Neutral Citation Number: [2022] EWHC 1433 (Ch)

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

7 Rolls Buildings
Fetter Lane
London
EC4A INL

Date: 1 June 2022

Before:

MR. JUSTICE MARCUS SMITH

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Between:

(1) OPTIS CELLULAR TECHNOLOGY LLC **(2) OPTIS WIRELESS TECHNOLOGY LLC** **(3) UNWIRED PLANET INTERNATIONAL LIMITED**	**Claimants**
- and -	
(1) APPLE RETAIL UK LIMITED **(2) APPLE DISTRIBUTION INTERNATIONAL** **(3) APPLE INC.**	**Defendants**

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MR. ADRIAN SPECK QC and **MR. TOM MOODY-STUART QC** (instructed by **EIP Europe LLP** and **Osborne Clarke LLP**) appeared for the **Claimants.**

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

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Approved Judgment

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MR. JUSTICE MARCUS SMITH:

1. Less than two weeks from today, on 1 June 2022, I begin a four-week FRAND trial. The trial begins on 13 June 2022. It is therefore quite troubling to have an application made which brings into focus the manner in which the case has been pleaded.

2. The fact is that pleadings serve a critical purpose in ensuring, first of all, that the parties understand the case that they have to meet. It enables them, from that understanding, to introduce evidence into the case to deal with the points in issue, and it informs the argument that the parties will adduce in relation to that evidence and those points taken in the pleadings. Finally, and not least, it identifies those points that the court has got to resolve at the conclusion of the trial. Pleadings are therefore critical and it is important that their scope be understood at a very early stage.

3. I make that general point because it underlines the deep unease that I have felt in hearing what has been put as a relatively narrow question of the introduction of new evidence that relates to a licence that has been concluded between Optis and another party on 5 May 2022.

4. The point, in brief, was that at the PTR for this trial that I dealt with last week, Optis sought to introduce this licence dated 5 May 2022 and the material that relates to it: that is to say, the "unpacking" of the licence and its negotiation history. It means that what Optis wants to rely upon is not merely the licence and its terms but also a significant number of related documents, some 291 documents; and, additionally, fact and expert evidence which expands what the court derives from that licence.

5. At the PTR, I indicated that I would be disinclined to permit the licence to be adduced if it was simply an expansion or further articulation of Optis's positive case as set out in the various position statements that have been articulated in the course of this trial. But if the licence was relevant as a rejoinder point, that is to say in response to material recently put in by Apple in reply to Optis's position statement, then I would be altogether more sympathetic.

6. To that end, I invited Optis to plead the point as a rejoinder point, which Optis has done in a document that is dated 27 May 2022. That is to say it has been produced quite properly, and in short order, by Optis after the conclusion of the PTR. Apple objects to the introduction of the rejoinder and objects to the introduction of the 5 May 2022 licence and objects to the evidence that relates to that licence, which is essentially Blasius 6, Bezant 4 and certain (small) parts in Bezant 5.

7. That is the matter on which I have heard submissions during the course of this morning and in relation to which I propose to rule.

8. It is necessary to go to the pleadings and I am going to begin with the Optis position statement, which I remind myself has itself been amended quite recently, that is to say on 5 April 2022. At the time that I permitted that

amendment, I made very clear that this needed to be the final statement of Optis's positive case.

9. Apple, it is fair to note, objected to the amendment, and I overruled those objections, but I ensured that the timetable was adjusted such that Apple was able, albeit under some significant pressure, to respond. I make that point because Mr. Bloch, QC (for Apple) in his articulated objections to the rejoinder point, has made very clear that Apple is operating under significant pressure to deal with the case as it stands, and I want to make it clear that I accept that.

10. It would be appropriate to indicate now that I would like formalised the points that Mr. Bloch made on instructions regarding the work that his expert would have to do in order to deal with the rejoinder point. I say that not because I doubt in any way what Mr. Bloch has said, I am quite sure it is accurate, but I do think the point needs to be formalised in evidence because it is something that I have relied upon in the course of considering this application.

11. I move to the Optis position statement and what Optis does in that position statement is articulate various bases on which the terms of a FRAND licence should be concluded or identified by the court.

12. One of those methodologies is a "comparables" analysis, which is set out in the paragraphs commencing at paragraph 23 of the position statement as amended. I do not need to read the entirety of that position statement into the record. Suffice it to say that paragraph 24 identifies the "comparables" methodology and then paragraphs 25*ff* proceed to unpack or expand upon that methodology.

13. Paragraphs 27, 28 and 29 identify the various comparable licences that are deployed by Optis. Paragraph 27 says that:

> "Optis's valuation expert does not consider or unpack five of the 19 licences that cover all, or any subset of Optis's cellular SEPs due to specific circumstances applicable to each licence."

14. Paragraph 28 then says that, of the remaining 14 licences, Optis's valuation expert has analysed each of the licences; however, in relation to five of those agreements, and they are then set out and I will not read them in the record because they may well be confidential, Optis's case is that they are not reliable or useful comparables.

15. Mr. Bloch, in his submissions, placed a great deal of reliance upon those words "not reliable or useful comparables", because, as he made clear, and as I accept, this plea is unequivocal. It is saying that these five licences are simply not helpful for purposes of the comparables methodology that is articulated by Optis.

16. Paragraph 29 then says that the remaining nine licences, and again it identifies them, but I will not read them into the record, constitute suitably reliable and useful data points. These licences are referred to as the "Optis Comparables", and it is important to note that that term, as a <u>defined</u> term, has a capital "O" and at capital "C". It <u>is</u> a defined term, with a clear meaning.

17. It was envisaged that the position statements would be responded to in the course of the pleadings that I ordered in the run-up to this trial. Both parties put in a position statement and then both parties replied to that of the other side. I do not need to consider the Optis reply to the Apple position statement, but I do need to consider the Apple reply to the Optis position statement.

18. Specifically, paragraph 38 of that reply says this:

> "As to paragraphs 23 to 28 of the Optis position statement [these are the paragraphs that I have just referred to], it is noted that Optis does not seek to rely on ten of the 19 Optis licences that have been disclosed in these proceedings. Apple does not seek to rely on those ten licences either, and does not address them further in this responsive position statement."

19. Paragraph 39 then deals with paragraph 29 of Optis's position statement and sets out Apple's case regarding their reliability for purposes of the "comparables" analysis. I do not need to consider paragraph 39 any further. The point that I make is that it is clear on the face of pleadings that Apple is not addressing any further the licences which Optis has said in paragraph 28 are neither reliable nor useful for purposes of the "comparables" analysis.

20. In these circumstances, it seems to me that it is incumbent upon Optis, if they wish to expand or vary the case set out in their position statement, to amend it.

21. With that general point, I turn then to the rejoinder point as it has been articulated. I want to read it into the record because it is a relatively short document. Paragraph 1 states:

> "In response to paragraphs 39 to 40 of the defendant's responsive position statement [I have just referred to that] served on 16 May 2022, and specifically in response to the contention that the Optis Comparables are uninformative of FRAND royalty rate for the PO portfolio due to the size of the licensee and/or its business, the claimant relies upon where the Optis Comparables sit within the context of all the Optis licences that have been analysed and addressed by the experts. Notwithstanding the fact that information derived from the other Optist licences are not themselves individually reliable, or useful, as identifying the true FRAND rate for the PO portfolio, the context which they provide is useful, particularly to test the defendant's contention."

22. It seems to me that this is a resiling from what has been said in terms in paragraph 28 of the Optis position statement. It seems to me that this is not a rejoinder point but it is a variation of the positive case that has been set out by Optis. As such, it seems to me that this paragraph is an impermissible expansion of Optis's case, and not one that I am going to permit.

23. Moving on to paragraph 2, this purports to be an elucidation of paragraph 1. It reads:

> "In particular, the claimant relies upon the evidence of both parties' accountancy experts regarding the context in which the Optis Comparables appear in the set of Optis licences (see eg Bezant 3, figures 2.2 and 2.3 and Gutteridge 2, figure 2.1). Specifically, this evidence shows that there is no, or no significant, effect attributable to the facts identified by the defendants as the basis of the aforesaid criticism. Further or alternatively, the said context allows the court to assess the size of any effect of a factor identified by the defendant (see also Bezant 5, dated 27 May 2022, paragraphs 4.8 to 4.16)."

24. So far as this paragraph refers to material already adduced as evidence in the case, I am certainly not going to strike that out. Mr. Speck, QC, who appeared on this occasion for Optis, made clear that both experts had traversed broader and more comparables than had been identified in the pleadings.

25. I am absolutely going to permit that evidence to remain in the case (Mr. Bloch has not sought to exclude it), but I should be clear that I am going to review the evidence that has been adduced through the prism of the parties' pleaded cases. It seems to me that that is the only fair way in which such evidence can be examined. I am not, as I say, going to exclude it, and I will hear the evidence in its totality, but what I have to decide is going to be determined by the pleadings, and I hope that is a clear indication as to what points the counsel in the case need to articulate or put to witnesses when they come to cross-examine the witnesses in the course of the four weeks commencing 13 June 2022.

26. I say that because it is common ground between the parties that time is of the essence in those four weeks. Both sides are going to be hard pressed to put their cases, and both would like more time to put their cases more fully, but that time is not available. I have made clear that I am not expecting each party to put their case in full, but they are going to have to put points that matter, and it seems to me the points that matter are the points that are articulated in the pleadings.

27. Moving on to the third paragraph in the rejoinder pleading, this reads:

> "The claimant also relies upon the said context, including the licence between Optis and [the other party] dated 5 May 2022. Specifically, the claimant relies upon Bezant 4, dated 25 May 2022, including the revised versions of figures 2.2 and 2.3 referred to above."

28. This paragraph make clear that the 5 May 2022 licence is not being relied upon in any way, shape or form as a rejoinder point. It is being relied upon as an expansion of the already expansive paragraph 1.

29. It seems to me, therefore, that the indication that I made last week that I would be more receptive to admitting new evidence for purposes of rejoinder is one that does not arise here. Paragraph 3 makes clear that what it goes to is an expansion of paragraph 28 of the Optis position statement, namely that licences which have been stated to be neither reliable nor useful comparators under any circumstance is sought to be expanded so that they are reliable and/or useful in

some circumstances but not in others. That, as I have indicated, is an amendment that I am not going to permit, particularly by implication, by allowing this rejoinder statement in.

30. For all those reasons, I am refusing the application to introduce the rejoinder point. I am not going to admit into the evidence Blasius 6 or Bezant 4 and I am not going to admit the very limited parts of Bezant 5 that counsel have identified for me.

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