



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S23/2021
File Title: CNS Pharma Pty Ltd v. Sandoz Pty Ltd
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Important Information

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BETWEEN:

CNS Pharma Pty Ltd (ACN 121 515 400)
Appellant

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and

Sandoz Pty Ltd (ACN 075 449 553)
Respondent

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APPELLANT'S SUBMISSIONS

Part I: These submissions are in a form suitable for publication on the internet.

Part II: The Appellant contends that the following issues are presented by this appeal:

- (a) Whether a licence for the last two weeks of a patent which was triggered by its anticipated expiry on 13 June 2009, and which did expire on that date, could retrospectively constitute a licence for a period when the patent did not in fact exist, namely the extended term of the patent to 9 December 2012 which was later acquired on 25 June 2014.
- (b) What is the correct approach to construction of a commercial contract in circumstances where the commercial object of the parties was not directed to the circumstances which eventuated, in this case, the grant of an extension of the patent after expiry of the original term on 13 June 2009?
- (c) Whether the effect of s 79 of the *Patents Act 1990* (Cth) (**Act**) is that a cause of action for infringement during the extended term arises only on the grant of the extended term and is not available to an exclusive licensee.

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Part III: The Appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903*.

Part IV: The judgments below are *H. Lundbeck A/S v Sandoz Pty Ltd* (2018) 137 IPR 408; *H. Lundbeck A/S v Sandoz Pty Ltd (No 2)* [2019] FCA 46; *Sandoz Pty Ltd v H. Lundbeck A/S* (2020) 384 ALR 35 and *Sandoz Pty Ltd v H. Lundbeck A/S (No 2)* [2021] FCAFC 47.

Part V: Narrative statement of the relevant facts

1. CNS Pharma Pty Ltd (**CNS Pharma**) is a subsidiary of Lundbeck Australia Pty Ltd.
2. In 2016, CNS Pharma commenced proceedings against Sandoz Pty Ltd (**Sandoz**) (among other generic pharmaceutical suppliers) for misleading or deceptive conduct.¹ CNS Pharma asserted that Sandoz had engaged in misleading or deceptive conduct by failing to warn pharmacists that the supply of Sandoz's generic escitalopram products may infringe Australian Patent No 623144 (the **Patent**) if and when an extension of the term of the Patent was granted.

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¹ *H. Lundbeck A/S v Sandoz Pty Ltd* [2018] FCA 1797; (2018) 137 IPR 408 (**Primary Judgment**), [26], CAB tab 1, 18.

3. The primary judge heard CNS Pharma's claim together with the claims brought against Sandoz by H Lundbeck A/S and Lundbeck Australia Pty Ltd (together, **Lundbeck**). The primary judge upheld CNS Pharma's claim.²
4. Sandoz appealed to the Full Court. That appeal was heard together with an appeal in relation to the claims made by Lundbeck. The Full Court allowed Sandoz's appeal in relation to CNS Pharma's claim. It did so because the Full Court also allowed Sandoz's appeal in relation to Lundbeck's patent infringement claim and CNS Pharma's claim depended entirely on there being a finding of patent infringement against Sandoz.³
5. Accordingly, CNS Pharma pursues its appeal on the basis that if Lundbeck is successful in its appeal, the orders made by the Full Court in relation to CNS Pharma's claim should also be set aside and its entitlement to damages, interest and costs restored.

Part VI: Outline of argument

CNS Pharma relies upon and adopts the statement of argument in Lundbeck's submissions.

Part VII: The Appellant seeks the following orders:

1. The appeal be allowed with costs.
2. Orders 1 to 3 made by the Full Federal Court on 4 August 2020 and orders 1 and 2 made by the Full Federal Court on 30 March 2021 be set aside.
3. The appeal to the Full Federal Court be dismissed with costs.
4. The cross-appeal to the Full Federal Court be allowed with costs.
5. The matter be remitted to the primary judge for recalculation of damages and interest thereon in the light of the Full Federal Court's adjustment of the primary judge's 25% discount of the damages amount to a discount of 2 to 3%.

Part VIII: The Appellant estimates that about 2 hours will be required to present its oral argument (in chief and reply) (in conjunction with the arguments made on behalf of Lundbeck).

² Primary Judgment [534] – [548], CAB tab 1, 179 – 183.

³ *Sandoz Pty Ltd v Lundbeck A/S* [2020] FCAFC 133 [148] – [151], CAB tab 10, 292.

Date: 15 April 2021



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