validity have in the past, at least on occasions, helped to inform the parties so as to enable them to resolve their disputes on a worldwide basis earlier rather than later."

25. That passage was quoted by and relied upon by Kitchin J. in *GlaxoSmithKline Biologicals SA v. Sanofi Pasteur SA* [2006] EWHC 2333 (Pat) at [32] - [35] and again at first instance by Lewison J. in *Glaxo Group Ltd v. Genentech Inc* [2007] EWHC 1416 (Pat), [2007] F.S.R. 35 at [63] - [65]. On appeal in the latter case, [2008] EWCA Civ 23, [2008] F.S.R. 18, Mummery L.J., giving the judgment of the Court of Appeal, referred to that part of Lewison J.'s judgment with apparent approval at [33].

26. In my judgment, those authorities demonstrate that it is perfectly legitimate for the claimant to seek to obtain a judgment of this court on the validity of the patent in suit in the hope that it will lead to a settlement of the dispute between the parties throughout Europe. Nor, in my judgment, would it be in any way illegitimate for the claimant, absent such a settlement being achieved, to seek to rely upon the judgment of the English court in proceedings before the courts of other Contracting States or the European Patent Office. It is commonplace for parties litigating on the same European patent in a number of Contracting States to put before the courts of one Contracting State decisions arrived at in one or more other Contracting States. I do not see that such conduct can possibly be stigmatised as an abuse of process. That is particularly so given that such judgments may come to the attention of courts in other Contracting States in any event. The courts of all the Contracting States are seeking to apply the same substantive law. It would be most unfortunate if anything were to be done which made it more difficult for the courts of the Contracting States to arrive at common answers to common questions.'

32. In the second case, *HTC v Yozmot* 33 [2010] EWHC 1057, having decided the trial and found against Yozmot the patentee, Arnold J. had to deal with an argument presented by Yozmot that, despite HTC being the winner, each side should bear its own costs of the litigation because of an open offer of a licence it had made at a relatively early stage of the proceedings. It was argued that the offer made the pursuit of the claim commercially pointless.
33. When dealing with and rejecting that argument, the Judge referred to his earlier judgment in *TNS v Nielsen* in the following passage:
- ‘9.it seems to me to be reasonably plain that HTC's objective in pursuing its claim for revocation was not limited to ensuring freedom of commercial action for itself, its distributors and its customers in the United Kingdom. On the contrary, having regard to the background of the parallel proceedings in Spain and threats that have been made to customers such as Vodafone in a number of European countries, it is evident that HTC hoped that a finding of invalidity by this court would be of assistance to it in foreign proceedings such as those in Spain. It may also be the case, although this is perhaps slightly more speculative, that HTC was of the hope that a judgment of invalidity of this court would assist in promoting a settlement between the parties on a European-wide basis.
10. It is perhaps worth interpolating at this point that, for the reasons I gave in my judgment in *TNS Holdings Ltd v Nielsen Media Research Inc* [2009] EWHC 1160 (Pat), [2009] FSR 23 at [23] to [26], it is legitimate, and I would add increasingly common, for parties to seek a judgment of this court on the validity of European patents in the hope that such a judgment will be of assistance to them in either of the two ways that I have just mentioned.
11. The conclusion I draw is that the open offer does not mean that the pursuit of the claim thereafter by HTC was commercially pointless.’
34. The following points emerge from all the caselaw:
- i) In my view they are consistent in holding that it is a judgment on **validity** that may be of assistance to the Court of another contracting state. That makes sense when one considers the injunction gap which can often arise in states such as Germany which operate a bifurcated system and where a decision on infringement may be issued a considerable time before a decision on validity.
 - ii) Where there is the possibility of an injunction gap, if there are otherwise reasons to expedite a trial which includes validity here, a factor in favour of expedition can be that the decision on validity in the UK may be of assistance in persuading the German infringement court to stay the grant of any injunction. But that factor is not enough to justify expedition on its own.
35. The final point in dispute between the parties concerned whether the Düsseldorf Court would take into account a UK decision on infringement only. In his evidence, Mr

Wilson relates what he was told by the German lawyer instructed by BOS in the German infringement action.

‘22. I have been informed by Mr Axel Verhauwen, a German lawyer and partner at Krieger Mes & Graf V. Der Groebens, who is instructed by BOS in respect of the German infringement action, that because the Dusseldorf District Court infringement proceedings between the parties are limited to the question of literal infringement, the Dusseldorf court will not take account of a foreign decision in relation to infringement.’

36. I should add that Mr Wilson goes on to acknowledge that the position regarding literal infringement can be ‘*contrasted with the situation where German courts have in the past considered foreign decisions relating to infringement by equivalence or, or validity but these find no application in the present case.*’

37. In response, Mr Hussey related what he was told by Mr Andreas Haberl of Preu Bohlig & Partner Rechtsanwälte mbB, a specialist patent litigator whose firm is instructed by the Claimant in the parallel German infringement proceedings.:

‘16. Mr Haberl has explained to me that the position in Germany, following the 2010 decision of the Federal Court of Justice in “Walzenformgebungsmaschine” (docket Xa ZB 10/09), is that German courts have to consider decisions of the EPO or courts of other contracting states of the EPC which concern an essentially identical question and, in case of a divergent decision, to deal with the reasons. I am told that this approach was confirmed in the 2014 decision “Sitzplatznummerierungseinrichtung” (docket X ZB 1/13).

17. Mr Haberl told me that, although these two Federal Court of Justice decisions, and decisions following them, dealt with validity or infringement by equivalent means, the interpretation of a patent claim is a question which equally concerns each national part of an EP – i.e. it is an “essentially identical question”. Considering the case law, the Düsseldorf court would take into account a UK decision on the same patent with regards to interpretation of the claims – as would be determined in any finding of noninfringement.’

38. So it would appear that Mr Wilson’s point depends on the infringement issues being limited to literal infringement (and without any issue of construction arising). Notwithstanding the evidence from both sides, I proceed on the basis that Henry Carr J.’s observation in *Takeda UK Ltd v F Hoffmann-La Roche AG* [2018] EWHC 2155 applies equally in Germany:

‘The UK courts are always very interested to see decisions of our German colleagues and judges of other EPC Contracting States pertaining in particular to equivalent patents. If I were hearing an infringement case in the UK, I would be very interested to see what decision the German courts had reached.’

39. Although I am only deciding the fourth application I mentioned above, and not the other three, in the unusual circumstances of this case, it is inevitable that my reasons may well have an impact on the other applications which are yet to be heard. It was for this reason that I read all the evidence relating to all four applications.
40. I refer to paragraph 12 of Mr Hussey's witness statement quoted above. It seems to me to proceed on a misunderstanding of the UK authorities and of the difference between a judgment which includes consideration of the validity of a European Patent and one which does not.
41. I do not rule out the possibility that, in some circumstances, the Court may be persuaded that there is good reason to expedite an infringement only trial here where the judgment may be deployed before the Court of another Contracting State to achieve greater commercial certainty for a party.
42. Leaving aside the possibility I just mentioned, I am entirely satisfied that, in the circumstances of this case, the Claimant has not demonstrated any reason, let alone a good reason, which would justify expedition of the trial of this action. It follows that there is no reason to expedite the hearing of the combined application.
43. Very briefly my reasons are as follows:
 - i) First in this dispute, the so-called injunction gap will not arise.
 - ii) Second, it seems to me that the experienced infringement Court in Düsseldorf does not need assistance in the form of a judgment of this Court on infringement of the UK designation of the patent.
 - iii) Third, it appears that the only reason for the action here is to attempt to influence the German court. If the 'spin-off' value of a UK judgment is not enough on its own to justify expedition here in a case where validity is in issue, that factor is even less powerful where validity is not in issue (i.e. infringement only) and there is no injunction gap in Germany.
 - iv) Accordingly, I see no reason, let alone a good reason, why this case should jump the queue and displace other litigants.
44. For all these reasons, I refused the Claimant's application to expedite the combined hearing.