[2020] IEHC 266

THE HIGH COURT

[2020/1219 P]

BETWEEN

EVALVE INC., ABBOTT CARDIOVASCULAR SYSTEMS INC., AND ABBOTT MEDICAL IRELAND LIMITED

PLAINTIFFS

AND

EDWARDS LIFESCIENCES IRELAND LIMITED, EDWARDS LIFESCIENCES CORP. AND EDWARDS LIFESCIENCES LLC.

DEFENDANTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 2nd day of June, 2020.

1. The Plaintiffs (Abbott) initiated these patent infringement proceedings on the 14th of February. The action was admitted to the Commercial List on the 24th of February 2020. A provisional trial date has been fixed for the 12th of January 2021. By Notice of Motion dated the 29th of April 2020 (the "Motion") Abbott seek interlocutory injunctive relief against the Defendants (Edwards). In the current application, Abbott ask the Court to fix a date for the hearing of the Motion, and to make the usual directions for the delivery of evidence and of written submissions.

2. The response of Edwards to this application for directions is unusual, and possibly unique. Edwards want the Court to make no directions and fix no hearing date in respect of the Motion, on the grounds that the Motion is an abuse of process. This stance on the part of Edwards is taken notwithstanding the fact that Edwards accept that the Court cannot at this juncture decide that the Motion will fail; it follows that the Court must proceed on the basis that the Motion may succeed. Equally, Edwards do not in terms claim an improper motive on the part of Abbott in bringing the Motion; while Edwards assert on affidavit and in submissions that Abbott have not been accurate in describing why the Motion is brought now, Counsel for Edwards at no point in his submissions suggested that the bringing of the Motion was actuated by any improper motive on the part of Abbott. The furthest Edwards go in this regard is the repeated statement by their deponent, Ryan Lindsey, in his evidence that the Motion will disrupt parallel litigation in other jurisdictions and "appears to impede the achievement of the expedited directions which the court made" in this jurisdiction.

3. Despite the fact that Mr. Lindsey is the Senior I.P. Counsel of Edwards, and therefore in a position to do so, he nowhere addresses in any meaningful fashion the ways in which the preparation for and hearing of the Motion would make it difficult or impossible for Edwards to meet the directions which the Court has fixed for the trial of this action. Significantly, at the hearing before me Counsel for Abbott confirmed that his clients would still meet all of the relevant directions, and Counsel for Edwards neither disputed that proposition nor stated that Edwards would not be able to comply with the existing directions if the Motion were to proceed.

4. With regard to the parallel proceedings in other jurisdictions, Mr. Lindsey does put some flesh on the bones of his statements that such litigation will be disrupted. However, the detail provided by Mr. Lindsey is unconvincing. For example, in his affidavit of the 4th of

May 2020 Mr. Lindsey stresses the importance of a hearing in Germany on the 14th of July 2020; the week of the 14th of July was the period proposed by Abbott for the hearing of the Motion in Dublin. Having stated that the proceedings in Germany "are of particular significance [...]" Mr. Lindsey goes on to state that the relevant Edwards personnel and the three person team of legal counsel together with the local external legal teams "will be fully engaged with preparations for trial well in advance of the respective hearing dates". The other hearing dates listed by Mr. Lindsey are the 30th of June (Italy), and the 10th of August (United States). The period proposed by Edwards for hearing the Motion was early September.

5. What Mr. Lindsey did not reveal in this affidavit is that the hearing in Germany was a two hour hearing, and that he would therefore be free to leave for Dublin that afternoon or the following morning. Addressing this fact in his later affidavit, Mr. Lindsey referred to the need to self-isolate or quarantine for fourteen days should he travel to Dublin directly from Düsseldorf. However, what Mr. Lindsey ignores in his evidence is that the hearing in Dublin will not require oral evidence from anyone (including Mr. Lindsey), that the hearing can be followed remotely in real time, and that he can provide instructions and guidance to the Edwards team as effectively remotely as if he were present in the Four Courts. It is by no means unusual for patent hearings, including trials, in Ireland to be conducted on that basis and it is surprising that these practical solutions to the perceived problems were not considered by Edwards. I have also, in fixing the dates for the hearing of the Motion, avoided any dates where Edwards are at hearing anywhere in the world not only in respect of this dispute but also the other unrelated proceedings mentioned by Mr. Lindsey in his evidence.

6. In summary, the submissions and evidence placed before me by Edwards accept that the Abbott Motion could succeed, do not allege in any clear, convincing or coherent way any improper motivation on the part of Abbott in bringing the Motion, and put up a few logistical objections which (inasmuch as they have any apparent merit) could have been sorted out between the parties if common sense were applied.

7. In these circumstances, the authorities relied upon by Edwards are of no assistance to them in sustaining any argument that Abbott have abused the process of the Court. The *P.J. Carroll & Ors. v. The Minister for Health and Children & Ors*. [2005] IESC 26, [2005] 3 IR 457, case establishes the power of the Court to prevent abuse of process, but does not suggest that the concept of abuse of process covers anything like the activities of Abbott of which Edwards complains. Murray C.J. in *Vantive Holdings & Ors. v. The Companies Acts 1963 - 2009* [2009] IESC 69 does observe that "abuse of process may take many forms [...]" but nothing in Vantive, or in any other authority, is capable of either prompting or requiring me to find Abbott has been guilty of such abuse. Indeed, the very paragraph of *Vantive* upon which Edwards rely talks about the power of the Court to dismiss proceedings on the grounds that they are frivolous or vexatious. The Motion which Abbott has brought simply cannot be characterised in those terms, given the concession made by Edwards that one cannot treat it as bound to fail.

8. Apart from the references to *P.J. Carroll* and *Vantive*, there was no real response by Counsel for Edwards to the submission by Counsel for Abbott as to what constitutes an abuse of process.

9. Counsel for Abbott relied upon the judgment of the Supreme Court (Hardiman J.) in *Liam Grant v. Roche Products (Ireland) Ltd and Others* [2008] IESC 35, [2008] 4 IR 679 at paragraphs 63 to 65:-

> "63 Firstly, there can be no doubt that the onus of establishing abuse of process is on the defendants who seek to stay the proceedings because of it and this onus is "a heavy one" (see *Goldsmith v. Sperrings Ltd.* [1977] 1 W.L.R. 478, per Lord Denning M.R. at p. 498.).
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> 64 Secondly, the classic and long established definition of an abuse of process is that of Isaacs J. in *Varawa v. Howard Smith Company Ltd*. (1911) 13 C.L.R. 35 at p. 91:-
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> > 'In the sense requisite to sustain an action, the term 'abuse of process' connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate, they are regarded as an abuse of process for this purpose …'
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> 65 This dictum was adopted by the High Court of Australia in *Williams v. Spautz* (1992) 174 C.L.R 509 at p. 537. In that case, Brennan J. said:-
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> > '… if there be a reasonable relationship between the result intended by the plaintiff and the scope of the remedy available in the proceeding, there is no abuse of process. If there be mixed purposes - some legitimate, some collateral - I would restate his Lordship's test [i.e. Bridge L.J. in Goldsmith] that 'but for his ulterior purpose, [the plaintiff] would not have commenced proceedings at all.' So expressed, the test casts on the other party an onus of proving what the plaintiff would not have done if he had not formed the intention of obtaining a collateral advantage. That onus may be impossible to discharge.' "

10. Counsel then opened the judgment of Denning M.R. in *Goldsmith v. Sperrings Ltd.* [1977] 1 WLR 478 at 489 (noting that, while this was a dissenting judgment on the facts, the majority judgments did not differ on the legal principles to apply):-

> "Abuse of legal process. In a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The

judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer."

11. I accept that these principles, in conjunction with the observations of O'Donnell J. in *Minister for Justice v. JAT (No 2*) [2016] IESC 17, constitute the law in Ireland. For the reasons which I have given, Edwards has not met the heavy onus of establishing an abuse of process by reference to any improper motivation on the part of Abbott, or by reference to any lack of legitimate purpose in the prosecution by Abbott of the Motion.

12. I also find that, on these authorities, it is not " an abuse of the process of this case managed Court to file a Motion without recourse to the Court to seek leave, in circumstances where there is no coherent explanation for why it is being brought months after an entry application." This was a central submission of Edwards and it fails for the following reasons:-

    1. In correspondence of the 19th of February 2020, the solicitors for Abbott referred to the possibility of an interlocutory injunction being sought if there was no trial in October 2020. On the admission hearing, Counsel expressly reserved the right of Abbott to seek an interlocutory injunction. By letter of the 24th of February 2020, agreeing the direction to be fixed by the Court, the solicitors for Abbott continued "to fully reserve our clients' rights in respect of interlocutory relief in these proceedings". Edwards cavilled at none of these reservations on the part of Abbott, nor did Edwards suggest at the time that Abbott would be required to explain to the Court the timing of any such interlocutory application. As a matter of principle, it is not an abuse of process or in any way inconsistent with case managed litigation for a party to bring a Motion before the court when it has (without any reluctance on the part of the Court or the opposing party) expressly and repeatedly reserved its right to move such an application. That is so whether or not the moving party explains the timing of the application for an interlocutory injunction. The timing of the application may well be a matter for the hearing of the Motion seeking interlocutory relief. However, I do not accept that a party in these circumstances must, just in order to obtain a hearing date and the necessary directions, justify to the Court why it has chosen to seek interlocutory relief at a particular point in time. Even if such an explanation would be welcome, failure to provide it does not render the Motion an abuse of process.

    2. There is no authority, from any jurisdiction, to which I have been referred by Edwards which supports this proposition.

    3. There is no instance in the history of the Commercial Court that supports this contention by Edwards; certainly none was identified when I asked Counsel for Edwards to do so.

13. The furthest that Counsel for Edwards could go in advancing this argument by reference to authority was that Order 63A, rule 5 of the Rules of the Superior Courts, provides that

orders and directions may be made by the Court of its own Motion for the conduct of the proceedings in a manner which is just, expeditious and likely to minimise costs. Counsel takes from this the proposition that the Commercial Court will not make orders or directions where it would result in proceedings being conducted in a manner which is not just, would not be expeditious and would waste costs. Even assuming that this rule has the meaning and relevance contended for it by Edwards, in the circumstances of this Motion there is nothing unjust about permitting the Motion to proceed; on the contrary, it would be unjust to refuse to permit the Motion to be heard. Equally, while the Motion will involve the expenditure of time and money, that is not inconsistent with the rule; the directions fixed will result in the Motion being heard expeditiously, and no waste in costs is identified by Edwards.

14. I have therefore decided that there is no merit in the submissions made by Edwards that Abbott should not be permitted to bring on its Motion. This Ruling summarises why I have come to this view. I have allowed Edwards a significant period within which to deliver its replying affidavits; to be precise, I have allowed Edwards the time they have sought. I have then fixed two weeks for Abbott to deliver their further evidence, and its written submissions. Edwards in turn has two weeks to deliver their second tranche of evidence and their written submissions. The parties agree that two days will be needed for the hearing of the Motion, which will take place on the 30th and 31st of July.