

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: Tuesday, 5th April 2022

Before:

MR. JUSTICE MARCUS SMITH
Hybrid Hearing

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

MR. TOM MOODY-STUART QC, MS. ISABEL JAMAL and MR. THOMAS JONES
(instructed by EIP Europe LLP and Osborne Clarke LLP) for the Claimants

MR. BRIAN NICHOLSON QC, MR. JON TURNER QC and MR. DAVID IVISON
(instructed by Wilmer Cutler Pickering Hale and Dorr LLP) for the Defendants

APPROVED JUDGMENT
ON APPLICATION

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MR. JUSTICE MARCUS SMITH:**Clarification of Optis's position statement as regards patent families**

1. I have before me an application that the claimant in this case, Optis, be obliged to more clearly articulate its case as to relevant families. It is trite, particularly when one is as close to trial as we are here, that the case that the court must try needs to be articulated with particular clarity so that the issues can be properly determined.
2. In this case, the amendment that Apple (the applicant here and the defendant in the proceedings) wishes to compel upon Optis relates to a table which appears in paragraph 16 of the Optis' presently amended position statement. What one has in the table at paragraph 16 is a statement as to the relevant families that Optis holds in terms of patents that go to the question of essentiality. One sees that, initially, as regards one form of technology, LTE, the number of patents alleged to have been relevant – I stress the past tense is 50. That figure has been deleted, and instead a figure of 38 inserted.
3. The position statement says nothing about the evidential basis for these figures. That is unsurprising: it is a position statement, not a proof of evidence. The deleted figure of 50 in paragraph 16 was originally supported by the evidence of a Ms. Dwyer, who, grouping the various Optis patents in a family grouping that she endorsed, came to the conclusion that the relevant Optis families were now 50 in number. It is now the case that Optis no longer seek to rely on Ms. Dwyer's evidence.
4. To be clear, as far as Optis is concerned, a line can be put through all and everything that Ms. Dwyer has said, because her evidence is no longer relied upon by Optis in support of its case. I do not think that one can completely put a line through Ms. Dwyer's evidence, for reasons that I am going to come to, but I accept that it is for a party pleading its case to effectively dictate to the court how it is choosing to present its case, and it is for the other side to knock it down and for the court to decide who is right and who is wrong.
5. So it seems to me that the deletion of the 50 in this case is a matter that follows from Optis's declared position regarding Ms. Dwyer's evidence. Naturally, Optis have not simply deleted, they are sought to fill the vacuum left by Ms. Dwyer by relying on other evidence. The evidence that is now relied upon is evidence emanating from publicly available (albeit on a subscription basis) material compiled by a firm called PA Consulting, which sets out its own evaluation in terms of essentiality. According to the correlation between the patents which Optis says it owns and the assessment of essentiality deriving from PA Consulting, the relevant families fall from 50, the old case based on Ms. Dwyer, to 38, the case presently pleaded. Now, that may be right, it may be wrong. Correctness is not a matter for me to determine today. It will be a matter for me to determine in due course at trial.
6. The point that Apple want to have pleaded in this amendment, and which is not presently pleaded, is the extent to which the Dwyer assessment of essentiality overlaps with the PA Consulting assessment of essentiality. Effectively, what Apple wants pleaded is the overlap of two circles as in a Venn diagram, one circle being essentiality according to Dwyer and the other essentiality according to PA Consulting. The Apple position is that it is only to the extent of the overlap in the Venn diagram that I have described should Optis' case be permitted to go forward. That results in a figure of 31,

down from 50, and down from 38. The figure of 31 effectively represents the common ground between the Dwyer analysis and the PA Consulting analysis.

7. Now, if it were the case that Optis were relying both on the PA Consulting data, and on Ms. Dwyer's assessment, then it seems to me that Apple would be right: 31 would be the right figure. But that, I am told in emphatic terms, is not the case. Of course, I place a great deal of weight on what Mr. Moody-Stuart, QC says on Optis' behalf, but I would rather go to the pleadings. If one goes to the pleadings, one sees that the relevant patents that are assessed and pleaded as being Optis's patents are those set out in Schedule 1 to the re-re-re-re amended particulars of claim. This lists the patents in play. It is right to say that they are grouped in accordance with family reference. One can see that from the schedule. It starts with ML1 and a number of patents are grouped under that family. It proceeds to ML10, and then ML106 and so on and so on. So one can see that is an articulation of family grouping in the pleading.
8. But that family group is not relied upon, in the pleading, as a limitation on the patents that Optis may rely upon. There is no plea indicating that the patents that Optis can rely upon are those specified by Ms. Dwyer nor those specified by PA Consulting. The pleading refers, without differentiation, to all of the patents listed in the schedule. It does not make any particular differentiation between patent families.
9. It seems to me, therefore, that now that Optis has abandoned the Dwyer 1 evidence, reference to patent families, so understood, falls away. There is no similar restriction in the pleadings. So it seems to me that the rider that Apple wishes to attach, reducing the 38 to 31 in this particular example, is essentially a misconceived fetter on the case that Optis wishes to put.
10. "Misconceived fetter" sounds unduly harsh, and I want to make two points very clear about how I see this. Paragraph 16, and the rest of the amendments to the position statement, are no more than an articulation of Optis's case, and it is that case which, amongst other things, I am going to be trying this summer. It is for Apple to challenge that case, and Apple will be entitled to do so in whichever way it chooses, provided that attack is properly articulated.
11. In particular, there are two lines of attack which may be open to Apple, and I want to make clear that I will countenance an attack on any of these bases if Apple is minded to pursue them. The first is that there is, obviously, an inconsistency between the Dwyer assessment of essentiality and the PA Consulting assessment of essentiality. At one time or another, both have formed part of Optis's case. It is, obviously, going to be open to Apple to say that Optis actually does not really know what is essential and what is not, because its case has changed. Apple will be perfectly entitled to deploy Ms. Dwyer's evidence to say that Optis's position has changed over time. Quite what weight will be attached to that change of position is a matter on which I can say nothing, but it does mean that, to that extent only, the Dwyer evidence will continue to be relevant. Ms. Dwyer will probably not be there, but Apple will be perfectly entitled to refer to the changes in case that have occurred over time, and use that to suggest that the presently pleaded case is, perhaps, not as strong as Optis would want to say in argument.
12. The second point goes to the question of the consistency between the two numeric values in the table that I have already referred to at paragraph 16. Mr. Nicholson, QC,

for Apple, suggested that the “Birss denominator” that appears in the third column of this table, a figure of 800, was one that was referable, and only properly comparable, to the originally pleaded 50, or the amendment that he wanted to have made of 31, and was not comparable to the figure of 38, which, as I have explained, is derived purely from the essentiality assessment of Optis-owned intellectual property rights through the prism of PA Consulting. That may be right, that may be wrong, I am really not in a position to say, and, again, this is a matter on which I will have to reach a view at trial. I would only say this: that if there is an apples and apples comparison between the 50, as was pleaded, and the 800 which is now pleaded, which is lost such that one has oranges and apples between the 38 now pleaded and the 800 that is still pleaded, that is a point that will go to the strength or otherwise of Optis's case, and I would expect mismatches to be articulated in the course of the evidence before me. But it is not a matter I can or should resolve now. However, I make clear that the fact that I am allowing the amendments to the position statement to proceed on this basis does not mean that I am going to prevent Apple from taking this point. Quite the reverse.

13. The fact is this is Optis’s case, it may be good and it seems to me that that case should be pleaded as Optis would wish, rather than as Apple would like it to be pleaded. That way I can have the best of both worlds. I can, at trial, see Optis’s case, and I can see Apple’s attack on that case. It does seem to me, therefore, that it would be helpful, not in the pleading, but elsewhere, to have an agreed articulation of the mismatch between Ms. Dwyer’s approach and the PA Consulting approach now adopted by Optis. As I understand it, that work has been done by Apple in preparation for this application. It seems to me that it would be helpful if the analysis, but not its relevance, could be agreed between the parties, so that we do not have a dispute about that come trial.

Clarification of Optis’s position statement as regards paragraph 1

14. I also have before me a request from Apple for clarification of paragraph 1 of the Optis amended position statement. Essentially, the point that Apple makes is that the declarations that it is said Optis will seek at Trial E bear limited, possibly no, relation to the evidence that Optis is pursuing as to a positive case in relation to the FRAND rates that it will be adducing evidence in relation to. There is, to a greater or lesser extent, a mismatch.
15. How great that mismatch is is not a matter that I am inclined to go into today. I will make it clear, however, that Apple are expected to respond to and deal with evidence, not evidence that might have been adduced under cover of a pleading permitting the adduction of such evidence, but which has not in fact been adduced.
16. I do not like, I have to say, paragraph 1, because it does seem to me that it is freezing in aspic certain positions that might well have been entirely justifiable in the past, but which are likely to bear no relationship to the declarations that the court is going to be asked to make now that things have moved on. I can see that there might be a desire to stick to these points, both as a matter of ensuring that Optis’s position on other points, notably competition points, are protected; and also to preserve a “fig leaf” so far as any future of question of costs might be concerned.
17. Be that as it may, I will deal with those points at the end of the case, rather than now. I will only articulate, on my part, a healthy scepticism as to the benefit, to the court at least, of paragraph 1. What I think I am more interested in is the substance of the

evidence that is referred to in the position statement, rather than the declarations that are being sought. Indeed, one can see a certain inconsistency in the declarations of the sort in the position statement, as amended, and in the particulars of claim, which seeks various declarations of an altogether different sort than those in the position statement.

18. The fact is there is a claim for a declaration. Precisely what that declaration will be will depend upon the evidence as I find it, and that is how I am going to deal with matters. I am certainly not going to expect Apple to adduce evidence which is not in response to evidence that is adduced by Optis.
19. I hope that squares the circle sufficiently clearly so that Mr. Moody-Stuart is not obliged to do further violence to his pleadings, but that Apple is in a satisfactory position in knowing the case that it has to meet.

Costs

20. I have before me two discrete costs matters. One arises in relation to the amendments which I have, today, allowed. There is no dispute in relation to the order that should be made: the costs of occasioned by and thrown away by the amendments on Apple's part will be paid by Optis and that has been conceded by Mr. Moody-Stuart, in my judgment entirely rightly. The reason I mention it is because it does seem to me to have some bearing on the strike-out application, which I heard before the amendment application, and in relation to which I made an order that costs be costs in the case. That order was not sealed, in anticipation of this application, in effect, to vary the prior costs order previously made by me.
21. The fact is that the strike-out application was neither successful nor unsuccessful. Had it failed, in the way that strike-out applications often fail, I would have made a costs order against Apple for making an ill-advised application. On the other hand, had it succeeded, I would have made a costs order going the other way, and we would have been faced with an earlier amendment question, to cure the problem, such as the one I have been dealing with today.
22. The reason I ordered costs in the case was because it seemed to me that the strike-out application constituted a helpful prism through which the rather bespoke order, as we now call it, that I made last year, was fleshed out and given a little bit more articulation. It seems to me that, notwithstanding the retraction now of Ms. Dwyer's evidence, such that, in effect, the strike-out application might be seen to have succeeded, I remain of the view that the hearing was a helpful and necessary one for the parties and for the court, in order to ensure that the trial operates in an efficient way, as we all hope it will.
23. For those reasons, I am not going to vary my order as made. I am grateful to both parties for giving me the opportunity to revisit matters, because things have undoubtedly moved on, but I do not want to get drawn, any more than I have done, into the reasons why Ms. Dwyer has been jettisoned from the Optis case. It seems to me that I might have my views, they may be right, they may be wrong, but on any view they are irrelevant. It seems to me that I should simply

look at the question of the utility of the hearing and the winner and the loser thereby.

24. I will say a sentence or two about indemnity costs. It is obviously clear that I am not going to be making such an order, given the affirmation of the order I previously made. But it seems to me that, even if I had been of the view that Optis should pay Apple's costs of the strike-out, I would not have been ordering indemnity costs. The *Excalibur* jurisdiction, as we call it, really requires something out of the ordinary, and by that we mean not merely a mistake or something that could have been done better, but something which requires proper sanctioning in costs. There is a certain stigma that attaches to indemnity costs, perhaps not as great as it was in the past, but nevertheless that stigma remains. It seems to me that this is a case where an error was made, it was drawn to the court's attention, and fulsome and appropriate apologies have been received from Optis, which I accept.
25. I am not going to make any further order in relation to that, even if I could, and I am very grateful that the position was rectified by Optis's counsel as quickly as it was.
