Factors to be taken into account when considering an application for an expedited trial

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IN COMPARISON WITH SOME OTHER countries, the English court system operates relatively quickly. However, litigation in this jurisdiction still takes time. As a very rough guideline, and depending on the division where proceedings are issued, a commercial dispute of any complexity is likely to take 12-18 months to reach trial (from the date when proceedings are first issued). In large disputes, where the trial is estimated to last several weeks, the process is likely to take much longer.

However, in cases of real urgency, the court has the power to order that a hearing of a dispute should be expedited. This is sometimes called a 'speedy trial'. This article considers the High Court's ruling in July in *Warner-Lambert LLC v Teva UK Ltd & ors* [2011], which provides useful guidance as to which factors the court should take into account when considering an application for an expedited trial. The judgment shows that the decision as to whether an expedited trial is ordered, and, if so, on what terms, continues to be a matter of judicial discretion – but that decisions by either party to waive certain elements of ordinary trial preparation and the existence of an interim injunction can be decisive factors.

FACTS

Warner-Lambert LLC markets the drug atorvastatin, protected by Supplementary Protection Certificate (SPC) GB 97011, as Lipitor. On 20 June 2011 Teva UK Ltd launched a generic version of atorvastatin without notifying Warner-Lambert. Warner-Lambert sued for patent infringement and obtained a without notice interim injunction from Floyd J, restraining Teva from making further sales. The parties consented to the injunction continuing until trial.

Teva had chosen neither to notify Warner-Lambert of its generic drug launch nor to seek a revocation of the patent so that it could exploit the marketing potential of launching a generic drug challenging Teva's monopoly. By launching its own generic drug, Teva would create a lucrative duopoly as a first generic company can usually expect to receive either the monopoly price or something very near to it. Once a third party enters the market, the duopoly will be broken and the drug prices will decrease.

Teva applied to the High Court for an expedited trial. Warner-Lambert's SPC was due to expire in November 2011, but a paediatric extension has been granted so that the SPC will not now expire until 6 May 2012.

The parties came before Floyd J again on 22 July 2011 to request that a speedy trial of the action be ordered. While both parties favoured a speedy trial, there was a difference of opinion as to when the trial should take place: Warner-Lambert preferred a timetable of February 2012 to allow adequate trial preparation and a judgment that would be handed down near to the expiration of the SPC. Teva preferred November 2011, based on the perceived urgency of enjoying a duopoly for as long as possible before the expiry of the SPC and the fact that the interim injunction granted against it in June would continue until trial.

INTERIM INJUNCTIONS AND EXPEDITED TRIALS

Teva argued that it was 'well established' that a speedy trial should follow where an interim injunction has been granted. While the judge accepted that he should take the injunction into account, he was not prepared to accept, in an intellectual property case such as this one, that an interim injunction automatically gives rise to the granting of a speedy trial.

EXPIRATION OF THE SPC

Teva then turned to the expiry date of the SPC. A February 2012 trial timetable would, in its opinion, lead to a judgment being delivered sometime in April or later, when the SPC was either due to expire or had already done so. Generic companies would at that time be able to launch the same product '... and the benefit [to Teva] of invalidating the patent would have been greatly diminished.' Teva could achieve a head start, it argued, with a November 2011 trial when generic third-party drug companies would not yet be ready to launch.

Warner-Lambert disagreed with Teva's argument for three reasons:

1) the SPC was originally intended to expire in November 2011;

2) Teva's evidence at the interim injunction had been that generic companies would

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be ready to launch a generic product within five months; and

3) since Teva had announced its intention to launch a generic version of the drug in June (being five months before the November 2011 proposed trial timetable), it would naturally follow that generic companies may already have tentative plans to launch in November.

Teva countered that not all generic companies would be willing to launch a product before a Court of Appeal decision had been obtained.

JUDICIAL DISCRETION

Having heard initial submissions from both sides, Floyd J turned to the law relating to expedited trials and examined Warren J's discussion in *CPC Group Ltd v Qatari Diar Real Estate Investment Company* [2009].

Warren J had himself quoted Jonathan Parker LJ in *Wembley National Stadium v Wembley* (2000), who reiterated the established position that the decision as to whether to grant an expedited trial was a 'a matter essentially for the discretion of the judge' and that the judge should review all aspects of the case and matters in general when exercising their judicial discretion, being:

1) the general principle under the CPR that cases should come before the court as soon as reasonably possible in line with the overriding objective;

2) the requirement of, and potential disruption to, both other litigants at court as well as the acting solicitors' other clients. With regard to the potential expedition of appeals to the Court of Appeal, Parker LJ noted the comments of Sir Thomas Bingham MR in *Unilever plc v Chefaro Ltd (Practice Note)* [1995] that it was necessary to impose 'a high threshold which a party must cross before its application will be granted';

3) whether or not the applicant could satisfy the court that there is an objective urgency to deciding the claim and the nature of the 'urgency' and whether it is justified. Parker LJ clarified that urgency did not necessarily mean that the case had to be dealt with immediately, but was urgent because there was a question that needed to be answered in weeks or even months, but before the timetabled hearing date;

4) the procedural history of the case. Delay in seeking an order for an expedited trial may count against an applicant but will not necessarily be conclusive; and

5) the respondent's attitude is not generally relevant unless they can show 'some real prejudice to [them]' at trial.

REAL PREJUDICE

Warner-Lambert argued that a November trial could cause it real prejudice in three key areas of trial preparation. These were:

1) The practicalities of calling an expert witness: a November trial may impede its ability to locate a suitably qualified expert who would be available during the trial window and who would make a satisfactory witness.

2) The practicalities of disclosure: although Warner-Lambert had already gone through disclosure for a similar piece of litigation in the US, it contended that the documents would need to be processed for the English litigation, which would take three months and render a November trial impractical. However, Teva did not put great emphasis on disclosure and was prepared to either waive disclosure or reduce it to requests for only specific documents; and

3) Experiments: although Warner-Lambert intended to rely on experiments, the particular experiments had already been relied upon before the European Patent Office and Teva said that it would not object to Warner-Lambert relying on those experiments. Neither party wished to carry out additional experiments.

The judge was clearly influenced by Teva's willingness to be flexible over experiments and disclosure. As Teva was prepared to allow Warner-Lambert to rely on experiments that had already been conducted, and there were no disputed facts that required further experiments, the judge took the view that this was not an issue that should affect timetabling.

The judge also made it clear that he would not have ordered a November trial if standard disclosure had been necessary. This was not a task, he said, which could be 'foreshortened simply by throwing additional manpower at the task'. However, Teva's offer to waive disclosure meant that this was no longer a problem. It also enabled Warner-Lambert's solicitors to focus their resources on the expert evidence. This, combined with the fact that Teva had already produced the bulk of its evidence, helped to persuade the judge that Warner-Lambert would have enough time to prepare its expert evidence.

OBJECTIVE URGENCY

The judge, therefore, took the view that a November trial would not cause any real prejudice to Warner-Lambert. He then considered the question of whether the degree of expedition sought by Teva was justified by the urgency of the case. This was not, in the judge's view, a case where it could be said that it was 'absolutely essential' that either party should have a decision by a particular date. However, he was 'just about persuaded' that, due to the interim injunction granted against Teva and the fact that it would 'continue to suffer a degree of uncompensatable harm for as long as it runs, and the potential loss to

the defendant of a period of duopoly', a November 2011 trial would be appropriate.

CONCLUSION

Floyd J's judgment is a useful summary of the current position regarding expedited trials. The case shows that this is a fact-sensitive issue that is a matter for the discretion of the trial judge. An application for an expedited trial is likely to turn on the question of whether the applicant can convince the judge that its need for a quick decision is sufficiently urgent to justify the delays that will be caused to other litigants whose trials will be delayed. The existence of an interim injunction does not inevitably lead to the granting of expedited trials but this will be a relevant consideration.

The case also shows that there are practical steps that an applicant for an expedited trial can take in order to improve its prospects of success. These include:

1) making the application as early as possible;

2) ensuring that the other side is in possession of all the evidence on which the applicant intends to rely at trial; and

3) showing a willingness to be flexible about procedural steps (and disclosure in particular) that would take place in a piece of litigation of normal length.

There is, of course, no legislating for the fact that the judge may, of their own volition, order a speedy trial at a case management hearing.

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PRACTICAL CONSEQUENCES OF OBTAINING AN EXPEDITED TRIAL

A speedy trial allows for issues to be resolved quickly and is, therefore, often an attractive option. However, there are a number of practical issues that parties should consider before attempting to go down this route. These include:

- Expense: the additional manpower required often renders expedited trials more expensive – tight deadlines can lead to the need for extra resources to cover disclosure, interviewing witnesses and locating experts.

- Preparation: before applying for an expedited trial, ensure you have all resources at the touch of a button – from electronic disclosure providers, to trainees and paralegals on hand. Road test possible deadlines so that you are not entering the unknown.

- Demands on management time: litigation often requires significant input from management and other employees (particularly, these days, someone from the client's IT department to assist with electronic disclosure searches). Where deadlines are tight, this can be a distraction from a business's core activities.

- Appeals: if the dispute is likely to be the subject of an appeal (for example because it turns on a point of legal principle) this may reduce the benefits of obtaining an early trial. While the granting of permission to appeal does not automatically operate as a stay of the first instance decision, such a stay may be granted where, for example, a party can show that it will suffer irremediable harm if a stay is not granted. In any event, the ongoing uncertainty may make it difficult to act upon the first instance decision.

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CPC Group Ltd v Qatari Diar Real Estate Investment Company [2009] EWHC 3204 (Ch)

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