

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

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

Date: 30<sup>th</sup> August 2022

Before:

**MR. CAMPBELL FORSYTH**  
(Sitting as a Deputy Judge of the High Court)

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Between:

**COOK (UK) LIMITED**  
(a company existing under the laws of France)

**Claimant**

- and -

(1) **BOSTON SCIENTIFIC LIMITED**  
(a company incorporated under the laws of  
Bermuda)  
(2) **BOSTON SCIENTIFIC MEDICAL DEVICE  
LIMITED**  
(a company incorporated under the laws of  
Ireland)

**Defendants**

AND

**BOSTON SCIENTIFIC SCIMED INC**  
(a company incorporated under the laws  
of Minnesota, USA)

**Third Party**

- and -

**COOK MEDICAL EUROPE LIMITED**  
(a company incorporated under the laws of  
Ireland)

**Fourth Party**

**COOK NEDERLAND B.V.**  
(a company incorporated under the laws of the  
Netherlands)

**Fifth Party**

**WILSON-COOK MEDICAL INC**  
(a company incorporated under the laws of  
the state of North Carolina, USA)

**Sixth Party**

**COOK IRELAND LIMITED**  
(a company incorporated under the laws of

**Seventh Party**

Ireland)

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**MR. IAIN PURVIS QC and MR. TOM ALKIN** (instructed by **Powell Gilbert LLP**)  
for the **Claimant and the Fourth to Seventh Parties**  
**MR. MICHAEL CONWAY** (instructed by **Simmons & Simmons LLP**) for the **Defendants**  
**and the Third Party**

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**APPROVED JUDGMENT ON FURTHER ISSUES  
RELATING TO THE CMC DATED 8<sup>th</sup> JULY 2022**

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**MR. CAMPBELL FORSYTH:**

1. This is a further decision on follow-on issues from the 8 July 2022 case management conference in a patent action between Cook (UK) Limited ("Cook") as Claimant and Boston Scientific Limited and Boston Scientific Medical Device Limited as Defendant's ("Boston"). The relevant decision from that CMC hearing is [2022] EWHC 2060 (Pat). I do not repeat the background or explain the context of the issues to be further determined more than needed below as this has already been set out adequately for current purposes in that Judgment.
2. At the CMC hearing I made a number of decisions relating to the disputed issues. The parties suggested they would attempt to resolve remaining consequential issues flowing from those decisions. This has not been possible and a number of consequential issues from the CMC have now been set out by the parties for me to deal with on the papers.
3. I have received written submissions and correspondence from both parties. The remaining issues to be resolved for the purpose of the CMC Order relate to matters Boston say Cook must address in its disclosure on the issue of infringement by way of its PPD and supplemental disclosure and also to a some timing points on the date for service of the PPD and statement of case on validity. I have considered the documents provided in full but have only summarised the points in issue below.

## Disclosure

4. The disputed elements of the draft Order on this issue are set out at paragraph 12 and proposed alternative paragraph 14.
5. Boston have proposed wording it says Cook must address in its PPD and any supplemental disclosure in accordance with paragraph 11.5 of the Patents Court Guide. The relevant text in paragraph 12 is:

*..., [such description to include (but not be limited to):*

*a. Any audible or tactile feedback that the Cook Parties know or believe to be caused during the operation of the device in question, together with details of how the Cook Parties know or believe the device to operate to cause such feedback;*

*b. Insofar as not addressed under 12.a above, what is meant by the “tactile resistance” referred to in the Instructions for Use for the Instinct and Instinct Plus, including how the devices operate to generate such “tactile resistance” (including, if different, all instances thereof); and*

*c. Whether the Cook Parties know or believe that any feedback referred to in 12.a and/or (if different) the “tactile resistance” described under 12.b will be perceptible to users and, if not, the reason that instructions relating to a user detecting “tactile resistance” at certain points were included in the Instructions for Use.]*

6. Boston argue that the scope and content of the PPD and any supplemental disclosure was in issue at the CMC and that this wording is intended to set out what Cook's counsel indicated at the hearing the PPD would address. It wants to have these issues specified in the order. The concern appears to stem from the evidence and submissions at the CMC where Cook noted the PPD may not cover the point on 'user feedback' for the relevant products. Cook responded to this by confirming it will be providing disclosure on the issue supplementing the PPD.
7. Boston explains its concern is that it was not in a position at the CMC hearing to seek an order in the terms sought above prior to the discussion on these issues at that hearing. Without such an addition to the order it believes Cook's objection to its inclusion may mean it is going to *'backtrack on what they indicated would be provided by way of the PPD or further disclosure.'* It is also pointed out that Cook appear to accept these

matters need to be addressed and therefore there should be no difficulty in an order that states these points expressly.

8. As an alternative, Boston propose in its paragraph 14 of the draft order a provision specifying certain disclosure being provided on the feedback issue:

*[14. (BSC's proposed wording in the event that its proposed wording in paragraph 12 is not included): No later than 2 September 2022, in addition to the description in paragraph 12 above and insofar as not already provided in accordance with that paragraph, the Cook Parties shall provide to BSC copies of all documents in their possession, custody or control that address whether the Instinct Clip and / or Instinct Plus provide feedback to a user during its deployment.]*

9. Cook takes issue with Boston's positions. In summary the reasons are;
- (1) The specific requirements of the disputed elements of the draft Order were not sought at the CMC hearing and a binding order should not therefore now be made by the Court.
  - (2) These specific requirements are unnecessary and inappropriate as the obligations on Cook by CPR 63.9 are adequate. Any debate on the adequacy of the PPD is best dealt with once the PPD is served.
  - (3) These specific requirements do not fairly reflect the discussion at the CMC.
  - (4) The terms of the proposed order are unworkable for a number of practical reasons.
10. Cook explains it has now agreed that its supplemental disclosure will include disclosure on the feedback issue identified in Boston's proposed alternative paragraph 14 of the draft order. The issue on this point therefore seems to be the terms of the proportionality of the search and whether this should be set out in an order or, as noted, that the obligations of CPR 63.9 should be satisfactory.

11. In my CMC decision at paragraph 24 I set out the relevant disclosure obligations. CPR Rule 63.9 and paragraph 6.1 of its Practice Direction modify the provisions for disclosure in Part 31.
12. Paragraph 11 of the Patents Court Guide sets out relevant guidance on disclosure by way of a PPD:

*11. Disclosure*

*11.1 Parties are obliged to provide disclosure in accordance with Part 31 as modified by Rule 63.9 and PD63.6.1-6.3 and as modified by Practice Direction 51U – Disclosure Pilot for the Business and Property Courts. Process and/or product description*

*11.2 Where appropriate, parties are encouraged to provide a process and/or product description (“PPD”) instead of standard disclosure relating to processes or products which are alleged to infringe or are otherwise relevant to proceedings.*

*11.3 Subject to 10.5 below, PPDs must be adequate to deal with the nature of the allegation that has been advanced by the other party or parties. The parties have joint responsibility at an early stage to determine the nature of the case advanced so that the PPD is adequate to deal with that case.*

*11.4 Parties should bear in mind when preparing a PPD that they may be called on to prove it at trial. Any material omission or inaccuracy could result in a costly adjournment with consequential adverse orders, including as to costs. A PPD ought to be accompanied by a signed written statement which: (i) states that the person making the statement is personally acquainted with the facts to which the description relates; (ii) verifies that the description is a true and complete description of the product or process; and (iii) contains an acknowledgement by*

*the person making the statement that he or she may be required to attend court in order to be cross-examined on the contents of the description.*

*11.5 Insofar as a party is not able to verify that the PPD is a true and complete description of all relevant aspects of its product or process (for example because it does not make certain components in its product and does not know how they work), then the correct course is for the party to verify such parts as it is able, and to serve a disclosure list (which may or may not contain any documents) in relation to the remainder.*

13. The CMC hearing provided an opportunity for the parties to set out in some detail the nature of the infringement allegations being alleged. As a result Cook has indicated it will provide supplemental disclosure to the PPD in accordance with paragraph 11.5 of the Patents Court Guide. In the circumstances, as required under Part 31, a reasonable search for relevant documents would be undertaken. A disclosure list will be served along with a disclosure statement setting out the extent of the search that has been made to locate documents which are required to be disclosed.
14. The Patents Court Guide at paragraph 11.3 notes the "*...PPDs must be adequate to deal with the nature of the allegation that has been advanced by the other party or parties.*". As the supplementary disclosure is part of the disclosure relating to the PPD this statement also applies to that disclosure.
15. The dispute here is essentially about whether these further or express statements in the draft order about the nature of the infringement allegation need to be set out in the order. There is also the question of whether, at this point after the CMC, these matters should be added to the CMC order.
16. As I mentioned at the CMC, the benefit of the issues on the infringement allegation being ventilated at the CMC was that Cook could take this into account to ensure it is

adequately dealt with in its preparation of the PPD and supplemental disclosure. In my view, the additional paragraphs proposed by Boston in paragraph 12 of the draft Order serve to further explain the nature of Boston's allegations. The obligation to deal with the allegations adequately in the PPD and supplemental disclosure is not in question. In the circumstances, taking all the arguments and facts into account in applying my case management powers, I do not agree that these additional paragraphs should be added to the order.

17. The remaining points on this are now essentially on the reasonableness and proportionality of the search. The usefulness of limiting this search to the US discovery database is debated and the fact that this was the subject of evidence and an order on disclosure requested by Cook from Boston at the CMC. I have no relevant evidence on whether the US discovery database is suitable in the context of the documents being searched or the proportionality of that search in this context. As Cook recognises, the duty regarding the preparation of the PPD and supplemental disclosure is on it in this regard. Therefore, for essentially the same reasons as set out above, I do not accept the additional provisions of the alternative paragraph 14 proposed by Boston should be included in the order.

#### Statements of case on validity and PPD timings

18. Various extensions have been agreed to deal with the disclosure. Two deadlines are disputed. The draft Order provided for the PPD to be served on 12 August 2022. The parties later agreed that the deadline for disclosure be moved to 2 September 2022. Cook was operating under the understanding the extension applied also to the PPD. Boston explain it is their position the extension was only for any supplemental disclosure and if Cook want an extension for the PPD to 2 September 2022 it needs to request this from the Court. Cook have explained the PPD and the supplemental disclosure are "*intertwined aspects of a single disclosure obligation and need to be*



*prepared in parallel*" and that there is an ongoing debate between the parties about the content of the PPD.

19. The disclosure obligations on the allegation of infringement have been subject to further debate on the details of the relevant allegations. The PPD and supplemental disclosure are linked. In all the circumstances, having considered the arguments on this issue and the request for an extension based on the debate between the parties and the lack of any noted prejudice, I have decided to allow the extension for service of the PPD to be on the same date as the supplemental disclosure on 2 September 2022.
20. Finally, an extension has been agreed for Boston's statement of case on infringement to 23 September 2022. This is based on the agreed extension of time for supplemental disclosure. Cook appears to have expected Boston to agree to an equivalent extension for service of its statement of case on validity. Although these issues are not directly linked, based in particular on the additional work that it has been explained the disclosure obligations has required and that no prejudice has been identified, I will allow the extension of time to 23 September for the service of the statement of case on validity.