Neutral Citation Number: [2021] EWHC 3413 (Ch)

Case No: HP-2021-000039

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

7 Rolls Buildings
Fetter Lane; London
EC4A 1NL

Date: 15 December 2021

Before:

MR. JUSTICE MARCUS SMITH

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Between:

OTSUKA PHARMACEUTICAL CO., LTD **(a company incorporated under the laws of Japan)**	**Claimant**
- and - **(1) GW PHARMA LIMITED** **(2) GW PHARMACEUTICALS LIMITED**	**Defendants**

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MR. JAMES SEGAN QC (instructed by **Powell Gilbert LLP**) for the **Claimant**

MR. THOMAS K. SPRANGE QC and MS. RUTH M.D. BYRNE (instructed by **King & Spalding International LLP**) for the **Defendants**

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Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MR. JUSTICE MARCUS SMITH:

1. I have before me an application by the Defendants to these proceedings for an extension of time to enable the Defendants to put in place a properly framed jurisdictional dispute, challenging the jurisdiction of these courts in favour of the courts of New York. The proceedings were commenced by the Claimant by way of a claim form dated and sealed 29 October 2021.

2. The dispute between the parties arises out of an agreement between them, which is confidential, and which confidentiality I can respect whilst keeping this Judgment "open". I shall refer to it as the "Agreement". The Agreement contains various provisions regarding dispute resolution, including a provision for good faith resolution (in clause 15.1) and an arbitration provision (in clause 15.2). It is common ground that the arbitration clause does not apply to the dispute as framed at the moment. (Indeed, the Claimant did try to commence an arbitration, and this was resisted by the Defendants.

3. The position is that these proceedings are actually commenced – there is no question of service out here – as of right against the Defendants, who are both resident and domiciled in England, specifically in Histon, Cambridge. There is an established default timeframe for the making of jurisdictional challenges, so as to prevent there being any form of submission to the jurisdiction.

4. The Defendants want more time to articulate and evidence their jurisdictional objections. The Claimant is prepared to give them more time, but just not as much as is sought.

5. In terms of timing, the difference between the parties is that the Claimant seeks the filing and service of any jurisdictional challenge, and any evidence in support, by 17 December 2021 (i.e., this Friday), whereas Defendants seek an extension to 14 January 2022, which they say will give them time to get their evidence in shape, and is the minimum that they need in order to get their evidence in shape. I have been told, in terms, by Mr. Sprange, QC, who appeared for the Defendants, that there is no prospect of his client putting in place the expert evidence that his clients wish to put in place this side of Christmas. In other words, if I make an order for the filing of evidence this year, the Defendants simply will be unable to comply given the nature of the expert evidence they wish to adduce.

6. The difficulty that I have with this application for additional time is that the proceedings have, in the scheme of things, been going on for quite some time. As I indicated, the claim form is dated 29 October, and we are now at 15 December. There has been, therefore, quite a lot of time in order to either put together the necessary evidence, or at least to articulate, with a degree of specificity and clarity, what exactly the Defendants need the additional time for. In short, I was expecting far greater clarity from the Defendants as to exactly what points were being taken and why – specifically – additional time was needed.

7. I am very grateful to Mr. Sprange, QC, in his oral submissions, to have supplemented the rather broad-brush evidence adduced by the Defendants in support of this application. Mr Sprange has sought to fill in some of the "blanks". As I understand it – and I say this entirely without prejudice to how Mr. Sprange's clients choose to make their case on jurisdiction in due course – there is what I will term a "weak Mozambique case", namely a contention that the patents in issue under the Agreement raise issues more properly resolved in the New York courts. I say it is a "weak Mozambique case", because not all of the patents are local to the US, and because the particulars of claim, as they stand, do not content any form of invalidity in relation to the patents pleaded. That, as it appears to me, is the point that will be taken not by the Claimant, but by the Defendants. So this is, as it were, a defendant-created point, none the worse for that, I am sure. But the fact is that the pleadings, as they stand, do not, on the face of it, give rise to any kind of Mozambique point at all.

8. There is also said to be a *forum conveniens* point and a comity point, which go to jurisdiction. No doubt both these points will require a degree of articulation on the part of the Defendants, which they have certainly not received to date.

9. At the end of the day, on the material before me, this is no more than a vanilla *forum conveniens* dispute, in circumstances where the Defendants are resident in this jurisdiction, but want the case not to be fought in their home territory but to be fought in a foreign jurisdiction. That is a perfectly common stance to take and for my part I require a degree of persuading that the evidence in support cannot be put together in relatively short order, and certainly could have been articulated in the course of November.

10. In these circumstances, I am really quite reluctant to grant an extension for the Defendants' evidence into January of next year. I am not going to make such an order. I accept what Mr. Sprange has said, that the very eminent judges that the Defendants are seeking to instruct as experts are unlikely to be able to produce the reports that Mr. Sprange says are needed by his clients this year. But I am afraid the nature of the evidence that one adduces in this sort of dispute has to be cut to fit the procedural timetable, unless there is clear and good reason that only one particular expert or experts will do. That case has not been made out. Most of these jurisdictional disputes involve statements not from eminent experts outside the law firms of the parties, but actually from the litigators who are involved in the actual litigation process, so as to describe the nature of the rival jurisdiction, and why that jurisdiction is clearly and distinctly the more appropriate jurisdiction in that particular case.

11. I do not consider that there will be any material disadvantage to the Defendants in jettisoning the very eminent experts they want to retain if these experts cannot produce the material in time, and going for perfectly satisfactory expert lawyers, who can explain to this court the issues that render a foreign jurisdiction clearly and distinctly the more appropriate one, in accordance with the well-established parameters of English law.

12. In short, I can see nothing exceptional or complex or difficult in this case, and it seems to me that it is important that this court sends a signal that jurisdictional disputes are not the be-all and end-all of dispute resolution; they

are very important interlocutory questions, but they need to be handled briskly, quickly and cheaply, and that is the procedure that I intend to put in place, by way of a procedural timetable set at this hearing.

13. I am not going to order that the Defendants' jurisdictional challenge be filed and served with evidence in support by 17 December 2021. That, it seems to me, is too short a period of time. I am going to order that that material be filed and served by no later than midday on 24 December 2021. I am going to keep the Claimants' feet to the fire and retain the 21 January 2022 date for any response to the jurisdictional challenge, with evidence in reply by 4 February 2022.

14. Thereafter, there will be a one-day hearing, listed after 14 February 2022, for the jurisdictional challenge to take place. Mr. Sprange has suggested that this hearing will take two days, and not one. Whilst the hearing length may need adjustment later on, at the moment I am afraid I have no confidence that two days is an appropriate estimate. I really have not seen enough material, but the material that I have seen strongly inclines me to the view that a day's hearing, with some pre-reading – and I stress the pre-reading comes on top – will be sufficient for this matter to be determined properly and appropriately, in light of the evidence that will come.

15. Naturally, if that estimate proves to be wrong in the light of the evidence that is served, the parties will take the responsible course and seek to adjust the hearing length.

[There then followed argument on costs.]

16. I have before me, consequential on my ruling just now, an application for the Claimant's costs. The incidence of costs is opposed by the Defendants, who suggest that either they should have their costs, or there should be a variance on the theme that they – the Defendants – should not bear the costs of this application. In the alternative, the Defendants seek costs in the case, no order as to costs or costs reserved.

17. To my mind, the incidence of costs does need to be resolved in the Claimant's favour. The application for an extension of time has been successfully resisted. True it is I have extended the timetable beyond the date specified as the one proposed by the Claimant, but the only reason I did that was because it did not seem to me to be fair, when the hearing was before me on the Wednesday, to order the service of evidence by the Friday. That, it seems to me, is just inappropriate case management. However, had the hearing taken place last week, I would have made an order that 17 December 2021 was the right date.

18. In short, the adjustment I have made is one that is driven less by the merits of the application for an extension of time, and more by the realities of the diary. It seems to me for those reasons the Claimant has been successful and should have its costs.

19. I appreciate that one is obliged, even when there is a summary schedule of costs, to apply a line-by-line analysis of those costs. That is difficult in cases where all there is is a summary schedule. Doing that exercise, I have little doubt that the hours spent by the Claimant's legal team have resulted in the grand total of costs of some £40,000. However, there is an overriding obligation to keep an eye on proportionality, and although this has been a hard-fought application – and I pay tribute to both leading counsel for the economy and clarity of their submissions – it is, at the end of the day, a time summons, and I think the costs order that I am going to make will have to reflect that fact.

20. I am going to order costs in a grand total of £25,000. I make clear that I am not excising elements of costs in the summary, I am simply having regard to the question of proportionality, and it seems to me that a sum of £40,000, even though that is broadly mirrored by the costs incurred by the Defendants, is too high, and a figure of £25,000, erring on the side of generous, is an appropriate amount that I will order.
