Neutral Citation Number: [2022] EWHC 422 (Pat)

Claim No. HP-2019-000006

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

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Thursday, 24th February 2022

Before:
MR. JUSTICE MARCUS SMITH

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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**

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MS. ISABEL JAMAL, MR. THOMAS JONES and **MS. JENNIFER DIXON** (instructed by **EIP Legal and Osborne Clarke LLP**) appeared for the **Claimants in Trial E.**

MR. MICHAEL BLOCH Q.C., MR. JON TURNER, MS. LIGIA OSEPCIU and **MR. DAVID IVISON** (instructed by **Wilmer Cutler Pickering Hale and Dorr LLP**) appeared for the Defendants in Trial E.

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Judgment Approved

MR. JUSTICE MARCUS SMITH :

1. I have before me an application for disclosure in this piece of FRAND litigation between Optis Cellular Technology LLC and others (**Optis**) and Apple Incorporated and others (**Apple**). The process by which this litigation is being conducted is not the usual one. The process that we are operating is one where the parties have each

produced in full their articulated case regarding FRAND rates, to include both pleadings (here called "position statements") and evidence in support.

2. Those positive cases have now been produced. We are in the next phase of that process, which is where the parties test the cases advanced by the other side and, to be colloquial, "kick the tyres" of those cases.

3. In order to have an effective process of inquiry, it is quite clear that (further) disclosure and (further) witness evidence will be necessary. What I made clear when I set this process running was that during the "interrogation phase" that we are now in, the parties would be entitled to ask for additional material and they would be entitled to identify those witnesses that they wanted the other side to produce, so there could not be a form of cherry-picking of material by a party asserting a particular contention.

4. Pursuant to this process, I have one contentious application regarding what is referred to as Apple's "comparables case". That case is helpfully summarised in paragraph 7(a) of Optis's written submissions. In essence, what Apple says that its own negotiations with its counterparties for licences to patents provides a helpful indication as to what the FRAND rate should be in relation to Optis' patents, which are the actual subject of these proceedings.

5. Optis dispute this. Optis contend that if the negotiating history is looked at, then one will not see a diligent attempt to negotiate FRAND rates as between Apple and its counterparties, but instead the precise opposite, a non-FRAND process whereby rates that are not FRAND are agreed by Apple in what would not be a process of negotiation between a willing buyer and a willing seller.

6. I obviously cannot say who is right and who is wrong on this point. That is not my function at this stage. My function at this stage is to ensure that there is a proper process for Optis to challenge what is Apple's case. Accordingly, it seemed to me that some form of disclosure on this point was necessary, and that the question was really was how much disclosure there should be.

7. What both parties were initially suggesting was that there should be some kind of sampling approach, so that a representative number of negotiations were disclosed so as to enable Optis to challenge, if it could, Apple's case. Indeed, such a process would also enable Apple to flesh out the statements it was making regarding its implementation of a FRAND framework in order to conclude the rates for the licences that it agreed.

8. During the course of submissions, I was educated into the way in which Apple maintains its records regarding this sort of negotiation. Apple keep, essentially, two sets of files in relation to these negotiations. The first set are the personal files (the **Personal Files**) of the Apple employees who are engaged in the negotiations. I was not provided with very much information as to how these documents are retained, but it is tolerably clear that they will not be ring-fenced from other areas of responsibility that these individuals have. One would expect to have licence negotiations mixed up with all sorts of other things. Equally, one will have a continually varying or fluctuating pool of persons who are engaged in Apple's process of negotiation.

9. So for a variety of reasons, these Personal Files do not constitute a pool of documentation that is going to be very easy to review at all.

10. Unsurprisingly, as a well-organised commercial organisation, Apple wants to keep track of the negotiation history of the licences it is party to. It therefore maintains a set of negotiation records. These records are described in paragraph 30 of Mr Trenton's 30th witness statement. Mr Trenton, I should say, is a solicitor acting for Apple. His statement tells me that Apple maintains records of correspondence that it collects in the course of business for each licence agreement it enters into (the **Negotiation Records**). The Negotiation Records comprise documents that are collected by Apple when custodians of the correspondence file those documents to the relevant negotiation file, in the ordinary course of business. The collection of Negotiation Records for each agreement depends on individuals filing correspondence to the relevant negotiation file and the time when the agreements were made. What Mr Trenton describes as the **Collected Negotiation Documents** were extracted by Apple from the Negotiation Records by removing the administrative documents. The documents were then reviewed for relevance by Apple's lawyers.

11. Mr Trenton made clear that due to the nature of Apple's process of compiling correspondence in these files, there was an element of subjectivity. In one case, for example, the Collected Negotiation Documents comprise only one document. For other counterparties, the number of Collected Negotiation Documents is considerably higher, numbering up to 3,000 pages.

12. In paragraph 42 of his statement, Mr Trenton makes clear that the volume of the Collected Negotiation Documents is over 10,000 pages of material. Importantly, these documents are held electronically.

13. One of the many objections that were taken by Apple to the disclosure sought by Optis was that the process of reviewing both the Personal Files and the Collected Negotiation Documents would take a long time, if reviewing for privilege, relevance and confidentiality. I take that point. This is a tall order.

14. What I proposed to Mr Turner, QC, who appeared for Apple, in the course of his submissions, was that we use a short-cut whereby the entirety of the Collected Negotiation Documents would be disclosed into a database which would be made available to a limited number of lawyers on Optis' side. When I say "lawyers", I make clear that I mean lawyers external to Optis.

15. This proposal reached a measure of sympathetic agreement by Mr Turner and what he proposed was that we follow this course, save that there be a privilege review by Apple so as to extract all privileged material, but leaving it to Optis to look at confidential and potentially irrelevant documents that would remain in the collection of documents that I have described.

16. That, as it seems to me, is an entirely sensible proposal and one that I am going to direct. I should make clear a couple of further points regarding this process:

    i) First of all, I am going to order that disclosure takes place in this way. I do so not because I doubt Apple's willingness to do this, but because I want to provide a form of protection to Apple in case there is a mistake in the privilege review process and a privileged document is inadvertently released to the

database. The short point is that inadvertent disclosure of privileged material will not constitute a waiver of privilege.

ii) Secondly, I want to make absolutely clear that the confidentiality ring that will apply to this database should contain, in addition to the usual provisions, an undertaking from the persons admitted to the ring that they will not continue to read a document that they consider appears to be privileged, that they will not use it for any purpose, that they will disclose the existence of that document to Apple forthwith, and that Apple will be entitled to take down the document from the database. That, I think, is a protection which Apple are entitled to have.

iii) Thirdly, it seems to me that disclosure on this basis is going to satisfy the need on Optis's part to "kick the tyres" on Apple's case. The fact is that on one level, Optis are getting far more than they asked for. They are getting not a selection or a sample of negotiation histories, they are getting the whole set. True it is they are getting only the Apple central records, the Collected Negotiation Documents. But it seems it me that that is really what is needed in this sort of case. The fact is that what one is trying to do is to get a grip on how it is that Apple does its deals with its counterparties and it seems to me that the documents that are filed centrally are likely to be the most important documents. I am accordingly not going to oblige Apple to do anything further by way of disclosure, including in particular in relation to the Personal Files. That, I consider, would be disproportionate.

iv) Fourthly, there was some suggestion by Optis that I additionally order a limited review of the Personal Files, confined to a review of the emails one person in Apple (a Ms Mewes) and searching for those against a limited number of counterparties. I have real doubt as to the practicality of this process given the way in which most people keep their emails, and the volume of email communications busy people have. It seems to me that not only is this likely to be a disproportionate exercise in circumstances where both legal teams have quite enough to be getting on with, but also it is unlikely to produce very much benefit over and above the documents that I am ordering be disclosed.

17. Accordingly, I am going to direct the disclosure in the manner I have described, of the Collected Negotiation Documents and I am going to order no more than that.

18. I will add this final rider: never say never. It may be that when the Collected Negotiation Documents have been reviewed by both sides, certain gaps which need to be filled appear. I make clear that I am not inviting such an application, but I cannot, I think, close the door against a further request for disclosure further down the line. I should say this also. I would be pretty unsympathetic to any point that relies upon the patchiness of the Collected Negotiation Documents. Apple have been quite clear that the efficacy of their processes depends very much on what the personnel involved chose to file centrally at any given time.

19. That is, if I may say so, blindingly obvious, but it does mean that there are deficiencies or patchinesses in the documentation which is simply "one of those things". The fact is it is one of the reasons why I was persuaded that the entirety of the

documents should be disclosed rather than a sample of them, so that one sees the set and not a possibly unrepresentative sub-set.

20. Finally, I should say that I have not lost sight of the fact that these documents, the disclosure of which I am ordering, are confidential not merely to Apple, but also to third parties. I will in due course hear from such third parties as wish to be heard about the process that I have outlined; and if they persuade me that it needs to be modified or changed in some way, then of course I will make that direction. To that extent, this order is provisional because I do need to hear from interested third parties who will want to have their commercial interests protected.

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