**Approved Judgment**

Citation number: [2018] EWHC 1626 (Ch)

Case No: HC-2015-005005

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

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

Date: Tuesday, 12th June 2018

**Before**:

**CHIEF MASTER MARSH**

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**Between:**

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| **(1) GLAXO WELLCOME UK LIMITED (T/A ALLEN & HANBURYS)**<br>**(2) GLAXO GROUP LIMITED** | **Claimants** |
| **- and -** | |
| **(1) SANDOZ LIMITED**<br>**(2) SANDOZ INTERNATIONAL GMBH**<br>**(3) AEROPHARM GMBH**<br>**(4) HEXAL AG** | **Defendants** |

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**MR. TOM HICKMAN** (instructed by **Stephenson Harwood LLP**) for the **Claimants**
**MR. MARTIN HOWE QC and MS. IONA BERKELEY** (instructed by **White and Case LLP**) for the **Defendants**

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# Judgment Approved

*If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.*

**CHIEF MASTER MARSH:**

1. I am dealing at today's hearing with an application made by the claimants seeking orders concerning the defendants' disclosure and relating to a notice to admit served by the claimants. To put the application briefly in its context, Sandoz has brought to market in the United Kingdom, and elsewhere by local distributors, an inhaler product named AirFluSal Forspiro which is a generic competitor to the claimant's Seretide Accuhaler inhaler which is out of patent. They both contain the same active ingredient and are for the treatment of chronic obstructive pulmonary disorder and severe asthma. The claim is made in passing off. The trial of the claim is due to commence in mid-October 2018 and there is a pre trial review listed to take place in about two weeks' time.

2. The claimants have issued a further application by which they seek to join three additional parties who have been referred to as the "Vectura parties" and to adjourn the trial date. That application is not before me today and it remains to be seen whether the claimants will be successful in any respect, either that parties will be joined or that the trial date will be maintained. The basis upon which the application to adjourn the trial date is made is indirectly relevant to part of the claimants' application before me.

3. The disclosure exercise that has taken place pursuant to the order for directions made on 14th June 2017 has been a lengthy one. That is unsurprising because the disclosure is very substantial, at least on the part of the defendants. The claimants sought wide-ranging disclosure from the defendants and searches have been undertaken from some 41 custodians. In relation to some custodians, the search period has been between 13 and 14 years. A considerable number of search terms have been applied to the documents and about 406,000 documents have been manually reviewed by a team working on behalf of the defendants leading to disclosure on 9th March 2018 of, in round terms, 75,000 documents. That process took some six months and, I am told, has cost about £2 million.

4. It is heartening to record that prior to the commencement of the disclosure exercise, and in accordance with the order I made in June 2017, there was a considerable degree of sensible and helpful engagement between the parties in scoping the disclosure exercise. There are two points arising from that exercise that are of broad relevance to today. First, and in my experience unusually, no agreement was made at that stage, prior to the disclosure search and review exercise being commenced, about whether (a) complete families of documents would be disclosed or (b) only the parent document and any children of that parent document, in the event of the children being documents falling within the standard disclosure test, would be disclosed.

5. The second point to mention is it was understood and expressly agreed in correspondence that there would be initial scoping in relation to the word search terms by the defendants and in the event of a very substantial number of hits being obtained from any custodian, that further consideration would be given to whether disclosure in relation to such a custodian should take place by reference to the agreed search term. As matters worked out, there was no indication from the defendants that what might have been regarded as an excess number of documents were responsive to the search terms. On any view, the task of reviewing 75,000 documents produced on disclosure is a very substantial one.

6. I turn now to the three aspects of the application I have to deal with. The first concerns what is described as the DocXChange platform, misdescribed by all as a "database". It

was a platform set up for sharing information between the second, third and fourth defendants for the purposes of the work they undertook in the design and bringing to market of the defendants' product. The application, as it was originally put forward, sought disclosure from the platform on the basis that disclosure had not been provided by the defendants. It emerged from the fifth witness statement of Mr. Marcus Collins, who is a solicitor with White & Case LLP, that the platform is no longer in existence. Its use was discontinued at the end of 2015 or in early 2016. The contents of the platform were deleted and the final work of closing down the platform, closing the various accounts, was completed in May 2016.

7. The claimants' application is to require the defendants to provide a further explanation for how the deletion of the database came about, who gave the instructions and in what circumstances it occurred. They refer to the litigation in Ireland between the claimants and a company called Rowex Limited (a joint venture company between a third party company and a company within the Sandoz Group) in which it was agreed in October 2015 for the purposes 'discovery' that disclosure would include documents held by the second, third and fourth defendants. The instant claim only commenced in late 2015 and there was then a contested hearing and an appeal concerning joining the second, third and fourth defendants. But it is clear that the defendants, that is all of them, were on notice by about May 2016 of the claim the claimants were intending to pursue against them. The claimants concern is that the destruction of the platform took place at about the time the second, third and fourth defendants were in the course of being joined, or at least were on notice of an intention to apply to join them.

8. Mr. Collins' sixth statement, served at the end of last week, provides further information about the destruction of the platform. The source of his information is not, however, spelled out in any detail. It is clear that the defendants have a generic IT Department, that is, there is one IT Department for all the defendants. It might have been thought with that information in mind the scoping exercise for disclosure in this claim would have started with a request to the IT Department to say what databases and platforms were in existence, or which had been in existence, so that the exercise started on a proper footing. It is clear that the defendants' solicitors, White & Case, were wholly unaware of the DocXChange platform until reference to it was raised by the claimants after disclosure and inspection had been provided.

9. The claimants require an order that a full explanation is given. The defendants' response is, in effect, to say that this is a dead issue and that making any order now serves no purpose at all. I disagree. I start by acknowledging that the disclosure exercise the defendants have undertaken is an immensely complicated one. There is no suggestion from the court that there has been an attempt to mislead knowingly. However, the exercise of providing disclosure is underpinned by duties placed on the disclosing party to undertake the exercise with due care. The evidence that has been provided to the court suggests to me that the care that is required by the defendant may not have been exercised in this case. The defendants and the defendants solicitors were plainly aware of their obligation to disclose documents which they had had in their control but no longer had. This is apparent from the defendants' disclosure statement. The statement is signed by four different persons, one on behalf of each defendant, which expressly states that the list is a complete list of documents which are or have been in their control. The carve out provided under Schedule 2, paragraph 2, of the

list is not, to my mind, sufficient, or at least not sufficiently precise, to enable the defendants to say that they disclosed the DocXChange platform.

10. Given the heat which this litigation has generated, it is right that the court should be careful about making remarks which may appear to be critical. The impression I am left with on reading Mr. Collins' statements, however, is that the failure to make reference to the DocXChange platform has not led to what I would regard as an appropriate level of contrition. The information which Mr. Collins provides on instructions is put in very general terms. It is not clear from his evidence – and this is accepted by Mr. Howe QC who appears for the defendants – whether there were documents held in the platform that were not held elsewhere. There is no certainty about that. It follows that there may have been documents falling within CPR 31.6 within the platform which would have been disclosed but for the destruction of the system.

11. Mr Collins' evidence is that there was a three-stage process commencing in June 2015 with the initial decommissioning of the platform leading to destruction of documents in about January 2016 and then a termination of the platform in July 2016. It is unsatisfactory to my mind that his evidence does not provide the sort of detail I would expect to have seen. I would have expected the evidence that relates to the destruction of a platform (which potentially contained disclosable material) to have been explained not second-hand by a solicitor on instructions, but by a person who has first-hand knowledge of the events and who can say that he or she, and the relevant entities, were unaware of the need to preserve the platform.

12. It follows that I do not accept there is no point in making an order. It will serve a very real purpose; namely to enable the court and the claimants to know what happened. There is the possibility that a serious error occurred. It may, with a proper explanation, be seen as simply a relatively minor error and therefore a benign one. But the court is entitled to know, based on first-hand information, just where in the spectrum between those extremes the events fall.

13. I will therefore make an order broadly in the terms that are sought and I will come to the terms of that order at the conclusion of this judgment.

14. The second element of the application concerns a notice of admission served by the claimants on the defendants. The notice is a detailed one comprising some 32 headline points with a considerable number of sub-points. The notice was met with a response from the defendants saying that they do not admit the relevance of the alleged facts and they do not admit any of the facts that are set out in the notice.

15. CPR 32.18 governs such notices. A notice to admit facts is a convenient procedural device and has the potential to save cost because a party need not go to the expense of proving uncontroversial detail. The rule, however, contains no sanction for a refusal to agree facts. It would not be common for the court to seek to apply any sanction to the refusal to admit facts other than a costs sanction after the event under CPR 42.

16. The claimants seek an order that the defendants should respond to the notice and, although the claimants accept that the defendants cannot be ordered to admit facts, to the extent that they decline to do so, they should not be permitted to seek to put forward

an alternative positive case at a later stage. The application is defined in paragraph 6 of the application notice.

17. The defendants' position is that the court does not have power to require them to provide any further response than they have already given. Plainly it is right that a defendant cannot be, and should not be, forced to admit facts. Generally speaking, a party is entitled to lead the evidence it wishes for the purposes of either pursuing a positive case or defending the claim at a trial. I have no doubt, however, that the court has power to make the sort of order that the claimants seek applying the overriding objective and the broad case management powers in CPR 3.1(2)(m) and indeed under CPR 3.3(b) to impose a condition.

18. The defendants point to aspects of the notice to admit which they say are unsatisfactory. For example, there are facts which are asserted that do not readily lead to a simple admit or non-admit answer. There are two additional points that are made on behalf of the defendants. First, the approach adopted by the claimants can be described as a unilateral one rather than being collaborative. The notice was served without prior warning and the defendants were required to respond to it within a short period. The springboard for the request is said to have been an observation made by me in paragraph 29 of the judgment dated 28th June 2017. Be that as it may, it is right to observe that the claimants could have proceeded with the request at a much earlier stage. Furthermore, this is complex multi-jurisdictional litigation and it would have been preferable for there to have been some engagement with a view to agreeing, if possible, a list of core facts to which the defendants could have responded by admission and non-admission. In any event, that is not what happened.

19. The second point taken by the defendants is that the timing of the order the claimants seek is wrong. There are two aspects of timing. First of all, but for today's application and but for the application to adjourn the trial date, exchange of witness statements would already have taken place. It is said that an attempt to narrow the range of disputed facts is best done after the exchange of witness statements and not before. The second timing issue concerns the claimants' application to join the Vectura parties. If the current defendants are required to re-answer the notice, their responses will not bind the Vectura parties which will necessitate further work.

20. It seems to me that the objective that lies behind the notice to admit facts is an entirely laudable one. There are, undoubtedly, many matters of fact in this case which are not controversial and it will be helpful to get into the open precisely what those facts are. The notice to admit covers a range of facts of different types and it is clear to me that a considerable number are uncontroversial. I have characterised the approach by the claimants as being less than satisfactory but it seems to me that the defendants' approach of simply refusing to admit any of the facts was unhelpful.

21. I have come to the view that now is not the appropriate moment for the court to exercise its discretion, a discretion I am satisfied exists, to make an order in the terms that are sought by the claimants. The litigation is in flux at the moment. It is common ground that the date for exchange of witness statements needs to be reviewed. It is plainly essential that the claimants' further application, in both limbs, is resolved as soon as possible. The right approach for the court to adopt today is to adjourn the relevant part of the claimants' application with a view to it, if necessary, being reconsidered by the court at a later date.

22. I would express the provisional view that the parties should seek to work together in a collaborative way to the extent they feel possible after exchange of witness statements with a view to achieving clarity about the differences between concerning the basic facts in which the dispute arises. That will be of considerable help to the trial judge. However, I do not consider it is right to make the order today. If the parties are not able to agree an approach, or to agree the detail of what it is they should do, the application can be restored to me for further consideration.

23. The third element of the application concerns disclosure. I propose to take this element of the application briefly. The problem which the claimants have identified concerns families of documents. Amongst the 75,000-odd documents that have been provided by way of inspection, the claimants are unable to discern which documents that form part of a family of documents fall strictly within the standard disclosure test and, by contrast, which documents are merely provided for the purposes of context.

24. As I mentioned earlier in this judgment, it is perhaps unfortunate that agreement was not reached on this subject prior to disclosure being undertaken. It is right for the court to adopt any approach which will reduce the burden on a receiving party to review documents that are likely not to be of importance in a case. The standard disclosure test must be applied strictly. It is not right that documents merely providing 'context' are disclosed, unless that is part of the court's order. I acknowledge there are circumstances in which the receiving party complains that attachments have not been provided. But, the corollary to such a complaint is that the attachments must, if they are to be disclosed, fall strictly within the standard disclosure test. It will lighten the burden of the claimants if they know which documents disclosed by the defendants are merely contextual in the judgment of the defendants and which fall within the standard disclosure test.

25. In the course of the hearing, Mr. Howe QC was able to take instructions and indicate, without the defendants agreeing to do so, that they are in a position to provide a list of the documents that have been tagged as being relevant by content. I am in no doubt that it is appropriate to make an order requiring the defendants to provide the further information that is required because I am satisfied it will, or is very likely to, limit the burden arising from disclosure on the claimants.

26. The precise, technical way in which this additional list is to be provided is a matter about which I would like to receive further submissions. It must be capable of operating electronically alongside the list which has already been provided so that claimants do not have to operate two systems in parallel.

27. I will now hear counsel on that subject and, having done that, I will come back to the scope of the order I am making as against the defendants in respect of the DocXChange platform.

*(For continuation of proceedings: please see separate transcript)*