



Neutral Citation Number: [2009] EWHC 1600 (Pat)

Case No: HC 08 C00781

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**  
**PATENTS COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 30/06/2009

**Before:**

**MR. JUSTICE LEWISON**

**Between:**

**KONINKILJKE PHILIPS ELECTRONICS NV**  
**and others**

**Claimants/First to**  
**Eighth**  
**Part 20 Defendants**

**- and -**

**HARVARD INTERNATIONAL PLC**

**Defendants/Part 20**  
**Claimants**

**- and -**

**MPEG LA LLC**

**Ninth Part 20**  
**Defendant**

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**MR. THOMAS DE LA MARE** and **MR. JAMES SEGAN** and **MR. TIM POWELL** (instructed by Messrs. **Powell Gilbert**, London WC2) appeared on behalf of the **Claimants/Part 20 Defendants**.

**MR. JON TURNER QC** and **MR. DANIEL BEARD** and **MR. JAMES ABRAHAMS** (instructed by Messrs. **Latham & Watkins**, London EC2) appeared on behalf of the **Defendant/Part 20 Claimant**.

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**Approved Judgment**

Transcript of the Shorthand/Stenographic Notes of Marten Walsh Cherer Ltd.,  
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**MR. JUSTICE LEWISON :**

1. On 24th October 2008, Kitchin J made an order following a case management conference. The case management conference took place in the context of an action for infringement of certain patents said to be essential for the manufacture of equipment compliant with MPEG-2 technology. This is technology used in equipment such as DVD players and set-top boxes.
2. The defendants are not manufacturers of this equipment; they buy ready made equipment and sell it on to retailers. The claimants are a group of patentees and the licence administrator, who offer licences to manufacturers and others to work the inventions protected by the patents in exchange for a royalty of \$2.50 per item. The standard form of licence is called a PPL.
3. The defendants have advanced three broad defences on the pleadings. First, they say, the goods which they have bought are licensed under a PPL. Although they themselves are not holders of a PPL licence, the manufacturers, who are sellers of the goods, are and the licence runs with the goods. Under the terms of the licence, the defendants are not liable to pay the royalty. That liability is the liability of someone in a different position in the supply chain. These issues have been called "the licence issues".
4. Secondly, they say, the claimants hold a dominant position in the market. They have a duty not to abuse that position. They abuse that position if the terms on which the licence is offered are not fair, reasonable and non-discriminatory, or FRAND.
5. The terms of the licence as applied to persons in the position of the defendants, who supply the low end of the market, are not FRAND because they do not allow the defendants to make a reasonable return. Moreover, the claimants selectively enforce their patents. In particular, they have not enforced them against the defendants' main competitors at the lower end of the market. These and other associated issues have been called "the FRAND issues".
6. Thirdly, they say, the patents are, in any event, invalid. These issues have been called "the patent issues".
7. Before Kitchin J it was agreed on all sides, and it is still agreed, that the case cannot be effectively tried in a single trial so, as Kitchin J rightly saw, the principal question for him was how to divide up the issues so that they could be efficiently tried with the least waste of costs. As he put it, it is not so much a preliminary issue, it is a question of dividing up the case so that it is in manageable chunks as a matter of sensible case management. He decided that the best, or, at any rate, the at least worst, solution was for the licence issues to be tried first, for the FRAND issues to be pleaded out and for the patent issues to be stayed. The licence issues are currently scheduled to be tried in October 2009.
8. The claimants now wish to revisit that order. They say that the licence issues and the FRAND issues should be tried together. They also say that no part of the case will be

ready for trial in October. As it seems to me, the task for me is again to find the least worst solution, bearing in mind that the perfect can often be the enemy of the good.

9. The court has the power to vary or revoke an order under CPR 3.1(7). It will only exercise this power where there has been a material change of circumstances since the original order was made or where the judge who made the order in the first place was in some way misled, whether knowingly or unknowingly.
10. I should, then, begin by considering the circumstances that Kitchin J took into account when he made his original order. I have seen a transcript both of his judgment at the end of the case management conference and of a discussion during its course. In my judgment, the following circumstances are relevant.
11. First, at the time there were two infringing products supplied by two suppliers referred to in the pleadings, but Kitchin J was told that the claimants intended to allege further instances of infringement. He and counsel discussed the means for the claimants to plead out their case on all infringing products. He recognised in the course of the discussion that there might be factual differences or issues between the various products or their suppliers and took the view that those could be dealt with during the trial of the licence issues.
12. Second, the licence issues included an issue about whether certain computer chips had been licensed.
13. Third, in Kitchin J's view, the licence issues could be determined relatively quickly and cheaply (emphasising the word "relatively") and could be dispositive of at least part of the proceedings, bearing in mind in particular the cost of the FRAND and patent issues. He was told that the cost of the FRAND issues was likely to be of the order of £3.5 million for each party. The patent issues might cost even more.
14. Fourth, the licence issues would require evidence to be led of trade practice as to how the agreements are actually interpreted and also evidence of New York law by which they were governed. None of that was, it said to him by the claimants' counsel, was likely to cause undue delay.
15. Fifth, bearing in mind the submissions made by the claimants, the FRAND issues as then pleaded might be susceptible to being struck out but, subject to that, Kitchin J took the view that the court was likely to have to decide the FRAND issues in any event.
16. Sixth, he added that if there was likely to be substantial delay in trying the licence issues, then it might be sensible to try those issues together with the FRAND issues.
17. Mr. De la Mare draws my attention to the questions that Neuberger J said in *Steele v. Steele* the court should ask itself before ordering trial of a preliminary issue. The relevant rules which govern the powers that I am being asked to exercise are contained in CPR 3.1(2). Subparagraph (i) enables the court to direct a separate trial of any issue and subparagraph (j) enables the court to decide the order in which issues are to be tried. These rules are expressed in entirely unfettered terms and the Court of Appeal has on many occasions deplored the use of judge-made checklists

supplementing the rules. In any event, Neuberger J's questions were directed to a preliminary issue properly so-called.

18. In the present case it was agreed there should be separate trials so the only question is what should go into the first trial. Moreover, Kitchin J has already decided that it is impractical to have a trial of everything and I am not sitting on an appeal from his decision, so the point has already been decided.
19. What, then, has changed? In considering what has changed, I will look only at what has actually happened and I will not pay attention to threatened applications, such as the possibility of a strikeout or the possibility of an application for some sort of freezing order. If those applications are made, they will be dealt with on their merits.
20. The first change is that the number of products in issue has grown enormously. There are now more than 500 of them. That, as it seems to me, is not of itself important. A PPL does not specify the product for which the patents may be used. What is of more importance is that the number of suppliers has also grown, because a PPL is granted on a supplier by supplier basis. The defendants bear the burden of demonstrating that the manufacturers with whose products they were supplied each held a PPL, or that a PPL was held somewhere along the supply line.
21. Instead of the two originally pleaded suppliers, there are now approximately 15 suppliers who supply some 80% of the defendants' products and a further 27 who account for almost all the rest.
22. As Mr. Turner QC explained in argument, the defendants' current case is that as long as a manufacturer had a PPL, it does not matter how the product found its way from the manufacturer to the defendants. The case has changed a little in the draft pleading that I was handed this morning and I will come back to that in a moment.
23. That is a much simpler way of putting the case than appears either from the correspondence or the draft pleading and it is simpler to investigate. In circumstances where Kitchin J envisaged that more products and/or more suppliers would be added to the list, it is not, in my judgment, a strong reason for disturbing his order. It may be the case that there are factual disputes but since this is not a preliminary issue properly so-called but, in Kitchin J's words, the division of a trial into manageable chunks. That does not, either, provide a strong reason for disturbing his order. On the contrary, if the number of contested facts in the licence issues at trial have grown, it will make the case less manageable if those contested facts were to be tried at the same time as the FRAND issues, which are likely to be complex enough on their own.
24. The parties have agreed that some limitation on the number of suppliers whose status should be investigated is a pragmatic solution. On the one hand, Mr. Turner argues in favour of a cut-off of 1% of the products supplied to the defendants, which would mean 15 suppliers would be investigated. Mr. De la Mare, on the other hand, says that in view of the fluctuations in the degree of business which the defendants may do, 0.1% is a sensible cut-off. On this question I agree with Mr. De la Mare. The investigation of 42 suppliers is not, in my judgment, unduly onerous and the cut-off point should be 0.1%.

25. There is then the question of suppliers going forward. That is linked, to some extent, with the new case against ABC. So far as going forward is concerned, there are a smaller number of suppliers who currently supply ABC and, in my judgment, ABC should provide names of all future suppliers to the claimants, if and when the current list changes.
26. The second change is that Mr. De la Mare says that the proportion of products covered by the licence issues has shrunk. He says that in view of Kitchin J's assumption that the trial of the licence issue would substantially dispose of the case, that assumption has been falsified by subsequent events. Mr. Turner, on the other hand, says that the products covered by the licence issue remain at over 90% and may increase. If Mr. Turner is right, then the amount in issue, assuming the defendants' total success on the licence issues, would be less than the costs of the FRAND trial. I do not think I am in a position to evaluate the strength of either contention. In my view, this is a neutral factor.
27. The so-called "chip issues" have gone from the trial of the licence issues. This removes one possible area of dispute from the first trial and is, in my view, a reason in favour of keeping the order. Mr. De la Mare says that the FRAND case as now pleaded, following Kitchin J's directions for pleading, makes it clear that the FRAND case is inconsistent with the licence case. The licence case positively relies on the licences; whereas, the FRAND case asserts that they are illegal and, therefore, void. Logic, therefore, dictates that the FRAND issues be tried first, otherwise there is a risk of inconsistent judgments.
28. There are, in my view, at least four answers to that point. First, at least part of the FRAND case does not assert the invalidity of a PPL.
29. Second, the defendants have undertaken to accept a licence on FRAND terms, to the extent that their defence on the licence issues fails, and in the FRAND trial the court's principal concern is to determine what those terms should be.
30. Third, the claimants's proposal is not that the FRAND issues should be tried first, as logic would dictate, but that the FRAND and licence issues should be tried together, so that whether Kitchin J's order stands or is varied, the licence issues will still have to be tried.
31. Fourth, if logic were the determinant, then the patent issues should go first, but no one suggests that.
32. The fifth factor is that Mr. De la Mare suggests that Kitchin J was concerned about delay and that two separate trials will increase delay. What this really boils down to is the question of an appeal. The concern is that if the court decides the licence issues, then whichever way the court decides, the loser will appeal and the appeal will prevent the FRAND issues from being tried expeditiously. This I think is soluble by case management. Preparation for trial is a far more onerous undertaking than preparation for appeal once the facts have been found. Separation of the trials reduces that burden but there is no reason why, if there is to be an appeal, the appeal itself should not be stayed until the trial of the FRAND issues has taken place. Then appeals on both sets of issues can go forward together. In any event, the possibility of

delay due to an appeal was already one which was inherent in Kitchin J's order and does not, therefore, represent a change in circumstances.

33. Mr. De la Mare also says that in view of the changes to the pleadings since the case was before Kitchin J, it can now be seen there is a considerable overlap between the licence issues and the FRAND issues such that separate trials of those issues will increase the cost. This, I think, is the most powerful reason in favour of altering Kitchin J's order.
34. The new pleaded issues in relation to the licence issues allege, on the defendants' side that, as part of the defence on the licence issues, the PPL has a plain and ordinary meaning. By contrast, in relation to the FRAND issues, it is alleged that the PPL is opaque. The defendants allege in relation to the licence issues that the claimants are estopped from advancing any other meaning. The estoppel is said to arise out of communications between the claimants and the United States Department of Justice and the European Commission, what the claimants published on their website and the course of conduct between the defendants and Philips.
35. The defendants further allege that the industry generally has conducted itself on the basis of what is said to be the plain and ordinary meaning. The allegations relating to communications between the claimants and the Department of Justice and the European Commission are also pleaded in relation to the FRAND issues and the defendants' draft defence explicitly cross-refers to that.
36. The claimants, on the other hand, allege that in accordance with the principles of New York law, the PPL must be interpreted in the light of post-contractual conduct and that includes the way the PPL has been operated in practice. In the light of the new issues, Mr. De la Mare says it would be necessary to call experts in New York law both on the applicable principles of interpretation in relation to the licence issues and also on the question of severability on the FRAND issues in the event that the FRAND defence succeeds. I do not regard that as being a strong point. These issues are discrete issues.
37. Second, he says it would be necessary to investigate the dealings between the claimants and the regulators twice; once in connection with the plea of estoppel and again in connection with the FRAND issues.
38. Third, he says it would be necessary to investigate how the PPL operated in practice and what the licensees' understanding of it was, both in relation to the estoppel and post contractual conduct issues and also in relation to the FRAND issues. Many, if not most, of the PPL licence holders are overseas companies and they are unlikely to relish two trips to London to give evidence. Even to proof them would require overseas trips in order to take their evidence.
39. The topics he says on which their evidence would be important include the make-up of chains of supply, whether any of them have in fact paid royalty under the PPL licence and, if so, in what circumstances; industry practice in relation to licensing; the relationship between the amount of royalty and the selling price; changes in the market; appropriate comparators for evaluating whether the terms of the PPL licence are FRAND; whether there has been discrimination by the claimants in enforcing their patents and whether competition has, in fact, been distorted. Many of these issues

arise only in relation to the FRAND issues, and in any event Kitchin J envisaged that evidence of how the PPL operated would be led.

40. Mr. Turner, on the other hand, says that if the licence issues were tried first, the FRAND case would become more focused, even if those issues had to be tried. For example, the allegation in the FRAND case of so-called "double dipping" would be determined by the trial of the licence issues. Likewise, the meaning of the licence would be determined in the licence issues trial, as will the question of whether it is plain or opaque.
41. Moreover, Mr. Turner says that even if there is overlap, there are a very large number of issues in the FRAND trial where there is no overlap at all. Those issues (for instance, market definition, whether the claimants dominate the market, the technical nature of the suggested comparators and the way in which the FRAND terms should be assessed) would all require expert evidence. The question of discriminatory enforcement is not relevant to the licence issues but forms a major part of the defendants' FRAND case.
42. In addition, he says, success or failure on the licence issues may also have a serious impact on the competition or FRAND issues because a smaller volume of infringing goods means less distortion of competition.
43. I am satisfied by Mr. Turner that there is little pleaded overlap. On the other hand, I agree with Mr. De la Mare there may be some evidential overlap. I take account of the logistical exercise in finding and proofing the witnesses and I agree that it is simpler to deal with them once, but I think that the overlap is exaggerated and to allow this degree of overlap to dictate a combination of trial on the licence issues and the FRAND issues would be allowing the tail to wag the dog. The findings on issues in round one of the trial will feed through, by issue estoppel, into round two. To the extent that there is overlap, I do not consider that it outweighs the other considerations and, in particular, the danger of incurring an enormous amount of costs, which proves to be largely unnecessary.
44. Mr. De la Mare also relies on the danger, as he puts it, of an amendment to the FRAND case in the light of a judgment on the licence issues. I do not regard that, in itself, as being a danger. As Mr. Turner himself accepts, determination of the licence issues may well alter the shape of the FRAND case. Mr. De la Mare says that it is still unclear on the pleadings what the defendants' case is about the construction of the PPL. The case on the construction has been explained in the defendants' skeleton argument. It is the same explanation as was given in the skeleton argument placed before Kitchin J. I do not see any real difficulty.
45. The defendants have now put forward a draft pleading which has backtracked, to some extent, on the oral explanation Mr. Turner gave yesterday but, at its heart, is an allegation that somewhere in the manufacture and supply chain there was a PPL holder and on the defendants' construction of the PPL, it does not matter where in that chain the licence holder was. If they are wrong in their construction of the licence, then the defence may well fail, but that, as it seems to me, is their risk. Where precisely in the supply chain the PPL holder was does not matter on the defendants' construction. The claimants' construction is that only the brand owner is the person required under the terms of the PPL to pay the royalty. So on neither side's

construction does it matter in which particular position in the supply chain the PPL holder is found.

46. I am told by Mr. De la Mare that the claimants' case is that the manufacturer in fact infringes when he manufactures and it is only the subsequent grant of a PPL licence to a brand owner which retrospectively validates the manufacture. That is not a construction which appears clearly in the claimants' pleading but if there is a construction which they advance which makes it important to identify precisely where in the supply chain before the arrival of the goods with the defendants the licence holder is, then that is a matter which can be explored in the pleadings. At the moment there is none.
47. As I have mentioned, there is a new claim being made against ABC. It is plainly sensible to consolidate that claim with the existing claim. The question, as I have said, is not really what products have been supplied, but who the suppliers are. As I have said, the number of suppliers currently supplying ABC is relatively small and it seems to me that as part of ABC's duty of continuing disclosure, they will have to notify any additional suppliers to the claimants. If that results in an application by the claimants to amend their pleadings, then the application can be dealt with on its merits at the time when it was made.
48. Weighing all these factors together, I do not consider that a sufficiently strong case has been made out to justify the variation or revocation of the order made by Kitchin J.
49. The second issue which arises is the question of a payment into court. The claimants ask me to order the defendants to make a payment into court as a condition of their being allowed to continue their FRAND defence. There is no application to strike out that defence, although the possibility of such an application was canvassed before Kitchin J.
50. Mr. De la Mare relies on CPR 3.1(3), which permits the court to attach conditions to an order. That begs the question, to what order is the condition to be attached? Mr. De la Mare says, quite rightly, that the application notice asks for an order under CPR 24; that is to say, an application for summary judgment. But the practice direction accompanying Part 24 requires evidence in support of such an application to say that there is no defence to the claim at issue and there is no compelling reason for a trial. That has not been said and, indeed, cannot be said, because the major issue between the parties is not whether there should be no trial, but whether there should be an even larger trial, as the claimants suggest.
51. There is, in my judgment, therefore, no valid application before the court under Part 24 and, as I have said, it is recognised on all sides that a trial of both the licence issues and the FRAND issues will, or at least may, take place.
52. In addition, as Mr. Turner points out, the express power under rule 24.6 to attach conditions to an order made under that part applies only where the court has determined an application under Part 24 and I have not determined such an application.



53. Mr. De la Mare says that if, as the claimant believes, the defence is shadowy and if the court were to come to the same view, then it has the power to order a payment in even if the claimant cannot go so far as to make an application for summary judgment.
54. I do not consider that Part 24 is the right vehicle for making such an order. The defendants have, in fact, offered a much smaller payment in. They assert that discrimination between retailers means that the FRAND royalty may be nil. Mr. De la Mare says that is a weak argument but, at the same time, he recognises that it is one that must go to trial. This, in my judgment, does justify the offered payment in but it does not go any further. I will, therefore, accept the defendants' undertaking to pay in the amounts of money which they say they will.
55. The last question relates to the membership of the confidentiality club. As part of its disclosure, the defendants have disclosed confidential commercial information which has been provided to a confidentiality club. The claimants wish to enlarge that confidentiality club to include representatives of Proskauer Rose, who are long-standing advisers to MPEG LA.
56. The starting point, as it seems to me, is that a party must be able to choose the advisers whom he wishes to advise him in the litigation. There has been no substantial reason advanced why the choice of Proskauer Rose is an inappropriate choice. I am satisfied that the confidentiality of the information will be respected and I am also satisfied, on the basis of the evidence, that there are difficulties in progressing the case without Proskauer Rose being admitted to the confidentiality club.
57. On this issue, therefore, I agree with the claimants and the relevant personnel at Proskauer Rose will be admitted to the confidentiality club on the provision of appropriate undertakings for confidentiality.
58. The last question that arises, and it is still one that I think has not been finally determined, is whether even the trial on licence issues is ready to be tried in October. There are, as I said, some issues that still need to be pleaded out and I would be willing to listen to discussion on the question of timetabling, either with a view to making the October date or with a view to a relatively short postponement of the date in order to allow the licence issues to be tried.
59. Finally, Mr. De la Mare invited me to lift the stay on the FRAND issues so that the preparation of the FRAND case can go ahead in parallel with the trial of the licence issues. That seems to me to be the worst of all worlds. It simply incurs all the costs of the FRAND without a discernable purpose. The FRAND issues will stay where they are for the time being.

MR. TURNER: I am obliged, my Lord. In relation to your question of the practical issue of scheduling the trial, in view of the fact that your Lordship has decided that the compass should include the 42 suppliers, it does seem to us that it will be tight to try to get that tried in October. Our suggestion would be that we investigate with the Clerk of the Lists

what is the earliest possible date that can be arranged for a trial if that date goes and that the parties then liaise on directions and work backwards from them, rather than seek now to make prospective directions in ignorance of what the Clerk of the Lists says. I do not know if that is acceptable?

MR. DE LA MARE: Yes, that is acceptable. We agree. It is very sensible to see what date we can get -- given the luminaries appearing in this case, no doubt, dates may be difficult -- and then to work back with some sensible directions from there for disclosure, experts' reports and such matters. One area I think we do need some greater certainty is in relation to the conclusion of pleadings.

MR. JUSTICE LEWISON: I am inclined to agree with you. You are entitled to put in a request for further information but that is not a terribly satisfactory thing to do. I think you do need to say, of your, suppliers who you say have the PPL and, if not the manufacturer, where in the chain of supply you say the PPL is held. Whether you are right on the construction of the licence is a different question but I think they are entitled to know where the PPL is.

MR. TURNER: I must say, in relation to that, the schedule that was put in, I do not know if your Lordship saw it, in bundle 1, tab 6 to the pleading for which we have made the proposed amendments, does have, if you go to the back of it, the specification. Perhaps if you turn in tab 6 to page 50, by way of example. You have there the supplier, which happens there to be Vestel Holland B.V. and in brackets you have another name next to it. Under the rubric of the proposed amended pleading, all we are saying is that the supplier to us is the first name. Where you have a name in brackets after it, that is the identity of the party which, on our case, was the holder of the PPL. That is all it is. So it may be that it is specified all the way through.

MR. JUSTICE LEWISON: So you will name the company, or the person, that you say is the holder of the PPL, so they can go and check their records?

MR. TURNER: Yes, we will.

MR. JUSTICE LEWISON: Mr. De la Mare, if that is right, then if the pleading is put in that form, you know what you need to know.

MR. DE LA MARE: No, with respect, we do not, my Lord, because we do not know in relation to the bracketed entity whether it is said to be a manufacturer or whether it is said that the goods are passed through their hands.

MR. JUSTICE LEWISON: But on their construction it does not matter.

MR. TURNER: It does not matter.

MR. JUSTICE LEWISON: And you do not advance a construction where it does matter, do you? Your construction is, "This just does not apply because you, Alba/Harvard, have not got a licence".

MR. DE LA MARE: It is relevant for us to know the actual case against us, to work out the chain of supply, which is what we say we have to engage with. Otherwise, at this juncture, we do not know whether it is being said that, for instance, in relation to -- Vestel is not a good example because Vestel is a situation where we do know the facts, but Sojitz or Shenzhen Xing Feng Industry Company, we do not know whether it is being said that the PPL manufacturer is the licensee, which is one thing that is capable of investigation, or will trigger certain investigations, or somehow that the goods have passed through their hands. They have to explain what their case is, my Lord, so that we know what it is we have to investigate.

MR. JUSTICE LEWISON: As I understand it, they have. They say it does matter where in the chain of supply the PPL licence holder is placed as long as he is there somewhere and

you can say from your records, that Vestel, whichever the company is, is or is not a licence holder, can you not?

MR. DE LA MARE: We can say whether or not the entity in brackets is a PPL licence holder and that was the purpose of us giving information as to who the PPL licence holders were globally. But what we do not know is whether this entity is said to be a manufacturer or whether it is said to be someone through whose hands the goods have passed.

MR. JUSTICE LEWISON: Why do you need to know that?

MR. DE LA MARE: So that we can investigate the case that is being made against us, my Lord.

MR. JUSTICE LEWISON: But the case that is being made against you is it does not matter which it is.

MR. DE LA MARE: It may turn out that it does, my Lord.

MR. JUSTICE LEWISON: I am sorry?

MR. DE LA MARE: It may turn out that it does.

MR. JUSTICE LEWISON: Because of the different construction that you are advancing?

MR. DE LA MARE: I do not know how it is going to pan out in reference to what the court decides.

MR. JUSTICE LEWISON: As I understand it, your case is, "All this is completely irrelevant because you, Harvard, do not have a PPL".

MR. DE LA MARE: We say that the question of where the chain of distribution lies and the definition of "sold" does not save Alba; that the relevant sale point is at the point of branding.

MR. JUSTICE LEWISON: Yes, so you say the fact that Vestel, or a Vestel company, had a PPL does not matter?

MR. DE LA MARE: Correct.

MR. JUSTICE LEWISON: It is irrelevant?

MR. DE LA MARE: Correct.

MR. JUSTICE LEWISON: So on your case it does not matter.

MR. DE LA MARE: Correct.

MR. JUSTICE LEWISON: And on your case it does not matter, so why does it matter?

MR. DE LA MARE: Mr. Turner may prevail in relation to manufactured and he may fail in relation to and/or passes through the hands of.

MR. JUSTICE LEWISON: Then you say he has not proved these are manufacturers, so he fails.

MR. DE LA MARE: My Lord, I am repeating myself. I am trying to say that ----

MR. JUSTICE LEWISON: I cannot see that it matters. They say it does not matter. You say it does not matter. If Mr. Turner succeeds in persuading whoever tries this is case that only a manufacturer with a PPL legitimises the goods but a distributor with a PPL does not, and Mr. Turner cannot prove that these chaps are manufacturers, he fails. He has not proved his defence.

MR. DE LA MARE: How are we to know the case that we, which we must be entitled to, to conduct our own investigations, are to investigate, unless we are told this? How are we to conduct our own investigations how are we to approach a witness to say, "Which is it?"

MR. JUSTICE LEWISON: It is an irrelevant fact on both sides' cases.

MR. DE LA MARE: My Lord, I am obviously not finding much favour so I am not going to continue pressing at a very firmly shut door.

MR. TURNER: My Lord, what I can undertake to do is to finalise this pleading within seven days -- within 14 days -- within seven days.

MR. JUSTICE LEWISON: Are you still aiming for a Michaelmas term trial?

MR. TURNER: If one is available.

MR. JUSTICE LEWISON: Then you cannot possibly have 14 days. That would be the end of term.

MR. TURNER: It will be done in seven days, come hell or high water. It will probably be the high water.

MR. DE LA MARE: Can I ask, in the context of that amendment taking place, that paragraph 37, which at the moment appears to say A, should be amended to reflect the very different B that it was said to reflect?

MR. TURNER: I am content with that.

My Lord, finally, in relation to costs, in relation to most of the issues that were today and yesterday's business, and certainly in relation to the main business, we have prevailed over a bitterly contested application.

MR. DE LA MARE: Before we comes to costs, which I anticipate is where my learned friend is going, can we deal with the question of the trial window if it is not possible for a Michaelmas trial? What we are concerned about is that it should not be held up for a long time for counsel's availability. Whilst that should be a consideration if one is looking for a New Year trial, we do not want to find ourselves, given the very eminent silks in this case, looking at a trial at the back end of next year.

MR. JUSTICE LEWISON: You want me to say, what, before Easter?

MR. DE LA MARE: Yes, certainly before Easter.

MR. JUSTICE LEWISON: I think Easter is late March, is it?

MR. DE LA MARE: I think it is early April.

MR. TURNER: We would agree to that.

MR. JUSTICE LEWISON: So I will then say I will vacate the October fixture and re-list for six days still?

MR. TURNER: For a six day trial.

MR. JUSTICE LEWISON: Before Easter?

MR. TURNER: Before Easter, to be listed perhaps at the earliest convenient date before Easter.

MR. DE LA MARE: I do not accept that six days is a realistic time estimate for the issues as they now stand.

MR. JUSTICE LEWISON: What do you say?

MR. DE LA MARE: I say it is nearer eight.

MR. JUSTICE LEWISON: Six to eight.

MR. DE LA MARE: Even 10.

MR. JUSTICE LEWISON: I will say six to eight.

MR. DE LA MARE: Can you say six to eight, my Lord, and if and when we get disclosure and it appears that there are going to be a substantial number of issues in relation to the 42 suppliers, we can then approach the court at that stage. We will have a better idea of the factual compass of the dispute. At present, we do not know.

MR. JUSTICE LEWISON: Will it be one day pre-reading?

MR. TURNER: Say two days pre-reading.

MR. JUSTICE LEWISON: Two days pre-reading, six to eight day trial estimate.

MR. TURNER: My Lord, in relation to costs, the application is for 80%.

MR. DE LA MARE: I do not accept that is an appropriate order, for these reasons. First of all, there have been vast costs incurred in relation to the pre-action correspondence. You have seen how thick the correspondence file is. A good deal of that has been a wild goose chase in relation to two matters: ABC, the position of opposition in relation to

ABC was always unreasonable and was conceded at the very last moment, and has incurred very substantial costs; and the position in relation to the wild goose chase in relation to suppliers was also unreasonable. The case that we have actually come to meet, as Mr. Turner explained it for the first time at court yesterday, was very different. All this category A, category B and the identity of the suppliers point was completely irrelevant. So we do not say progress has been made, the pleadings have been changed, Mr. Turner has been driven into making some fairly substantial concessions and we think that the appropriate order is that costs should be in the case.

MR. TURNER: My Lord, very quickly, it was not unreasonable, and your Lordship has seen the material correspondence, to desire the cut-off in relation to the ABC claim to make the point manageable. It also occupied only a small amount of correspondence. I would say much the largest part of that very substantial volume of correspondence was concerned with issues where the parties were sorting out materials along the lines that I showed your Lordship yesterday and most particularly in relation to the issue which came before your Lordship on the division of the trials, because it was leading to that head. In relation to that issue, your Lordship, has made your decision.

MR. JUSTICE LEWISON: I think the defendants have been the successful party on most of the issues in the case, although I think there has been some there have been some red herrings along the way, which would warrant a slightly larger than usual reduction from their costs, so I will order the claimants to pay 60% of the defendants' costs in any event.

MR. TURNER: That is to be assessed and paid in the usual way?

MR. JUSTICE LEWISON: Yes.

MR. TURNER: And the other 40% of the costs; those will be costs in the case?

MR. JUSTICE LEWISON: No, I do not think so.

MR. DE LA MARE: I am sorry? I did not hear that.



MR. JUSTICE LEWISON: The remaining 40% of the costs.

MR. TURNER: Your Lordship has made an order in relation to 60% of the costs. Then in relation to the 40%.

MR. JUSTICE LEWISON: Yes, I suppose they would be costs in the case.

MR. DE LA MARE: We do not accept that an assessment now would be an appropriate matter, not least because money is apparently being paid into court by way of undertaking and because there is the prospect of recovery of, at the very least, that sum so it would be inappropriate to make an assessment at this stage.

MR. JUSTICE LEWISON: I do not think I have, have I?

MR. DE LA MARE: That is the usual rule, if a costs order has been made .... If I am wrong on that then I do not need that order.

MR. JUSTICE LEWISON: Thank you very much.

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