



Neutral Citation Number: [2020] EWHC 2033 (Pat)

Case No: HP-2019-000006

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

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

Date: Monday, 27th July 2020

Before:

MR. JUSTICE BIRSS
Remotely via Skype

Between:

- (1) **OPTIS CELLULAR TECHNOLOGY LLC**
(A company incorporated under the laws of the State
of Delaware)
- (2) **OPTIS WIRELESS TECHNOLOGY LLC**
(A company incorporated under the laws of the State
of Delaware)
- (3) **UNWIRED PLANET INTERNATIONAL
LIMITED**
(A company incorporated under the laws of the
Republic of Ireland)

Claimants

- and -

- (1) **APPLE RETAIL UK LIMITED**
- (2) **APPLE DISTRIBUTION INTERNATIONAL**
(A company incorporated under the laws of the
Republic of Ireland)
- (3) **APPLE INC**
(A company incorporated under the laws of the State
of California)

Defendants

Approved Judgment

MS. ISABEL JAMAL, MS. EMILY MACKENZIE and MS. JENNIFER DIXON
(instructed by **EIP Europe LLP and Osborne Clarke LLP**) for the **Claimants**

MR. MICHAEL BLOCH QC and MS. SARAH LOVE (instructed by **Wilmer Cutler
Pickering Hale and Dorr LLP**) for the **Defendants**

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.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Tel No: 020 7067 2900 DX: 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MR. JUSTICE BIRSS:

1. I am going to make an order that this matter be tried in a five-day trial in the period from 1st June until the end of that term in 2021.
2. I am also going to schedule a further hearing to manage this dispute in the first week of September. That is in about a month or five weeks from now. That hearing, if it has not already been resolved, will be the time in which I will resolve any outstanding disputes about the scope of the trial which will take place in the period I have just specified.
3. I envisage that this trial (Trial F) will deal with the issues that Ms Jamal identified when I asked her, in other words: first the unwilling licensee question as pleaded in the Particulars of Claim; second, the three out of the four Defence points that were made in counsel's submissions at the beginning; and then, finally, the point on ownership of the patents and the effect of the MSA.
4. That is what I am directing and I am satisfied that that is sufficiently clear at this stage to make it right to make the direction now, in accordance with the overriding objective. But Mr. Bloch is completely correct that it is critical that the identification of exactly what those issues are needs to be resolved, and done in short order. If I was able to give you more time before the first week in September I would have done that, but it is just not possible to do that, and so you are getting the very earliest availability that I can give to that question.
5. I am also satisfied that it would not prejudice Apple to have those issues resolved in that way. It is not a preliminary issue, it is the scheduling of issues to be decided in these proceedings. I believe all of them -- with the exception of what is called the "interim licence", which was never an issue which made sense to be resolved at Trial E anyway -- all the other ones I am scheduling are issues which have been pleaded recently. I am satisfied that with regard to the rules on varying orders, to the extent I am varying existing case management orders, it is appropriate to make the order in this form.
6. Whether or not the order counts as expedition I do not know, but I do not regard that as an important question. It is clear, in my judgment, that these issues should be resolved at that stage in this overall dispute, because by then, if Optis is right, it will have established, if it can, that it has at least one or two (I cannot remember now) patents which are valid and infringed.
7. All the points made by Apple on the consequences of taking this course are legitimate points, but the issue is a fundamental one. Mr. Bloch characterises what would happen as Optis trying to show it is entitled to an injunction despite Optis's behaviour being so bad, (as it were). However that formulation misses the potential significance of the point that has been put against Apple, that its refusal to abide by a finding of what is FRAND may have adverse consequences.
8. I certainly am not in a position to rule on these questions now, but it does seem to me to be sufficiently properly arguable, that it is appropriate for that issue to be decided in that way and at that stage in these proceedings.

9. Just looking briefly at -- yes, change of circumstances – I have dealt with that.
10. Can the issues be distinguished? As I have said, they are sufficiently clear now to make the order, but their terms will need to be finally resolved in early September.
11. Prospects of those issues avoiding the need for further proceedings? Generally, in my judgment, there is a real prospect that the determination of Trial F (as it is being called) may well lead to no further matters needing to trouble the court at all in this dispute. I do not say that it will happen, but it is certainly a real possibility that that will happen, by promoting settlement between the parties, which is itself a worthwhile objective.
12. I certainly do not believe the implications of dealing with these issues in this way is likely to prejudice either party or affect the efficient resolution of the issues at the appellate level. More importantly, I am not requiring anyone to make any assumptions, despite the two annexes to Ms Jamal's draft order. In my judgment the way it should be done is that one annex (or somewhere) should set out a list of what issues will be decided and another annex should make absolutely clear, what issues are not in issue at that hearing. That is what needs to be clarified. They are not assumptions, they are simply expressions of what is not in issue.
13. If it turns out, as I think I said to Ms Jamal earlier on, that the fact that something is not in issue, means that Optis do not get the relief it seeks even if it wins on the points it says it should win on, then so much the worse for Optis.
14. Has the application been made timeously? Yes, it has, given the way that pleadings in this case have developed.
15. I recognise that it will put extra strain on the legal teams for both sides to resolve issues in this way and it is a change from the way these proceedings were set up. Nevertheless, given what is at stake in these proceedings and given that I am directing a trial that will take place a year from now, I am quite satisfied that organisations with the resources of the parties before me, when a case is of such importance, will be able to prepare for it properly and fairly.
16. That is my decision.

(For continuation of proceedings: please see separate transcript)