EIP

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Background

The first UK battle held in the wide-ranging (both in terms of number of patents and geographical area) patent fight between Abbott and Dexcom has ended in a stalemate. Mr Justice Mellor has found two Abbott patents and two Dexcom patents all to be invalid. (Abbott dropped its infringement argument on a third Abbott patent at issue before trial.) While this was the first of five UK trials to be held, the judgment from the third trial had been delivered earlier, with Mr Justice Richards finding the Abbott patent at issue valid but not infringed by Dexcom. The judgment of the second UK trial is pending, and there are two more UK trials scheduled, in addition to actions in the UPC, Spain and Germany.

All of the actions relate to patents for medical devices for continuous glucose monitoring (CGM), used as an improved alternative to the snapshot finger prick method previously used by diabetes sufferers. Both parties manufacture such devices. The market for CGM devices is growing, and in 2022 the NHS announced a deal with Dexcom to provide monitors to all Type 1 Diabetes Patients across the UK.

Abbott patent EP (UK) 2 146 627

This patent relates to a method for a CGM device to notify the user of results which potentially signal an issue without interrupting the user while they are using the interface of the device in some other way. This is achieved by a two-alarm system, the first operates in real-time in a way that avoids disturbing the user's actions, and the second once the user has finished their actions. It has a priority date of 14 April 2007.

Mellor J found that Dexcom's "G6", "G7" and "D1" devices would infringe the patent, but

that the patent lacks novelty over the user guide for Dexcom's first CGM device, the "STS". A second piece of prior art, a patent application from 2006 ("**Bunte**"), was found to not render the patent obvious, and a third was dropped before trial. There was comment made regarding a preliminary opinion of the German Federal Patent Court which agrees that the patent lacks novelty over the STS user guide, but disagreed regarding Bunte – the German court thought that Bunte rendered the patent obvious. Mellor J did not find this a reason to question his finding on Bunte, as their consideration was different from that which he was asked to consider.

Abbot patent EP (UK) 2 476 223

This patent relates to the use of a separate device (a conditional amendment application specifying a mobile phone) to host a safety critical application for the CGM device; for the separate device to perform necessary testing, including an installation check and a functionality check, on the safety critical application to ensure it continues to operate correctly; and for the user to be able to access non-safety critical functionality if the necessary testing on the safety critical application fails. It has a priority date of 8 September 2009.

Mellor J found that, on his preferred claim construction, the Dexcom devices did not infringe the patent, but that on an alternative claim construction they would. This is consistent with a finding of non-infringement by the Mannheim Court. Mellor J also found that this patent lacks novelty over a patent application from 2009 ("**Gejdos**") for the checking of the integrity of a database by a healthcare management software system. A second piece of prior art, a patent application from 2002 ("**Lebel**"), was found not to render the patent obvious. Mellor J did not make any finding on a Gillette argument brought by Dexcom as Dexcom had not explained their argument properly.

Dexcom patents EP (UK) 2 914 159 and EP (UK) 3 782 539

These patents relate to a system which continually analyses glucose values and includes an alert set by the user, a fixed alert and a temperature conversion function. The '539 patent is a divisional of the '159 patent, and the priority date for both is 30 October 2012. The '539 patent is accepted by Dexcom to be invalid as granted, but Dexcom have applied to amend it unconditionally in such a way that the scope becomes the same as the '159 patent. Mellor J found that Dexcom's amendment extended the scope of the patent and lacked clarity, and therefore is not allowed. Abbott has accepted its devices would infringe both patents, if valid.

Mellor J found that the '159 patent lacked novelty over two pieces of prior art, both US patent applications with priority dates of September 2007 ("**Brauker**") and July 2009 ("**Shariati**

"). He also concluded that, should he be wrong about the patent lacking novelty, it would be obvious over Brauker, Shariati, the Dexcom STS guide and the guide for an earlier Abbott CGM device, the "Navigator". Mellor J dismissed Dexcom's argument of hindsight and did not consider Abbott's insufficiency argument.

Conclusion

CGM devices are clearly an area where both Abbott and Dexcom have extensive patent portfolios. While this particular trial has not furthered either companies' agendas, given the large and growing market for such devices, it does not appear that this is a fight that either company will surrender soon.