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Case No: HP-2019-000006

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

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
London
EC4A 1NL

Wednesday, 5th February 2020

Before:

MR. JUSTICE MORGAN

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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. THOMAS JONES** (instructed by **EIP Legal & Osborne Clarke**) appeared for the **Claimants.**

MR. BRIAN NICHOLSON QC and **MS. ANNA EDWARDS-STUART** (instructed by **Wilmer Cutler Pickering Hale and Dore LLP**) appeared for the **Defendants.**

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Approved Judgment

Transcript of the Stenograph Notes by Marten Walsh Cherer Ltd.,
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MR. JUSTICE MORGAN :

1. If there is to be an appeal against anything I decide, and if the Court of Appeal would benefit from a more elaborate statement of my reasons, then I would be ready to provide that. At the moment, I will identify the two questions which are before me, and I will indicate my conclusions in relation to those questions with brief reasons.

2. The first question concerns the trial that has been directed already in relation to patent '818, and the second question concerns what trial directions I should give in relation to the dispute as to patent '744.

3. As to '818, the position of the claimants is that the existing trial directions for '818 should continue to have effect. There will be a trial in October of this year. That will be a trial that does not deal with FRAND questions but will deal with everything else in relation to '818. It will be what has been called a technical trial. It will deal with the validity of the patent, the essentiality of the patent, the infringement of the patent, and whether the defendants have a good defence on the facts and on the law relying upon alleged non-disclosure or relying on an alleged estoppel against the claimants.

4. The case for the defendants is that the trial in relation to '818 should deal with what has been described as technical matters. They will include the validity of the patent, the essentiality of the patent, the infringement of the patent, and they will also deal with some technical questions which are relevant to the non-disclosure or estoppel defence. However, the defendants say other issues of fact and of law as to non-disclosure or estoppel should not be tried at the trial in October. Instead, there will be a series of technical trials or possibly a series of technical trials which do not involve all of the estoppel points until one reaches a stage where there is then what can be regarded as an estoppel trial. The estoppel trial will deal with any patents that are found to be valid and infringed at earlier trials, and the estoppel trial will then deal with questions of fact and law as to estoppel.

5. The difficulty I have with the defendants' approach is that at this point, particularly where there has not been a pleaded reply to the non-disclosure or estoppel defence, I feel no confidence whatever that one can distinguish between some of the issues in relation to the estoppel, which will be dealt with in the first trial relating to '818, and the other matters that will be separated off. It seems to me imperative that one can draw a clear, predictable and workable line as to what is to be tried and what is not to be tried, and I am not persuaded that that workable line has been identified.

6. It is also the case that it is entirely conventional to try all the issues arising in relation to the piece of litigation unless there is a good reason to separate off a part of the dispute and one can clearly identify what has been separated off. That has been done in this litigation with the separation of the FRAND issues to a later stage. However, just because there has been a separation of the FRAND issues does not encourage me to try to carve out other parts of the litigation and postpone them. That is the reason that has persuaded me to accede to the claimants' suggestion as to the trial in relation to '818.

7. I am afraid I do not give any real weight to a point that has been urged upon me by Mr. Speck QC for the claimants to the effect that he may be able, in October of this year before patent expiry on 20 October 2020, to ask the court to grant an injunction

before patent expiry. I think the timetable is simply too difficult for the claimants to enable them to achieve any such outcome. So I will accede to the claimants' suggestion as to what is tried in relation to '818.

8. I will have to hear submissions on the time estimate, although I have I think heard most of what can be said on that. Depending on what I say about the time estimate, it may be that the October trial date will not survive. That is a risk but it will have to be addressed on its merits and to give effect to what is appropriate.

9. Turning from that trial to the trial in relation to '744, the point is made that what the claimants seek to achieve and what they need for their purposes in relation to FRAND is to obtain success in relation to one patent. If they can show that the patent is valid and has been infringed, it is essential and the estoppel defence is defeated, it may well be the case, they submit, that the court will not be required to labour through a number of further technical trials about other patents. The single success will be the trigger, which will enable the claimants to reach forward to the FRAND trial and seek to make progress there or possibly get an injunction putting the defendants to their election even in advance of the FRAND trial.

10. Based upon what I have been told about how other pieces of litigation have gone and how success on one patent has led to it being unnecessary to address technical trials in relation to other patents, I am persuaded that there is a real possibility that an early trial of '744 will be beneficial to the parties by avoiding the need for further trials and beneficial in terms of court resources in that the court will not be conducting a whole series of trials, which in the end do not have any real impact upon the parties' overall commercial position.

11. I cannot at this stage predict everything. A number of doubts have been expressed about the possibility that I have referred to, which I regard as an advantage.

12. Furthermore, there is another element which could disrupt the development of the litigation in the way I have described, and that is an appeal in relation to one or more of these patents. However, my overall assessment is that the wisest form of case management is indeed to promote the trial in relation to '744 so that it is the second trial which takes place following the trial already directed for '818.

13. One cannot be certain that any one set of directions will turn out to be better than another. However, I assess the prospects of what I have identified as being superior to the alternatives that have been identified by the parties. Those are the conclusions I have reached.

14. There will need to be directions at least for '818 and '744 on that basis. Of course, the directions involve pleadings, disclosure, evidence, experts and then the run-up to the trials. Of those directions, many of them are obvious, some of them are agreed.

JUDGMENT ON LISTING

15. Things may have changed since Nugee J did his very best to help the parties, which led to a listing in October. I suspect that the way things look today is different from the way things looked when Nugee J considered matters. However, listing has fixed

a trial in October in relation to a specific patent and I do not think I should throw that over if the parties do not agree; I think I should adhere to that.

16. One thing I must react to is the time estimate, which it seems likely did not take account of, or fully take account of what has clearly emerged today, which is that the October trial will, if it goes ahead, deal with the estoppel defence. I think simply adding a day could well prove to be inadequate. However, I also think that six days for the '818 trial, particularly if it is before the same judge who considered '818 before -- and I think that is the position -- may involve much less prereading and a much more rapid addressing of the issues. So I am going to leave the trial where it is in October, I am going to increase the estimate by a day. I think a day is not enough for estoppel alone but there could be savings in the six days which will be diverted to the estoppel case. So it will remain fixed and the time estimate will go up to two plus seven; it is currently, I am told, two plus six. Listing must be told straightaway. I expect listing will continue with the listing and not require the case to be moved for one day.

17. This is a pragmatic response to the situation the court is placed in today. More information will emerge over the next few weeks and months. If that information indicates that the time estimate must be increased by a period which makes a trial in October no longer possible, then the parties must inform listing and if there is disagreement it will have to be put back before a judge for resolution. If the parties turn up for trial in October with a time estimate of two plus seven when the case plainly requires significantly more than two plus seven there are consequences which the parties may very well wish to avoid. The consequences would include the whole case being adjourned without being started or being started and being adjourned part a heard for what will inevitably be a lengthy adjournment. So the parties have to keep this time estimate under review, they have got to be collaborative, they have got to be realistic and they have got to be candid. If they can do all those things and keep the listing, so be it. So today I will maintain the listing and increase the time estimate by one day.

JUDGMENT ON STATEMENTS OF CASE

18. I am going to accede to this application in both respects. The order I am going to make is that the claimants will serve a statement of case on infringement -- that is shorthand; it was called essentiality and infringement, but unless there is any dispute, that is the phrase I will use. They are to do that by 6th March. The defendants are to reply by 3rd April.

19. So far as validity is concerned, the defendants are to serve a statement of case on validity by 3rd April 2020. If Mr. Nicholson is right that it is all pretty straightforward, that is not an onerous requirement and it is a useful requirement for me to impose.

20. The claimants' response by 1st May and in the claimants' response they must comply with paragraph 6.5 of the Patents Court Guide.

21. The reason I am doing that is it seems to me the more the parties are pinned down to what their case is and the more clarity there is for the opposing party and for the court

the better and the earlier the better. I think these are not onerous requirements, nor are they premature requirements. That is my conclusion.

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