Neutral Citation Number: [2021] EWHC 1322 (IPEC)

Case No: IP-2018-000045

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY ENTERPRISE COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17/05/2021

Before :

HIS HONOUR JUDGE HACON

- -

Between :

CLAYDON YIELD-O-METER LIMITED	**Claimant**
- and -	
(1) MZURI LIMITED	
(2) CHRISTOPER MARTIN LOLE	**Defendants**
- and -	
JEFFREY CLAYDON	**Third Party**

- -
- -

Thomas St Quintin (instructed by **Nash Matthews LLP**) for the **Claimant** and **Third Party**
Brian Nicholson QC and **David Ivison** (instructed by **Shakespeare Martineau LLP**) for the **Defendants**

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 6.00 p.m. on Monday 17 May 2021.

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HIS HONOUR JUDGE HACON

Judge Hacon :

Introduction

1. On 22 April 2021 I handed down my judgment in the trial of this action. A draft of the judgment had been sent to counsel on 19 April 2021. The Claimant's claim for infringement of two patents was dismissed. The judgment was handed down remotely pursuant to the Covid-19 Protocol, being circulated on that date to the parties' representatives by email and made public by release to Bailii.

2. On 22 April 2021 I was hearing a trial in other proceedings. The parties were informed that no attendance was required on that date to deal with matters consequential to the judgment.

3. In the normal course, when consequential matters if not agreed are adjourned to be heard, or decided on the papers, on a date after a judgment is handed down, the parties by consent seek an order adjourning the hearing at which the decision to be appealed is made until the date of the court's ruling on consequential matters. This is often together with a direction that the period of 21 days for filing an appellant's notice shall run from the date of that future ruling. No such order was sought by either side in the present case.

4. On 13 May 2021 the Claimant's solicitors wrote to the Defendants' solicitors enclosing a draft of a proposed order. It included a reference to the Claimant seeking permission to appeal insofar as the judgment related to the validity of one of the patents in suit.

5. On 14 May 2021 the Defendants' solicitors replied, asserting that this court no longer has jurisdiction to grant permission to appeal since no application was made to this court at the hearing at which the decision to be appealed was made, within the meaning of CPR 52.3(2)(a) and there was no application to adjourn the date of that decision. Further, the 21 day time limit for filing an appellant's notice, imposed by CPR 52.12(2)(b), had expired on 13 May 2021; an application to vary that time limit could only be made to the Court of Appeal, pursuant to CPR 52.15(1).

6. Late in the afternoon of Friday, 14 May 2021 Mr St Quintin, counsel for the Claimant, sent an email to the court, copied to counsel for the Defendants. The court received written submissions from counsel for the Defendants, Mr Ivison, on Monday, 17 May 2021.

The rule

7. CPR 52.3(2)(a) provides:

> *(2) An application for permission to appeal may be made –*
>
> *(a) to the lower court at the hearing at which the decision to be appealed was made;*

8. CPR 52.15(1) provides:

> *(1) An application to vary the time limit for filing an appeal notice must be made to the appeal court.*

The Claimant's arguments on the Covid Protocol

9. Mr St Quintin advanced two arguments in his email of 14 May 2021 relating to the Covid Protocol. The first was that a remote handing down of a judgment under the Covid Protocol does not amount to a hearing at which the decision to be appealed was made within the meaning of CPR 52.3(2)(a). The second was that the remote handing down of a judgment under the Covid Protocol either automatically adjourns the CPR 52.3(2)(a) hearing or alternatively in the present case that hearing must be taken to have been adjourned because the court intended a further hearing if the parties were to be unable to agree an order on consequential matters.

10. I do not accept either of these arguments. I can see no rational basis for treating the handing down of a judgment under the Covid-19 Protocol as being different from the handing down of a judgment in open court in relation to permission to appeal. I accept that there was no hearing in the usual sense of the term on 22 April 2021. But even where a judgment is handed down in open court, it is not unusual for the parties to have been informed by the court that they need not attend and that there will be a subsequent hearing of submissions on consequential matters if not agreed, or alternatively that such matters will be decided by the court in writing. In those circumstances there is no hearing in the usual sense when the judgment is handed down. The question is whether there is nonetheless a hearing within the meaning of CPR 52.3(2)(a). If so, in my view there is also a hearing in that sense when a judgment is handed down under the terms of the Covid Protocol.

Create Financial

11. Before looking at the law more generally, I refer to a case cited by Mr St Quintin, namely *Create Financial Management LLP v Lee* [2020] EWHC 2046 (QB) and the further arguments he made by reference to that case.

12. In *Create* Morris J gave judgment in an application for an interim injunction. It was handed down in the afternoon of 17 July 2020. The parties considered its terms for about 40 minutes and then the hearing resumed. There was further oral argument and a supplementary judgment. It was apparent that further matters had to be considered and that another hearing would be necessary the following week. One followed on 20 July 2020 at which the judge approved a draft Order. Thereafter the defendants sought permission to appeal. It was recognised by the judge and the parties that a further issue remained outstanding. The judge gave directions for a further hearing which took place on 24 July 2020.

13. At the hearing on 24 July 2020 the claimant raised the contention that the court had no jurisdiction to give permission to appeal since the application for permission had not been made – it had not been made at the hearing at which the decision to be appealed was made, in compliance with CPR 52.3(2)(a), namely the hearing of 17 July 2020. The defendants submitted that at the close

(loosely termed) of the hearing on 17 July 2020, the hearing was adjourned to be continued the following week and was continued on 20 July 2020.

14. Morris J held that since the issue of permission to appeal was made after he had approved the draft order, even if the hearing of 20 July 2020 was a continuation of the hearing of 17 July 2020, as to which the judge made no final ruling, that hearing came to an end upon his approval of the draft order and the making of the order of 20 July 2020. Consequently CPR 52.3(2)(a) was not satisfied and the judge had no jurisdiction to consider an application for permission to appeal.

15. Mr St Quintin submitted that none of the mischiefs to which CPR 52.3(2)(a) is addressed, referred to by Morris J, arise in the present case. That is true, but Morris J considered those mischiefs, in his paragraph 40, which he drew from *Lisle-Mainwaring v Associated Newspapers Ltd* [2018] EWCA Civ 1470. He said that the mischiefs did not arise on the facts before him and yet he still found that the application for permission to appeal was not made at the hearing specified in CPR 52.3(2)(a). His judgment shows that the question whether CPR 52.3(2)(a) has been complied with does not depend on whether, on the facts of the case, the *Lisle-Mainwaring* mischiefs are prevented by the rule.

16. Mr St Quintin further submitted that unlike the events in *Create Financial*, no order has been made dealing with any of the consequences of my judgment of 22 April 2021. He said that I must have anticipated further argument and therefore, by inference, I adjourned the hearing at which the decision to be appealed was made.

17. Although I have no recollection of what I thought at the time, I assume that I contemplated the possibility of further argument. However, I must also have considered it possible that the parties would agree a form of order and in particular that the claimant may choose not to appeal. I do not see any necessary inference of an adjournment of the hearing.

McDonald v Rose

18. However, the more substantive answer to Mr St Quintin's arguments can be drawn from *McDonald v Rose* [2019] EWCA Civ 4. In his judgment (giving the judgment of the Court) Underhill LJ considered several authorities including *Sayers v Clarke Walker* [2002] EWCA Civ 645, *Owusu v Jackson* [2002] EWCA Civ 877, *Jackson v Marina Homes Ltd* [2007] EWCA Civ 1404, *Lisle-Mainwaring v Associated Newspapers* [2018] EWCA Civ 1470 and *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633. He then provided a summary headed "The Correct Procedure" at paragraph 21 (the emphases in bold are mine; that in italics (as well as bold) is original):

> "[21] It is the experience of the court that the effect of the rules, as expounded in the authorities referred to above, is often not properly understood by would-be appellants. We think there is value in our summarising in this judgment the effect of those authorities and the procedure that ought to be followed in consequence by parties wishing to seek permission to appeal from the lower court (which is good practice though not mandatory). We would set the position out as follows:

(1) The date of the decision for the purposes of CPR r 52.12 is the date of the hearing at which the decision is given, which may be ex tempore or by the formal hand down of a reserved judgment: see *Sayers v Clarke* and *Owusu v Jackson*. We call this the decision hearing.

(2) A party who wishes to apply to the lower court for permission to appeal should normally do so at the decision hearing itself. **In the case of a formal hand down where counsel have been excused from attendance that can be done by applying in writing prior to the hearing.** The judge will usually be able to give his or her decision at the hearing, but there may be occasions where further submissions and/or time for reflection are required, in which case the permission decision may post-date the decision hearing.

(3) **If a party is not ready to make an application at the decision hearing it is necessary to ask for the hearing to be formally adjourned in order to give them more time to do so: see *Jackson v Marina Homes*.** The judge, if he or she agrees to the adjournment, will no doubt set a timetable for written submissions and will normally decide the question on the papers without the need for a further hearing. **As long as the decision hearing has been formally adjourned, any such application can be treated as having been made 'at' it for the purpose of CPR r 52.3(2)(a).** We wish to say, however, that we do not believe that such adjournments should in the generality of cases be necessary. Where a reserved judgment has been pre-circulated in draft in sufficient time parties should normally be in a position to decide prior to the hand down hearing whether they wish to seek permission to appeal, and to formulate grounds and such supporting submissions as may be necessary; and that will often be so even where there has been an ex tempore judgment. Putting off the application will increase delay and create a risk of procedural complications. But we accept that it will nevertheless sometimes be justified.

(4) **If no permission application is made at the original decision hearing, and there has been no adjournment, the lower court is no longer seized of the matter and cannot consider any retrospective application for permission to appeal: see *Lisle-Mainwaring*.**

(5) **Whenever a party seeks an adjournment of the decision hearing as per (3) above they should *also* seek an extension of time for filing the appellant's notice, otherwise they risk running out of time before the permission decision is made. The 21 days continue to run from the decision date, and an adjournment of the decision hearing does not automatically**

> **extend time: see *Hysaj***. It is worth noting that an application by a party for more time to make a permission application is not the only situation where an extension of time for filing the appellant's notice may be required. It will be required in any situation where a permission decision is not made at the decision hearing. In particular, it may be that the judge wants more time to consider (see para (2) above): unless it is clear that he or she will give their decision comfortably within the 21 days an extension will be required so as to ensure that time does not expire before they have done so. In such a case it is important that the judge, as well as the parties, is alert to the problem."

19. Thus, the hearing at which the decision to be appealed was made, within the meaning of CPR 52.3(2)(a), is the hearing at which the judgment is handed down by the lower court. Where the handing down is a formality and the parties are not required to attend, it still constitutes a hearing, still the hearing referred to in CPR 52.3(2)(a). That hearing can be adjourned for the purpose of hearing applications for permission to appeal, but it must be done formally by the court following an application by at least one of the parties. Where that happens, an application for permission to appeal will be treated as being made at the hearing referred to in CPR 52.3(2)(a). If there has been no such adjournment, the lower court has no jurisdiction to consider an application for permission to appeal at a subsequent hearing.

20. Further, even if an adjournment has been granted, unless the lower court also grants an extension of time to file an appellant's notice, the time for doing so expires 21 days after the date on which the judgment was handed down.

Conclusion

21. It follows that in the present case, first, I have no jurisdiction to consider the Claimant's application for leave to appeal. Secondly, even if I had such jurisdiction, the time for filing an appellant's notice has now expired and an application to extend time retrospectively may be made only to the Court of Appeal.