Neutral Citation Number: [2020] EWCA Civ 451

Case No: A3/2019/0819

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
HHJ Hacon

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2020

Before :

LORD JUSTICE FLOYD

- -

Between :

REGEN LAB SA	**Appellant**
- and -	
(1) ESTAR MEDICAL LIMITED	
(2) ESTAR TECHNOLOGIES LIMITED	
(3) MEDIRA LIMITED	
(4) LAVENDER MEDICAL LIMITED	
(5) ANTOINE TURZI	**Respondents**

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Mr Antoine Turzi and Mr Andreas Pigni (respectively Chief Executive Officer and Head of Legal Affairs of Regen Lab SA) for the **Appellant**
Gareth Morgan (solicitor, **CMS Cameron MacKenna Nabarro Olswang LLP**) for the **Respondents**

Telephone hearing date: 19 March 2020

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Lord Justice Floyd :

1. On 19 March 2020 I held a hearing by telephone in open court to determine a number of applications which have been made by both sides in relation to this appeal. The matters which fell to be dealt with at the hearing were of some urgency, as the appeal itself was listed to commence on 1 April 2020, less than two weeks away from the hearing. I will refer to the parties as Regen, who is the appellant, and Estar, who are the first to fourth respondents.

2. Although it has been represented by solicitors and counsel in the past, at the hearing Regen represented itself and had been doing so for some time. I allowed the Chief Executive Officer of Regen, Mr Antoine Turzi, and its Head of Legal Affairs, Mr Andreas Pigni, to speak on behalf of Regen. Regen was represented at the hearing by Dr Gareth Morgan of Estar's solicitors, CMS Cameron McKenna Nabarro Olswang LLP ("CMS").

3. Regen commenced patent infringement proceedings against Estar in the Patents Court in respect of the UK designation of European Patent 2 073 862 ("the 862 patent"). Estar counterclaimed for revocation on, amongst other grounds, lack of novelty by reason of prior use. By a judgment delivered on 18 January 2019 HHJ Hacon dismissed the action and revoked the UK designation of the 862 patent. Thereafter, on 11 April 2019, the Opposition Division ("OD") of the European Patent Office issued a decision in opposition proceedings pronouncing the 862 patent invalid as a whole. On 10 June 2019 I granted Regen permission to appeal to this court from HHJ Hacon's judgment. There is also a cross-appeal by Estar, for which the judge gave permission in the event that Regen obtained permission to appeal. Regen has also filed an appeal against the decision of the Opposition Division to the Technical Board of Appeal ("TBA") of the EPO. It has not (as it could have done) asked for expedition of that appeal. In those circumstances, it is estimated that the appeal to the TBA could take in excess of two years to reach a hearing.

4. It is against this background that the parties make a series of applications:

    i) An application dated 17 October but sealed on 21 October 2019 by Estar seeking an order that, unless Regen pay the sums owed to them pursuant to orders for costs made in the court below, the appeal should be struck out. By the same application Estar seeks an order that, in the event the appeal is to proceed, Regen is to provide it with security for costs by paying the sum of £267,421 into court, and, in default, the appeal is to be struck out ("**Estar's strike out and security application**").

    ii) An application by Regen dated 28 February but sealed on 5 March 2020 for a stay of the appeal to this court pending (i) the final outcome of the EPO appeal and/or (ii) the final outcome of criminal proceedings in Switzerland against Estar. By the same application notice Regen seeks "postponement of the appeal" to this court, by which I understand it to mean an adjournment ("**Regen's stay and adjournment application**").

    iii) A further application by Regen of the same date contains seven heads of relief including (i) a stay of execution in respect of all costs awarded to Estar; (ii) an order denying the relief sought on Estar's applications; (iii) relief from

sanctions for failing to pay any costs to Estar; (iv) a refund to Regen for its costs incurred in "the present application"; (v) security for Regen's costs of the appeal and/or cross-appeal in the sum of £270,000, paid into court; (vi) an order striking out the cross-appeal unless Estar pays the costs of this application within 14 days; (vii) if the sum for costs is so paid, then security for costs ("**Regen's combined application**").

5. It will be seen that Regen's combined application is in some ways the mirror image of Estar's strike out and security applications, but founded on the cross-appeal. In addition to all these applications, in accordance with this court's usual procedure, Regen was asked by the court to show cause why its appeal should not be dismissed for failure to comply with the directions to lodge the appeal bundles by the due date ("**the own-motion application**").

6. At the hearing I explained that I would refuse Regen's stay application. I then turned to consider whether the appeal should be struck out for failure to lodge the appeal bundles on the own-motion application. I decided that it should be. In those circumstances, I did not think that any of the other applications required determination. I indicated that I would assess the costs of the various applications compendiously by making an order that Regen pay to Estar the sum of £10,000, approximately 50% of their bill for the applications. I explained that I would give my reasons at a later date in writing. These are my reasons.

7. I need to set out the background and procedural history in a little more detail. In consequence of its failure in the patent infringement and revocation proceedings before HHJ Hacon, Regen was ordered by the judge's order of 13 March 2019 to pay to Estar the sum of £225,000 as an interim payment on account of costs ("the March costs order). The judge gave Regen an unusually long period to comply with the March costs order, to 30 June 2019. There was evidence before him (from Regen) that Regen was experiencing short-term financial difficulties, but would have no problem in making a significant cash outlay or obtaining funding within that generously extended period. Shortly before the time for payment, however, Collyer Bristow (Regen's then solicitors) wrote on behalf of Regen stating that Regen would not be in position to pay the outstanding sum by 30 June, and announcing an intention to apply for a stay. The basis for the stay was that Regen's appeal would be stifled if Regen was obliged to pay the outstanding sums. Collyer Bristow stated that it was intended to serve evidence in support of these contentions, and also conveyed an offer from Regen to arrange a bank guarantee in support of its application for a stay and relief from sanctions.

8. Regen did not, in the end, provide any evidence in support of its application or arrange a bank guarantee. Instead, it ignored the deadlines which it had itself proposed for the filing of evidence on its own stay application, and sought to defer the hearing of that application on the basis that Regen had initiated criminal proceedings in Switzerland against an employee of Regen alleged to have misappropriated confidential documents and to have provided them to Estar (an allegation which we shall see re-surfacing at a later point in the narrative). The hearing nevertheless went ahead. Regen, although the applicant on this application, was neither present at the hearing nor represented. The judge was therefore obliged to hear Regen's application without the benefit of any evidence or submissions from Regen.

9. The judge was referred to evidence concerning Regen's lavish expenditure on other litigation and product marketing since his judgment had been handed down. On 30 January 2019, some 12 days after HHJ Hacon handed down the main judgment in the action, Regen decided to increase hostilities by commencing further patent proceedings against Estar under a US patent corresponding to the 862 patent before the United States International Trade Commission ("ITC"). There was evidence that such proceedings could incur sums in costs in the order of USD 2 million. In the same period Regen was estimated to have spent some USD 1 million on marketing at trade shows.

10. In his judgment on Regen's stay application, having referred to that evidence, HHJ Hacon said:

> "Given that approach by [Regen] there does not seem to me anything even approaching a good reason to extend the time for payment of the £225,000, whether until the outcome of the appeal or for any other period."

11. Regen's application was dismissed, and by an order dated 19 July 2019 ("the July costs order"), Regen was ordered to pay £20,000 as the costs of their application assessed on the indemnity basis by 2 August 2019. There was no appeal from that order.

12. No sum has been paid under either the March or July costs orders.

13. Despite its claim that compliance with the interim costs order would stifle any appeal, Mr Turzi gave evidence in the ITC proceedings in July 2019 about the outstanding obligation to pay £225,000 under the March costs order as follows:

> "Q. If RegenLab wanted to, would it be able to pay that 225,000 pounds?
>
> A. Of course.
>
> …
>
> Q. Is RegenLab seeking finance to enable itself to pay the 225,000 pound [sic] ordered by the U.K. court?
>
> A. No."

14. Regen subsequently changed solicitors from Collyer Bristow to Marks & Clerk.

15. It was in those circumstances that Estar applied for the appeal to this court to be struck out for failure to comply with the March and July Orders of HHJ Hacon. The Civil Appeals Office set successive deadlines for Regen to respond to this application. The first deadline was 5 November 2019. On 4 November Regen asked for an extension of time resulting in a new deadline of 19 November. On that day Regen wrote directly to the court indicating that its new solicitors, Marks & Clerk, were no longer instructed. The email stated that Regen was in "good financial shape, growing year over year thirty percent". It explained that it had withdrawn the ITC proceedings, and that stays of other infringement proceedings had been achieved in

France and Germany. However, it made clear that it intended to re-file the ITC complaint. It went on to say:

> "Despite the withdrawal of the current ITC (see above), Regen will continue enforcement of its patent rights in Europe and the USA. Regen is seeking damages for at least 10 million USD for patent infringement by Estar since 2008 and reimbursement of all legal costs incurred. It appears that the only activity of Estar is to commercialise copycats of Regen's products. It would therefore be desirable for the PRP [platelet rich plasma] industry that Estar disappears from the market."

16. Although it was still some months before any formal application would be issued, the email of 19 November asked informally for a stay of enforcement of the March and July costs orders and of the appeal pending the outcome of the EPO proceedings. It asked for the hearing (it is not clear whether of the application or the appeal) to be scheduled in February or March 2020. The letter went on to refer again to the criminal proceedings in Switzerland for violation of commercial confidentiality against a former employee of Regen. The employee was said to have passed secrets to Estar and that Estar had used these documents in the patent proceedings in the UK. As a consequence, it was said that Estar would not be able to pay Regen its costs if the appeal succeeds. The letter was signed by Messrs Turzi and Pigni.

17. The Master granted a further extension for Regen to respond to Estar's strike out and security applications to 4 February 2020. On 6 February Master Meacher pointed out that if Estar wished to stay the appeal or stay the execution of the costs orders they would have to file an application to that effect, which they should do within 7 days. No such applications were filed by 14 February. On 12 February CMS wrote to the court with a copy to Regen setting out the remaining steps in the procedural timetable, including the fact that the bundles were due to be filed at court and served on all parties by 19 February. On 27 February Master Bancroft-Rimmer directed that Estar's security application would be considered on the papers on 2 March 2020. If Regen had not filed submissions by 28 February it would be considered on the basis of Estar's submissions alone. Likewise, the security application would be considered in the absence of any other applications Regen intended to make if these other applications were not filed by 28 February. The Master also pointed out, confirming what Regen had been told on 12 February by CMS, that the appeal bundles should have been filed by 19 February. (They were by now more than a week out of time, without any request for an extension of explanation of the breach.) The Master said that unless they were filed by 4 March the appeal would be placed in the dismissal list to show cause why the appeal should not be dismissed for failure to lodge the bundles.

18. No bundles were filed by 4 March, or at any stage thereafter.

19. On 28 February Regen filed its formal applications, which were sealed on 5 March. In a letter dated 3 March 2020 which referred to its lack of solicitors and its ignorance of the timetable, Regen said:

> "In view of the aforementioned, it was and is still impossible for Regen to meet the deadlines as set forth in the schedule. Regen will not be able to prepare bundles for tomorrow, March

> 4 2020 and to prepare appropriately for the April 1, 2020 deadline. Rights of Regen in order to appropriately prepare for the Appeal have been restricted in a substantial manner. As mentioned in Regen's application, if the Appeal is not stayed (as in France and German[y]) then Regen requests a delay, a new schedule for the Appeal and postponement of the Appeal."

20. In view of the rapidly approaching appeal, I directed a hearing in order to resolve these cross-applications. Messrs Turzi and Pigni were not in a position to travel, because of the current coronavirus emergency, and requested a postponement until after the date fixed for the appeal. I refused the postponement and decided to hold a telephone hearing. Notwithstanding the obvious urgency, Regen alleged that they could not attend by telephone. I found this incredible and made it clear that the hearing would go ahead on the telephone as planned. In the event, as I have said, both Mr Turzi and Mr Pigni were able to attend by telephone.

21. I turn to Regen's application for a stay of the appeal. I did not consider that there were any grounds for a stay of the appeal pending the decision of the EPO or any other proceedings. My reasons are as follows.

22. First, a stay would be productive of unacceptable commercial uncertainty for Estar. The UK designation of the EP has been revoked and has therefore provided the respondents with certainty for the UK, subject only to the outcome of this appeal. It is true that if the TBA holds the patent to be invalid that will be the end of the matter, and it would not be necessary for the appeal to be heard. But if the TBA holds the patent valid, or valid in amended form, as Regen no doubt wish, Regen has made it absolutely clear that it wants to proceed with the appeal in order to be able pursue its policy of seeking to remove Estar from the market. For that purpose Regen will need to revive the appeal for it to be heard in two to three years' time. This is a very long period for uncertainty as to the validity of the UK patent to be hanging over Estar's head, and over the heads of other operators in this market in the UK.

23. I note also that stays are in force in France and Germany. However, I am aware that the national procedural law of some member states of the EPC provides for automatic stays where EPO proceedings in relation to the validity of a patent are pending. That is not the case here. In addition, the order staying the French proceedings was by consent "au vu de l'accord des parties".

24. Secondly, Regen has delayed in bringing its stay application. I can see no reason why the application for a stay was not made in the Notice of Appeal. Instead, although Regen made it clear that they wanted a stay, no formal application was made until the appeal was a matter of a few weeks from a final hearing. By that stage it had ensured that the prejudice to Estar would be extreme. Not only would Estar lose their date for the hearing of the appeal, but Regen had banked a period of uncertainty at least until the appeal could be re-fixed.

25. Thirdly, Regen's conduct is highly inconsistent. It was Regen who chose to pursue Estar to judgment in this country before the proceedings in the EPO were resolved, no doubt hoping for a success by utilising this jurisdiction. Now it has met with failure at first instance it wants to halt the proceedings whilst they attempt to restore the validity of the patent in the EPO. If the approach to this litigation was to be that

validity should first be tested in the EPO, that approach should have applied from the outset, so that the heavy costs of a full trial of infringement and validity could have been avoided. By comparison, the additional costs of an appeal to this court are likely to be less onerous.

26. Finally, Regen has shown itself perfectly content to launch litigation in multiple countries against Estar with no apparent regard for saving costs. The relatively small costs saving achieved by staying the appeal carries little or no weight against that background.

27. The stay is also sought on the grounds of an allegation of criminal conduct by Regen's own employee in Switzerland, which is supposed, in some way, to have infected the trial judge's conclusion that the patent was invalid. Mr Pigni and Mr Turzi were not able to explain to me with any precision how these allegations about the conduct of its employee are related to the issues in the action. They made a vague suggestion that the facts upon which the prior use was based were "staged". I simply do not understand how a prior use could be "staged" given the need for it to have occurred before the priority date, and before the allegations of misconduct were made. There are, in any event, fundamental difficulties with taking account of these allegations. First, there is at present no ground of appeal which even remotely raises such issues. Secondly, there is no application to adduce further evidence in the appeal. Thirdly, Regen has persistently sought to withhold from Estar the documents in which these allegations are set out, except on an "Attorney's eyes only" basis which would prevent Estar from taking instructions. Minutes before the telephone hearing a quantity of further material was sent on the "Attorney's eyes only basis" to Estar's solicitors and the court. It would be unthinkable for this court to grant a stay or postponement of the appeal based on allegations which Estar have not been able to learn about, let alone respond to. It is not open to me in accordance with common law principles of natural justice to take steps based on material which one side has not been able to deal with: see *Al Rawi and others v The Security Service and others* [2011] UKSC 34. If Regen seriously considered that it had uncovered material which was relevant to the outcome of the appeal, it is all the more astonishing that it did not launch any application based on it until the last minute before the appeal, and even then has taken none of the appropriate steps (such as an application to adduce fresh evidence and amend the grounds of appeal) to make that material relevant to the outcome of the appeal.

28. Balancing the possible advantages of a stay against the factors I have identified above, I concluded that the scales came down very heavily against Regen. I therefore refused the stay.

29. I should deal with Regen's application that the appeal be adjourned. I am entirely satisfied that any difficulties which Regen has in preparing for the appeal are of its own making. It is now 14 months since the judgment of HHJ Hacon. If Regen is not ready for its appeal that can only be because of its failure to put its solicitors in funds to deal with it. It has not helped itself by changing solicitors twice and then deciding to proceed without any legal representation at all, in circumstances where it plainly could pay for representation on its own evidence. In all the circumstances I have recounted above, and which are expanded on below, a simple adjournment of the appeal could not be justified.

30. I turn next to consider whether the appeal should be dismissed, on the own-motion application, for failure to lodge the appeal bundles. On such an application one would expect the party in default to come forward with an explanation for its non-compliance with the court's direction. In the present case this was particularly important as Regen had a history of procedural wrongdoing, one is tempted to say procedural vandalism. To recapitulate, it had breached the March and July costs orders. It had launched an application for relief from sanctions in respect of those costs orders which it then failed to support either with evidence or with attendance or representation at the hearing. It had ignored successive directions in the appeal as to the service of its response to Estar's strike out and security applications. Against that background there was an obvious inference that continued breaches would be treated as intentional, and not warrant any further indulgence being offered by the court.

31. In addition to an explanation for past failure, one would also expect an appellant in such circumstances to come forward with some precise and concrete proposal as to when and how the failure was to be rectified. Such a proposal was particularly necessary in the present case given the imminence of the hearing of the appeal, and the prejudice and inconvenience to Estar, the court and other litigants if the court time reserved for the hearing of the appeal was not utilised.

32. I was particularly concerned at the hearing to learn what explanation if any Regen had for the failure to progress the appeal in a timely manner. Messrs Turzi and Pigni attempted to place blame on their solicitors, and on the fact that they were unrepresented. They complained about the sums in costs which their solicitors had asked to be placed on account before taking the necessary steps, and they said that, as unrepresented litigants, Regen did not know what steps it was necessary to take. I asked Messrs Turzi and Pigni whether it was inability to pay which had led to a situation in which they had no solicitors and to the failure to take the necessary procedural steps, but they made clear in an emphatic way that this was not the case.

33. I am wholly unable to accept that this amounts to a good explanation for the failure to comply. Ultimately, I believe that Regen has taken a deliberate decision not to pay any outstanding sums to Estar, or expend further money on this appeal by instructing solicitors and putting them in funds, because of their belief that their commercial interests are better served by pursuing Estar in other tribunals, such as the EPO and the ITC. I am not prepared to assume in Regen's favour that they are unable to pay. To do so would be inconsistent with Mr Turzi's evidence to the ITC, with their preparedness to embark on expensive ITC litigation, with their litigation against Estar in France, Germany and Poland, with the extravagant sums spent on marketing, and the submissions made by Mr Pigni and Mr Turzi at the hearing[1]. The failure to progress the appeal is plainly part of a deliberate strategy on the part of Regen aimed at de-railing it. It believed that by dragging its feet it could achieve derailment of the appeal without the need to obtain a stay.

34. Moreover, there is no indication that, even despite this unappetising history, Regen has any intention of lodging the bundles in the foreseeable future. Regen's letter of 3 March 2020, quoted above, stated that immediate filing of the bundles was not

[1] It is true that at one stage it was being asserted that Regen had temporary financial difficulties, and that payment of the March and July costs orders would stifle its appeal, but those assertions were never supported by evidence, and more recently Regen has been saying that it is in good financial shape.

possible, and that Regen itself would not be able to prepare adequately for the hearing on 1 April 2020. Quite apart from the absence of any consideration for the ability of Estar to prepare for the appeal, the letter assumes that the lodging of the bundles was something that could occur at some point in the future after the appeal date had been vacated. Regen did not come to the hearing (a hearing, amongst other things, to show why the appeal should not be dismissed) with any concrete proposal as to how the appeal could be progressed. Mr Turzi and Mr Pigni did did not suggest that any steps were in hand to obtain representation, or that they planned to argue the appeal themselves. Instead they fell back on their view that it was better for the appeal to await the outcome of the EPO proceedings. I have already explained why that proposed course of action is not available to them.

35. Against all this, Regen may properly contend that there is a valuable property right at stake, albeit one that has been declared a nullity by the High Court and the OD of the EPO. It may also be said that I have granted permission to appeal on the basis that there is a real prospect of persuading this court that the patent is valid. I am also prepared to assume that Regen's behaviour is motivated by a genuine belief that it would be in their own interests for the appeal to be delayed.

36. These points have, whether individually or together, very little weight. The fact that a valuable property right is at stake is a reason for pursuing an appeal with diligence and vigour, not for declining to instruct solicitors and deliberately allowing procedural deadlines to be missed. The test for the grant of permission to appeal is, what is more, a notoriously low threshold and has to be set against the fact that a highly experienced patent judge, and a specialist tribunal of the EPO have both held the patent to be bad. A genuine desire to avoid a hearing of the appeal in one's own interest cuts little ice, when the observance of procedural rules is required for the benefit of all users of the court system, not just an individual litigant.

37. Whilst I must make allowances for the fact that Regen is not represented, I am not able to think of any real support for Regen's position beyond the points I have considered above. I have, of course, thought about whether I should give Regen one last chance to comply. I do not think that is a course I can properly take. First, the timescale is now so short that it is effectively common ground that the appeal cannot be put in order in time for it to be heard as listed. If the appeal date is vacated, it will be 9 to 15 months before it can be relisted. The vacation of the appeal hearing gives rise to exactly the same sort of prejudice to Estar as I have already mentioned. It also prejudices the efficient administration of justice by wasting valuable court resources. Secondly, this is not something which Regen specifically asked for. Rather Regen have put their case based on their commercial preference for a stay.

38. It follows that I will make an order striking out the notice of appeal for failure to lodge the appeal bundles. The appeal must in consequence be dismissed with costs.

39. The remaining applications do not therefore arise, although I cannot refrain from remarking that some aspects of Regen's combined application, such as the attempt to obtain security for costs of the purely responsive cross-appeal, or orders seeking to strike out the cross-appeal for failure to comply with a costs order which has yet to be made, were completely unarguable. Others, such as the suggestion that this court could stay the execution of the March and July costs orders were equally hopeless, given the fate of the application to stay the March order before the judge, from which

there was no appeal. I would add that, in the light of the above rulings, it is neither necessary nor desirable for me to be drawn into the dispute concerning the use to which the documents marked "Attorneys eyes only" may now properly be put. I would only record that specific attention was drawn by Regen at the hearing to the material so marked which was sent to the court in the minutes before the hearing started.

40. I make an order in the terms of the draft which will accompany the issue of these reasons. In view of the current health emergency, and as the outcome of the applications was made clear at the hearing, these reasons and accompanying order will be made available to the parties in final form by simultaneous transmission by email, and without the need for a formal hand down in court.