IN THE HIGH COURT OF JUSTICE Claim No. HP-2023-000043
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
Wednesday, 27th March 2024

Before:
MR. JUSTICE MEADE

BETWEEN:

(1) DISH TECHNOLOGIES LLC
(a company incorporated under the laws of the state of Colorado, USA)
(2) SLING TV LLC
(a company incorporated under the law of the state of Colorado, USA)
Claimants/Applicants

- and -

(1) AYLO PREMIUM LTD
(a company incorporated under the laws of Cyprus)
(2) AYLO FREESITES LTD
(a company incorporated under the laws of Cyprus)
(3) AYLO BILLING LIMITED
(a company incorporated under the laws of Ireland)
(4) AYLO BILLING US CORP
(a company incorporated under the laws of the state of Delaware, USA)
Defendants/Applicants

- and -

AND BETWEEN:

Claim No. HP-2024-000009

(1) AYLO PREMIUM LTD
(a company incorporated under the laws of Cyprus)
(2) AYLO FREESITES LTD
(a company incorporated under the laws of Cyprus)
Claimants/Applicants

- and -

(1) DISH TECHNOLOGIES LLC
(a company incorporated under the laws of Colorado, USA)
Defendant/Respondent

(Transcript of the Stenograph Notes of
Marten Walsh Cherer Ltd., 2nd Floor, Quality House,
6-9 Quality Court, Chancery Lane, London, WC2A 1HP.
Tel No: 020 7067 2900. DX: 410 LDE
Email: info@martenwalshcherer.com
Website: www.martenwalshcherer.com)

MR. TOM MOODY-STUART KC and MS. KYRA NEZAMI (instructed by Allen & Overy LLP) appeared for DISH.

MR. IAIN PURVIS KC and MS. ISABEL JAMAL (instructed by Mishcon de Reya LLP) appeared for Aylo.

PROCEEDINGS

IAIN PURVIS KC

MR. JUSTICE MEADE: Yes, Mr. Purvis?

MR. PURVIS: My Lord, you are aware I appear with Ms. Jamal for the applicant, Mr. Moody-Stuart and Mr. Nezami for the respondent.

MR. JUSTICE MEADE: Sorry to keep you. I was dealing with another one that I thought would be a bit quicker at 10 o'clock.

MR. PURVIS: Not at all, my Lord. We hope you have had some opportunity to read at least the skeleton arguments.

MR. JUSTICE MEADE: Yes, I have read the skeletons. I have read what you might call the principal witness statements, and I have just taken on faith what is said in the skeletons about the other ones, the German evidence.

MR. PURVIS: Yes, I am grateful. On the face of it, it is a little complicated procedurally but we have tried to assist with the chronology, which I hope your Lordship has seen ----

MR. JUSTICE MEADE: Yes.

MR. PURVIS: ---- and I think will find useful.

MR. JUSTICE MEADE: I have that at the back of yours.

MR. PURVIS: As you are aware, it is our application for a trial date to be listed in November, or possibly December, this year, which would be a small amount of expedition over and above the trial dates which are available in the listing window, which as I understand it is now from 13th January 2025 for a trial of six to seven days, which is now the agreed

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estimate.

MR. JUSTICE MEADE: Yes.

MR. PURVIS: My Lord will have seen, these parties have been involved in litigation, first of all in the United States, since around, well, if you include the original licensing correspondence, since about March 2023. Those licences that were originally offered included the European patents in did dispute.

The United Kingdom action was commenced by DISH by the issue of proceedings for infringement on '680 patent on the 11th December 2023, and at the same time proceedings were issued in a regional court in Munich for infringement of the '805 patent, which is a divisional from the same parent, and a day later in the UPC on the '680 patent. There was a certain amount of complication after that, you will have seen, in the evidence on the question of whether there was an opt-out, or whether the opt-out had been reversed in relation to the German patent. I do not think it particularly matters, save as giving some context to the general confusion that was going on around January of this year.

Although those things took place on 11th and 12th December, DISH did not tell Aylo about any of those events, for reasons that have not been explained. Aylo happened to find out about the UK proceedings on 12th December, because of

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1 TOM MOODY-STUART KC
2 My Lord, if my learned friend is seeking to rely on
3 Leaning and novelty in relation to Leaning, then one might
4 question how much help they are going to get from a decision
5 of the UK court in relation to that when they could just show
6 the document itself in Germany and say, "Look, here it is."
7 If they are so confident in their case on Leaning, we say it
8 does not work. Obviousness is where they are going to have to
9 do the work. However, they are saying they have a strong
10 novelty attack. Well, they get a significant benefit,
11 presumably, by just showing the German infringement court
12 Leaning itself and being able to say, "Look, irrespective of
13 any other decision, this novelty-destroying", they say prior
14 art, "you can take into account and look at that, and that
15 renders it highly likely that the patent will be rendered
16 invalid." So it is a question of ----
17 MR. JUSTICE MEADE: That is true, but you have to reach a certain
18 heft in the German view. If the German court could say it is
19 50/50, okay, we get an anticipation argument but who knows if
20 it will succeed, having another court that has looked at it at
21 a trial might get them over the line. Or they might win on
22 obviousness. None of this is certain, Mr. Moody-Stuart,
23 because you if were just focusing on obviousness you would say
24 the German court might say we are going to have different
25 evidence so it does not count. These are all possibilities.

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1 TOM MOODY-STUART KC
2 MR. MOODY-STUART: My Lord, yes. My learned friend has presented
3 your Lordship, in effect, with a certainty of usefulness to
4 provide this good reason and a certainty of the necessity to
5 avoid an injunction, to avoid this disruption. In my
6 submission, neither of those are made out on his evidence. It
7 is a series of hypotheticals that it might be helpful, and we
8 say it is at the vanishing end of might, and also that it
9 might only be necessary to have -- the risk of there being an
10 injunction in Germany, Mr. Marra's evidence very carefully is
11 not saying that it is impossible to design around this and he
12 does not say why he has not taken the steps or is not going to
13 take the steps to do so or cannot do it by any injunction date
14 in Germany. We say other than the contention that there is a
15 good reason because the risk of an injunction in Germany
16 having an effect in this country, this is all, in my
17 submission, extraordinarily hypothetical in terms, and that is
18 not good enough to establish the good reason test.
19 My Lord, dealing with the other matters, the effect on
20 the administration of justice, your Lordship is, with respect,
21 perfectly right in terms of it depends on who else is in the
22 list and what is going on and whether there is a gap.
23 However, we do take issue with Aylo's contention that the
24 degree of expedition is modest, in that it is only just a bit
25 before the year that is the aim of the Practice Direction. My

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1 TOM MOODY-STUART KC
2 learned friend relies on that saying it is only six to eight
3 weeks earlier than a 12-month aim, based, as I understand it,
4 on my client's EP '860 claim, which was issued in December.
5 His own claim, which is the one that he needs to have
6 expedition on, we have said they can be heard together, but
7 that was only issued earlier this month. Yes, in March. So
8 from there, if one counts a year forward from that date, on
9 the assumption we are not relating back in this way, then is
10 quite a significant degree. To get the thing on in November
11 that is eight months.
12 MR. JUSTICE MEADE: You agree that if the clock started running in
13 December, then it is modest, but if it started running in
14 March, then it is not modest.
15 MR. MOODY-STUART: My Lord, I would say if it starts in December,
16 I do not say it is that modest, and I do not say that, but it
17 is certainly not modest at all if one considers it. That is
18 the point. My learned friend's submissions on modesty all
19 depend -- this is the patent that he brought in and he brought
20 proceedings on in March, and to then say "Let us back-date it
21 as if we had taken steps in November ----"
22 MR. JUSTICE MEADE: How is '805 different from '860? Is it not
23 just a set of extra claims that they ----
24 MR. MOODY-STUART: It is different claims.
25 MR. JUSTICE MEADE: It is always different claims, otherwise it

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1 TOM MOODY-STUART KC
2 would not be a divisional. It is different claims. They had
3 to knock it out, otherwise they would not have certainty from
4 the result of the trial. It is just another set of claims.
5 In what sense was the dispute not heading for a showdown as of
6 11th December 2023?
7 MR. MOODY-STUART: My Lord, the dispute that my clients brought,
8 which is in relation to not the patent in Germany, and I think
9 is common ground would not have been of any use in Germany,
10 that was contemplated in December. That is when we brought
11 our German proceedings as well and when we brought the EPC
12 proceedings. In terms of my learned friend saying, "Well, now
13 we want to bring in the UK", and it is the UK we are focusing
14 on here for this claim in relation to the other patent, my
15 Lord, that must start at the date he started the claim.
16 MR. JUSTICE MEADE: This all has the feeling of a very, very
17 specific argument you might have over a limitation period in
18 relation at the back of that rather than a slightly more ----
19 MR. MOODY-STUART: My Lord, I take the point, but it is broad.
20 Actually, my learned friend says again and again it is only
21 six to eight weeks based on this 12 months' expedition, but
22 that is in relation to my case and not his case.
23 In terms of prejudice to my clients on expedition, there
24 is something that arises from the way in which my learned
25 friend expresses his case in the skeleton. My Lord, it is

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1 TOM MOODY-STUART KC
2 said that the validity case is straightforward, because it is
3 only one piece of prior art. My learned friend has not said
4 he will not seek to introduce any other parts of prior art, in
5 particular if we seek to amend, which would seem to be likely.
6 We are concerned that in paragraph 23 of his skeleton, when he
7 addresses this, faced with our evidence where we say we may
8 wish to -- let us look at 23. What my learned friend's
9 skeleton says, he does not anywhere commit to saying that
10 these are the only issues that will be in issue come November.
11 When we come to look at another point on infringement, he does
12 not commit to saying well all websites are the same and so it
13 can be dealt with in a straightforward fashion. He says that
14 we assert all the websites are the same, he does not confirm
15 that they are or not -- in terms of the infringement case.
16 MR. JUSTICE MEADE: But you have both agreed a six to seven day
17 estimate, so what am I looking for here?
18 MR. MOODY-STUART: My Lord, it is a question of the amount of work
19 that needs to be done to fit it into the six to seven day
20 estimate. Let us look at it. At the moment a six to seven
21 day estimate has been agreed on the basis of the prior art.
22 If we look at 23 ----
23 MR. JUSTICE MEADE: Can I ask you this, Mr. Moody-Stuart. Does
24 the infringement allegation as you have pleaded it, in your
25 opinion, need more time to prepare than between now and

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1 TOM MOODY-STUART KC
2 November -- as you have pleaded it?
3 MR. MOODY-STUART: My Lord, as we have pleaded it?
4 MR. JUSTICE MEADE: Yes.
5 MR. MOODY-STUART: We have said, we have alleged, that there are
6 two general classes of websites and they are generally the
7 same. That has not been admitted, so we do not know whether
8 we will need more time. If they all operate in the same way,
9 and if we get a PPD promptly, and if it is directed that this
10 is to come on in November, I am not saying it is impossible
11 for it to happen but I am saying that it is prejudicial to do
12 something quicker that otherwise could be done at a more
13 reasonable pace.
14 If it turns out that there are 52, which is the number
15 of websites, and they all operate differently, then I do not
16 think it could be done in November. I do not know, because I
17 do not know what the differences would be. The point is we do
18 not know. We have alleged they all operate in the same way,
19 they do not admit it, and my learned friend says in his
20 skeleton, well, they assert we assert they are all the same
21 way, but he does not say they all operate in the same way.
22 Things in his knowledge and his gift to reassure of this
23 working and being workable and being able to be prepared for
24 November, he simply does not engage with; he relies on our
25 assumptions about how the case might be without confirming

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1 TOM MOODY-STUART KC
2 that that could be.
3 MR. JUSTICE MEADE: In that case how long do you think it would be
4 safe to allow for this trial to be got ready? When you
5 started it on day one, when did you think the trial would be?
6 MR. MOODY-STUART: My Lord, we were contemplating March would be a
7 time that we would be absolutely certain that it would be all
8 ready in March of next year. My Lord, we are still at a stage
9 where we have not seen -- there is nothing in this that
10 necessarily takes it out of the ordinary. So I am not saying
11 it is vastly complicated, but I am also not saying that this
12 is something that can safely, without potentially prejudicing
13 my client, be squeezed in to bring it on in November as my
14 learned friend says or December. We just do not know is the
15 point.
16 Indeed, in 23 of my learned friend's skeleton, he says:
17 "[Our] evidence in relation to the expedition application
18 seeks to suggest that the case could in the future change in
19 material ways, and that those changes could make the case more
20 complex, which could affect the parties' ability to prepare
21 for a trial in November-December 2024" -- that is what we say
22 -- "(e.g. amendment of the patents, a challenge to priority,
23 new prior art being pleaded, infringement turning out to be
24 more complex than anticipated ..." These are the matters that
25 they are within his gift to say "Actually, it is not more

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1 TOM MOODY-STUART KC
2 complex".
3 MR. JUSTICE MEADE: Apart from amendment to the patent, yes.
4 MR. MOODY-STUART: Amendment to patent, but we say we may well
5 amend the patent, we are contemplating it, and if we do then
6 he is not saying "Well, whatever your amendments we will stick
7 to the prior art". What he says instead at the end of this
8 paragraph: "The trial should be listed on the basis of the
9 situation as it stands now, and if later on either party seeks
10 materially to change its case, then the Court will, in the
11 usual way, consider such an application to amend in light of
12 the trial date and the extent to which those amendments can be
13 accommodated." My learned friend is saying list it now, when
14 we have not yet firmly put forward any amendments we are
15 making, and then, having got that listed at a time that can be
16 done based on all the assumptions, then it is to be considered
17 whether or not we are allowed to apply to amend, based on the
18 time available. He says to whether those can be accommodated
19 within the trial date and the preparation time.
20 My Lord, that is a significant fetter on our ability to
21 consider and prepare our case if it is said that what is going
22 to happen is that our ability to amend our patents is in some
23 way limited because expedition has been obtained at this stage
24 when we say we might amend, but your Lordship has been told to
25 ignore that. Do you see, my Lord ----

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MR. JUSTICE MEADE: Not really. Normally with these expedition-type applications, the court is in a position to make a reasonable estimate of what is going to be involved in getting ready for trial. I appreciate your point, but at the moment I have two patents of a general level of complexity, I can have a good idea of, a jointly agreed estimate for the length of the trial, which I appreciate is not that, and an idea of the attacks on the patent. I mean, any time you decide when to have a trial you have to be reasonable about it and anything could change in any case. I would be very surprised, it would be a remarkable case if I were to expedite it and then you come forward with your claim amendments next month, whenever, the month after, in a reasonable time and the court says that you cannot amend your patent because the trial has been expedited. I cannot imagine a case where that has happened, and I cannot think of -- if you try and amend them the day before the trial, that is a different thing.

MR. MOODY-STUART: My Lord, of course.

MR. JUSTICE MEADE: But you are not going to do that, so I just do not see any of these uncertainties are anything unusual to this case. It seems to me if we were doing this we would always say there is prejudice to the party resisting because the issues could turn out to be different.

MR. MOODY-STUART: My Lord ----

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MR. JUSTICE MEADE: I appreciate you say that you do not know what they know about the complexity of the infringement, I understand that, that is a fair point.

MR. MOODY-STUART: My Lord, and just to make that particular point good, 21(b) in their skeleton: "On infringement of EP680, it is agreed that issues relating to joint tortfeasance ... Although DISH/Sling's infringement case accuses a number of different websites owned/operated by Aylo, and whilst of course Aylo will further investigate the issue fully in preparing its PPD in respect thereof" -- they have not admitted they are all the same, they expressly declined to admit that -- "DISH/Sling's case is that the websites all operate in a materially identical way." We do not know.

MR. JUSTICE MEADE: I know you do not know. They may not know. I do not know what detail these claims go down to. They may have to go and ask the people who run their server farms or something. I think it is incredibly speculative to think they have up their sleeve already a notion that infringement is so much more complicated than it looks. But anyway I think ----

MR. MOODY-STUART: My Lord, that is the point.

MR. JUSTICE MEADE: Mr. Moody-Stuart, what you can help with is where are you at on amendment of the claims?

MR. MOODY-STUART: My Lord, we are contemplating it. Obviously these things have to be considered. My Lord, this case has

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been on foot for two weeks. There is a likelihood we may amend, but I cannot put it higher than that and it is something that it is a real possibility, but I cannot say these are the amendments I am contemplating. I know what I would do if I draft it, but it is a question of where the case is.

MR. JUSTICE MEADE: Right.

MR. MOODY-STUART: So, my Lord, I cannot put it higher than it is in the evidence, which is that we may. It is not in any sense unlikely is what I would say.

MR. JUSTICE MEADE: For all I know, Mr. Moody-Stuart, you have reached the conclusion that you have to amend over Leaning and you just do not want to have to front up with that.

MR. MOODY-STUART: My Lord, certainly in terms of novelty our position is that we do not do.

MR. JUSTICE MEADE: Okay.

MR. MOODY-STUART: As I understand it.

MR. JUSTICE MEADE: Okay.

MR. MOODY-STUART: But this is not the case that I have not drafted the pleadings on anything. In terms of the rest, we are contemplating it and that is ----

MR. JUSTICE MEADE: That answers the question.

MR. MOODY-STUART: My Lord wants a firm decision that we have to. The answer is we do not have a firm decision that we have to.

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In terms of special factors, my Lord, my learned friend criticises my clients for saying they are in some way gaming the system. We do not accept that at all.

MR. JUSTICE MEADE: You have made carefully considered strategic decisions to squeeze the maximum out of the parallel regimes that exist. Let us say that.

MR. MOODY-STUART: My Lord, and my learned friend is taking a series of tactical decisions in order to achieve the aims that he wants, including this application, to achieve his litigation aims in the various different jurisdictions. So, my Lord, we resist the suggestion that we are gaming the system any more than he is.

MR. JUSTICE MEADE: I thought you would say that.

MR. MOODY-STUART: There is certainly no suggestion of impropriety. To an extent, one's legal advisers are paid to deal with things in the most appropriate way.

MR. JUSTICE MEADE: I think the one that is urged particularly is why did you not just tell them on day one all the proceedings that you were issuing, would that not have been the transparent thing to do, because you definitely put yourself in a position to achieve a strategic advantage by not telling them, did you not?

MR. MOODY-STUART: My Lord, in that my learned friend is applying to change what we are doing now to achieve what he thinks is a

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