



Neutral Citation Number: [2021] EWHC 2080 (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: Thursday, 1st July 2021

Before:

MR. JUSTICE MARCUS SMITH

Between:

(1) OPTIS CELLULAR TECHNOLOGY LLC
(company incorporated under the laws of the State of Delaware)

(collectively,
“Optis”
Claimants

(2) OPTIS WIRELESS TECHNOLOGY LLC
(company incorporated under the laws of the State of Delaware)

(3) UNWIRED PLANET INTERNATIONAL LIMITED
(company incorporated under the laws of Republic of Ireland)

- and -

(1) APPLE RETAIL UK LIMITED
(2) APPLE DISTRIBUTION INTERNATIONAL LIMITED
(company incorporated under the laws of Republic of Ireland)

(collectively
“Apple”
Defendants

(3) APPLE INC
(company incorporated under the laws of State of California)

MR. TOM MOODY-STUART QC, MR. THOMAS JONES and MR. HENRY EDWARDS (instructed by **EIP & Osborne Clarke**) appeared for the **Claimants**.

MS. MARIE DEMETRIOU QC, MS. SARAH LOVE and MR. WARREN FITT (instructed by **Wilmer Cutler Pickering Hale and Dorr LLP**) appeared for the **Defendants**.

MR. ANDREW SCOTT appeared for a **Third Party**.

Approved Judgment

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MR. JUSTICE MARCUS SMITH :

1. The present application arises out of a case management hearing that I am conducting in what is known – to the parties and to me – as “Trial E”. The essential issue, to be resolved in Trial E, are the “FRAND” terms (“FRAND” meaning **F**air, **R**easonable **A**nd **N**on-**D**iscriminatory) on which the defendant companies – “Apple” – will have to licence various patents held by the claimant companies – “Optis” – these patents having been declared to be “standard essential patents” for the purposes of various telecommunications technologies.
2. The details of Trial E do not particularly matter for purposes of the present application, and for that reason my broad brush summary in paragraph 1 above will suffice. The application that is before me and determined by this ruling is an application made by Apple against a third party. The identity of that third party is – so Apple tells me – highly confidential, and I accept that for the purposes of this application. The third party is the counterparty to Apple of a licence agreement existing between Apple and that third party. For that reason, I shall refer to the third party as the “Third Party”, without disclosing the Third Party’s name or identity.
3. As is tolerably well-known to aficionados of FRAND litigation, one key source of data for deriving the prices in a (court-determined) FRAND licence are the prices agreed in comparator licence agreements. In short, the rates in these comparator licences form one of the inputs in a model or calculation to determine the FRAND rate payable in the instant case. Very often disclosure of licences is made in the litigation, so as to enable both sides to it to calculate the FRAND rate or to enable the experts instructed by the parties to express opinions as to what the FRAND rate should be.
4. Licences such as these are inherently commercially very confidential. That confidentiality exists as between the “Litigating Counterparty” (that is, the party to the FRAND litigation seeking or being obliged to disclose the licence) and the “Non-Litigating Counterparty” (that is the party to the licence who has no other involvement in the FRAND litigation). Almost always, these licences contain detailed provisions concerning their confidentiality. It is commonplace for orders in relation to disclosure to ensure that the interests of third parties (to the FRAND litigation) such as Non-Litigating Counterparties are protected. It is important, however, to understand this. The Non-Litigating Counterparty is a third party to the litigation and is not the disclosing party. The party disclosing the document is the Litigating Counterparty. Here, that is Apple, who has entered into the licence with the Third Party.
5. The interests of the Third Party arise because, as a Non-Litigating Counterparty to the licence, the Third Party has the benefit of the confidentiality provisions in the licence agreement (the “Licence”) which it has a legitimate interest to protect and preserve. That is why disclosure regimes in FRAND trials tend to include provisions entitling Non-Litigating Counterparties to be consulted on what is being disclosed and to intervene and object as necessary.
6. Entirely unsurprisingly, the orders in this case contain many and multiple provisions protecting confidential information. I do not need to set them out in

detail. There are several confidentiality rings into which relevant documents can be disclosed. There is also – more importantly for present purposes – precisely the sort of provision that I have just described, entitling the Non-Litigating Counterparty to object to disclosure of the Licence, and to be heard on this question.

7. In this case, Apple wishes to disclose into the confidentiality ring the Licence. The Licence is dated 11 February 2021 and is, as I have described, between Apple and the Third Party. The Licence contains the following confidentiality provisions under clause 8 (omitting the headings):

“8.1 The terms of this Agreement and all correspondence and information relating to this Agreement are strictly confidential. The Parties shall keep the terms of this Agreement, and all correspondence and information relating to this Agreement, strictly confidential and no Party shall now, or hereafter, disclose the same to any third party except

- (a) with the prior written consent of the other Party;
- (b) as may be required by applicable law, regulation or order of the governmental authority of competent jurisdiction (but for the avoidance of doubt) not including filings allowed but not required by any such law, regulation or order;
- (c) during the course of litigation or arbitration, so long as the disclosure of such terms and particulars is subject to the most highly confidential restrictions available to litigating party or parties involved in such arbitration, such restrictions are embodied in a court-entered or arbitration-entered protective order, limiting disclosure to outside counsel, and such disclosing Party provides the other Party written notice at least ten (10) business days prior to such disclosure;
- (d) in confidence to the professional, legal or financial counsel representing each such Party;
- (e) in confidence on terms no less protective than those contained herein to acquirers (including prospective acquirers) of Divested Patents solely to the extent reasonably necessary for explaining the scope of the releases, licences or covenants granted herein; or
- (f) in confidence to any party covered by the releases, licences or covenants granted herein save as to the scope of the releases, licences and covenants contained herein.

With respect to the foregoing (e), such disclosing Parties shall, to the extent legally permissible, provide the other Party with prior written notice of such applicable law, regulation or order, and use reasonable efforts to limit the disclosure in terms and conditions of this agreement, or other confidential information of such other Party to the information set forth in Annex B that is expressly required for disclosure in such instance and to obtain a protective order or other confidential treatment with respect thereto and comply with all legal requests of the other Party in connection therewith, in each case in accordance with the applicable law, regulations and orders.

- 8.2 Neither Party shall issue a press release, seek publicity or make any other public statement regarding this Agreement without the prior written approval of the other Party, including initiating or responding to an inquiry by the press concerning the other Party, its products or services or the agreement, its terms or negotiation. A Party that proposes to issue a press release or other public statement regarding this agreement must send such proposed release or statement to the other Party, who will review at least three (3) days in advance of the proposed release or statement, and must receive the written approval of such other Party prior to issuing such press release or public statement.”
8. By its application dated 26 May 2021, Apple seeks two forms of order in relation to the Licence. First, it seeks an order that the Licence as between Apple and the Third Party be provided for inspection to Optis in accordance with the terms of the confidentiality ring applicable. Secondly, and relatedly, it seeks an anonymity order for the preservation of confidentiality of the confidential aspects of this application, including the agreement and the identity of the Third Party.
9. Both aspects of this application are opposed by the Third Party. As regards the first aspect, the Third Party says that the release for inspection of the Licence should not be sanctioned by this court, and should instead be refused. As regards the second aspect, the Third Party says that there is no justification for an anonymity order in this case, whatever I say about the first aspect of the application. In short, the second aspect of the application is a matter that is moved not for the protection of the Third Party, but out of Apple’s own interests and concerns.
10. At first blush, the first aspect of this application appears to be a straightforward question of disclosure and inspection. On the one hand, that is exactly what it is, because what is being sought by Apple is exactly that: disclosure and inspection of the Licence. On the other hand, for reasons that I am going to go into, it seems to me that, actually, what is here being sought is something that is not really a matter of either disclosure or inspection, but something rather different. It is necessary that I unpack these rather difficult distinctions, and that is what I propose to do now.
11. Before I do that, however, it seems to me important that I articulate the generally well-understood principles as to how disclosure and inspection should work in the case of confidential documents. It is well understood that the price of litigation can often involve the production (to use a neutral term that is neither “disclosure” nor “inspection”) of commercially and other highly sensitive information by one party to the other. In order to operate a fair process, “inspection” is preceded by “disclosure”. Disclosure involves the identification of relevant documents by the disclosing party. It is inspection, which follows disclosure, that results in the receiving party actually seeing the document in question. Inspection does not follow in the case of each disclosed document. It may very well be that the receiving party does not want to see the document in question. Or, it may be, that the disclosing party objects to inspection. Disclosure is a necessary prior step both to inspection and to articulating objections, by the disclosing party, to inspection.

12. Production – to revert to my neutral term – of confidential but relevant material is often required in order to achieve a just outcome, and the interests of confidentiality in those circumstances take second place. Of course, the approach of the courts is far more nuanced than that, and the court must, in reality, conduct a careful balancing exercise to ensure both (i) a fair and proper due process, where the parties to the litigation have the relevant material to hand and (ii) the protection of legitimate interests of confidence.
13. The way the court does this is in multiple ways. One has to weigh, for instance, the importance of the production that is being sought. It is necessary to see just where the document fits in the case that is being articulated. Clearly, documents that are borderline relevant, and so technically producible, are less easily accorded inspection where the interests of confidence are major and cannot be protected in other ways.
14. Another approach involves protection of confidentiality by other means. Courts such as the Patents Court and the Competition Appeal Tribunal are well able to protect confidentiality through the use of confidentiality rings, through limiting access to certain documents to certain closely confined parties and, indeed, to the redaction of documents so that irrelevant but sensitive material is not seen. The tools that the court has are many and they are used, in cases such as this, with regularity.
15. What is required in these cases is, as I have said, a balancing exercise to work out whether the interests of relevance and proper process outweigh the interests of confidence, bearing in mind, on both sides of the equation, the various tools at the court's disposal to ensure that justice is properly done, having regard to those potentially conflicting interests. As a rider to this, it is important to understand that the disclosure process is undergoing a major review in this jurisdiction, that very much affects this balancing process. I am very conscious of the fact that there is, in the Business and Property Courts, a pilot scheme regarding disclosure which very much re-writes the old notion that a relevant document is automatically disclosed. That is no longer the law under this pilot. What one has instead is a far more targeted form of disclosure, which obviously pays due regard to relevance, but which does not, as in the old days, require disclosure of anything that satisfied the train of relevant inquiry of *Peruvian Guano* (i.e., *Compagnie Financiere du Pacifique v. Peruvian Guano Co*, (1882) 11 QBD 55). Over time, we have moved very far from that; and whilst it would probably be an error to regard the pilot scheme as the culmination of this process, it is certainly a very significant factor that needs to be weighed when considering disclosure and the interests of justice in the case, as against confidentiality and the interests of justice in the broader sense of preserving rights of confidence that exist, and exist for very good reason.
16. Turning back to this case, what we find here is that the party who, in this case, as the receiving party, is the beneficiary of the disclosure process so far the Licence is concerned – that is Optis and not Apple – is playing no part in this application. Obviously, counsel for Optis have known of the application: but they have not participated, and are entirely neutral on the application being moved by Apple. Indeed, counsel for Optis asked for – and received – my

consent to remove themselves from the (virtual) courtroom in which this hearing was conducted.

17. This is not, therefore, a case where the Litigating Counterparty is seeking disclosure of the Licence so as to benefit the other side to the litigation, and is seeking to have the interests of confidence of the Non-Litigating Counterparty overridden in order to enable another party to the litigation to have sight of the Licence. This is not that case.
18. Rather, this is a case where Apple, having possession of the Licence because, of course, they are a party to it, and knowing what it says, want to deploy it for their own purposes in the litigation in order to advance a comparables case on FRAND rates that they – Apple – wish to make. This is, therefore, not really an application which is being moved out of an interest of disclosure of a document or inspection of it. What, actually, this application is all about is to enable Apple to deploy the Licence with its own experts so as to advance its own interests in Trial E. Entirely understandably, Apple has taken the view that it needs to jump through the hoops of the disclosure process in order to be able to do so.
19. The reason that Apple must do so lies in the rather broad confidentiality provisions in clause 8.1, that I have already set out. These provisions preclude Apple from showing or deploying the Licence (that it has in its possession) to its own experts in order to frame its comparables case in Trial E. That is what underlies this application.
20. That, as it seems to me, is a very important factor in the balancing exercise that I need to undertake. Indeed, it seems to me that Optis's lack of interest in this application, and the Third Party's strong opposition to the same, are both very material factors.
21. Before I come to the balancing exercise, it seems to me that it is important, in the light of the wholesale objection that the Third Party made at the outset of this application, to at least regularise the disclosure and inspection regimes. It seems to me, for the reasons I have given, that disclosure is a very different matter from inspection.
22. It seems to me essential that the existence and broad nature of the Licence be formally disclosed to Optis (of course, Optis knows very well already, having seen the application, but the process is important) so that Optis at least knows (in a formally proper way, as part of the disclosure process) of the existence of the Licence and its broad nature. In this way, Optis can, if so advised, seek inspection of the Licence in due course.
23. Accordingly, it seems to me that disclosure must be made of the licence, and it must be made in these terms:

“A licence between Apple and [the Third Party], dated 11 February 2021, that covers [the Third Party's] 3G, 4G and 5G technologies.”

I should stress that when disclosure is made, the full and proper name of the Third Party will be inserted by Apple, in place of my square-bracketed reference

to “[the Third Party]”. However, I can see no reason at all why I should disclose the identity of the Third Party; and good reason not to, given Apple’s very firm objections to that disclosure.

24. That is a description – including the identity of the Third Party – which I consider alerts Optis, as the party receiving disclosure, of the nature of the Licence, and I stress that it is a form of words that counsel for the Third Party has approved on instructions from his clients. That disclosure, therefore, does not constitute any kind of breach of the confidentiality provisions in the Licence. It does not constitute a breach for two reasons:
 - i) First of all, it is not a breach because there exists the prior consent of the other party within clause 8.1. I make it clear, for the avoidance of doubt, that this consent needs to be reflected in a recital in the order consequential on this hearing, namely that the consent of the Third Party has been given. It seems to me that, given the provisions in clause 8.1, there should be a three-day delay between the making of this order (with the Third Party’s consent) and the disclosure of the Licence in the terms that I have described.
 - ii) Secondly, I want to make it clear, again, to ensure that Apple’s position is protected, that I am ordering disclosure in those terms. That, I think, means that there will be protection to Apple in the unlikely event that the Third Party were to say the disclosure should not be given. Given the consent that has already been forthcoming, that is highly unlikely, but I think that Apple are entitled to the benefit of a protection of an order of the court that disclosure in those terms be made.
25. That regularises the position so far as disclosure is concerned. It seems to me that the question of inspection does not, at this stage, arise at all. Optis will, on disclosure, have an entitlement to consider whether they want to see the terms of the Licence, i.e. inspect it. It seems to me that, to the extent that Optis are interested in seeing the Licence, that is a matter which needs to be considered in the light of Optis’ request for inspection – and the Third Party would have to be heard on that occasion also.
26. I turn, then, to the real substance of this application, which is this: should Apple be entitled to look at, or (more precisely) to show to their experts something which, according to the strict terms of clause 8.1, they are contractually precluded from doing? To my mind, that raises a balancing exercise similar but, in important respects, very different, to the balancing exercise that takes place on inspection.
27. It seems to me here that the question is not whether a party receiving disclosure has an interest in inspecting that disclosure. It seems to me that the question is whether I should attach weight to Apple’s undoubted desire to deploy this licence agreement as part of its FRAND comparables exercise. Clearly, the document can be shown to Apple’s external lawyers. That is consistent with the terms of the Licence and these lawyers have, indeed, already seen it. The point that Apple makes is that in order to advance, even to articulate, its case on comparables, showing the Licence to its external lawyers is not going to

advance matters very far. What Apple needs to do, in order to work out how far, if at all, it wishes to rely on the Licence, is run it under its experts' scrutiny to see what they say. That seems to me to be an entirely fair point. It does seem to me that an assessment of the significance of this Licence, in the context of Apple's comparables exercise, is one that can only be undertaken with the benefit of expert advice.

28. The question is whether, in framing their own case, Apple should be released from obligations of confidentiality that they have willingly entered into in a licence that postdates the disclosure regime in this litigation. As a counsel of perfection, what Apple should have done is discussed this problem with the Third Party when they were agreeing this licence in February 2021. I say "as a counsel of perfection" because I am sure that the license negotiating teams within Apple are very different to those who run this litigation. No doubt the left hand did not know what the right hand was doing.
29. Nevertheless, significant weight needs to be attached to the fact that this is an agreement, voluntarily entered into, which Apple now seeks to escape the clutches of. Mr. Scott, who appeared for the Third Party, put the point in somewhat emphatic terms. The way he put it was that Apple was seeking to breach the agreement before the ink on it was dry. I am not sure that I go as far as that. It is quite clear that Apple are actually not seeking to breach the agreement. What Apple are trying to do is to have validated, by this court, something that would otherwise be a breach. What Apple are doing is seeking to use the disclosure and inspection process, not to benefit Optis, but to benefit Apple.
30. I see nothing wrong with that. It seems to me that it is an entirely relevant consideration that I must bear in mind, that in order to advance its case in litigation a party is going to need to use documents in its possession or power or control which are subject to third party rights of confidentiality. I can put the point, by way of example, in the following way. Let us suppose that the Third Party – and, indeed, all of Apple's Non-Litigating Counterparties – had opposed the deployment, by Appeal, of all licences. That might very well amount to a considerable – and difficult to justify – fetter on Apple itself, which would (and I am speaking hypothetically) weigh heavily on a judge in granting an application to use this material (to describe the true nature of the position).
31. It would be an utterly unsustainable situation for this court to say, "Yes, you are trying to escape, through the disclosure process, a confidentiality obligation, and the court is not going to let you do that. You can disclose the documents to the other sides in the litigation, but you cannot use them yourself". That is clearly something which this court could not countenance. This court would not be prepared to force a party to fight a case with one hand tied behind its back.
32. But that is not this case. There is, quite significantly, I think, in this case, an earlier agreement between the Third Party and Apple, dated 2014, which is said by Mr. Scott on behalf of the Third Party to be the proper comparator for the purposes of Trial E (at least so far as licences between the Third Party and Apple are concerned). That, to be clear, is not accepted by Apple. But the position is

that Apple is well-able to deploy multiple comparator licences, including an earlier licence between Apple and the Third Party. There is here no root and branch objection to the use by Apple of all licences between Apple and Non-Litigating Counterparties.

33. In short, this is not a case where one has multiple licences which are withheld from use in litigation by third parties relying on confidentiality rights. We are talking here about a single licence agreement, which may or may not be extremely relevant.
34. It seems to me that the balancing exercise that I must undertake is as follows:
- i) Significant weight must be attached to the confidentiality obligations which one party (here Apple) has assumed in the Licence to the Third Party. In particular, the Licence was entered into after the disclosure process had begun. In short, these obligations were assumed in circumstances where the need to deploy this Licence in this litigation was known to Apple (at least as an organisation, and without going into questions of specific attribution of knowledge).
 - ii) Optis, as I have noted, has expressed no interest in seeing the Licence.
 - iii) I cannot be satisfied that the Licence is as relevant and important to the comparables as Apple say it is. Indeed, Apple could not itself articulate precisely how the Licence would fit into the process it was proposing to undertake. The fact is that the process of articulation of the case on comparables and on FRAND rates is in its early stages, and will only culminate in a presentation of case, including evidence, at the end of November of this year. By that stage, by my orders, both Apple and Optis will have put all of their cards on the table and will have articulated, with all the supporting evidence, exactly what their case, amongst other things, on FRAND rates, actually is. It follows that I am in no position to understand precisely how Apple is putting its comparables case. Apple may have a better understanding than me or Optis, but I accept that even they are in the early stages of working out what their case is. I do not consider that Apple can plausibly say more than that their experts would like to see the Licence in order to work out whether it may assist Apple's case. This is a very low order of relevance or materiality to the comparables process.
35. For all these reasons, I refuse Apple's application of Apple to seek to use the 2021 licence as of this moment. It seems to me that Apple must come with far more justification in order for me to override the clear and strict provisions of confidentiality that exist in clause 8.1, and which the Non-Litigating Counterparty to the Licence is asserting. However, whilst I am shutting the door pretty firmly, I am not absolutely closing it. I am prepared to entertain in the future an application (from Apple: Optis would be entitled to significantly more latitude) seeking (in effect) permission to deploy the Licence at some point in the future.

36. Ms. Demetriou, counsel for Apple, would say, at this point, that Apple cannot possibly put such an application together without showing the Licence to Apple's experts. In other words, I am placing Apple in a "Catch 22" situation, by indicating they may make an application in the future, whilst depriving Apple of the means of making it (namely, showing the Licence to the experts). Whilst there is something in this point, I do not think there is very much to it. The reason there is not very much to it is this: once Apple have come to grips with what their case on comparables actually is, their experts will be able to say how useful a 2021 licence of this (broad) sort covering 3G, 4G and 5G technologies actually would be. If there is to be a further application – and, for the reasons I have given, this should in no way be taken as an encouragement - I would expect a statement by an expert, supported by the usual undertakings that an expert gives when making a report, setting out why it is that this particular agreement is so important in the context of Apple's case that, as I say, Apple ought (in effect) to be released from the burdens and obligations of clause 8.1.
37. I also make it clear that were Optis to be seeking inspection of the Licence the position would, in my judgment, be different, and I would be minded to accede much more freely to the inspection of the Licence, albeit no doubt in redacted terms, into the relevant confidentiality ring.
38. In any event, the first aspect of Apple's application is refused.
39. I then turn to the second aspect, the anonymity order. I can deal with this aspect rather more quickly. I have, quite deliberately, avoided using the true name of the Third Party in this judgment. That is because even names can be – and from Apple's point of view, in this case, are – confidential. It seems to me that on the one occasion where I have used the name of the Third Party (paragraph 23 above) it is appropriate simply to refer to the "Third Party", although the disclosure statement will be in different terms. That is because, where the due process of justice is not prejudiced – as here – Apple are entitled not to have the litigation create adverse consequences beyond those that are unavoidable or inevitable.
40. Because of the absence of prejudice to the due process of justice, I am entirely satisfied that this redaction to the judgment is appropriate. What I am not going to do is make an order for anonymity. The reasons for this, it seems to me, are quite clear. Whilst the court is prepared to take certain steps, almost automatically (but only for good reason), to protect matters of confidence – they include confidentiality rings, redaction, considering very carefully whether disclosure should be ordered at all – a positive order requiring third parties to the litigation not to say a particular name or use particular information is, as it seems to me, something that requires justification going well beyond the mere question of commercial confidentiality. There is, I am afraid, a certain price that has to be paid in participating in litigation, even as a defendant, and that price is the fact that the justice process involves public scrutiny so that there can be public confidence in its processes. Whilst certain steps are justifiable in order to ensure that the pain of litigation is minimised and confidential information is protected, it seems to me that it goes far too far to impose an anonymity order, simply to protect commercial confidentiality without more. That is as far as Apple's position goes. They say that they have a right to confidence in not just

the terms of the Licence but also in terms of the name of the counterparty, the Third Party. Whilst I can understand the basis for this contention, I make no finding in regard to it. What is clear is that even if soundly based, which I am prepared to assume for present purposes only, this interest lacks altogether the weight necessary to justify buttressing it by an anonymity order. I decline to make the order simply because it has been insufficiently justified in terms of weight of factors pointing in favour of making it.

41. But I go further, and say that, actually, an anonymity order in this case would be a grave potential inconvenience to the parties, third parties, and to the court. The fact is, as we all know from confidentiality rings, that it is very easy to misspeak and mention a name or a term in an agreement in circumstances where one should not because persons are in court who should not hear a word or a name or a rate. It seems to me that the anonymity order is likely to impose on all parties and the court a difficult burden of watching their tongues and, indeed, watching their word processors, when conducting this litigation. It seems to me that that is a further reason to refuse to make an anonymity order, which I am afraid I do not see as justifiable as a matter of basic principle.
42. So, for all those reasons, the second aspect of the application is also refused.



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**

HP-2019-000006

Mr Justice Marcus Smith

1 July 2021

B E T W E E N:

(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 LIMITED
(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

ORDER

UPON the Claimants' application by notice dated 4 June 2021 and the Defendants' applications by notice dated 10 June 2021;

AND UPON the Defendants' agreeing to provide a response to the first request of the Claimants' Restricted Confidential Part 18 Request for Further Information dated 2 June 2021;

AND UPON Trial E and the case management thereof having been docketed to the Honourable Mr Justice Marcus Smith (the "Docketed Judge");

AND UPON a case management conference being held on 1 July 2021 before the Docketed Judge;

AND UPON reading the Claimants' updated Draft Order served with their skeleton on 30 June 2021;

AND UPON hearing counsel for the Claimants and counsel for the Defendants;

IT IS ORDERED THAT:

Variation of existing Trial E Directions

1. Save as consistent with the following paragraphs of this order, the case management directions given in the orders listed at appendix A hereto in respect of Trial E in these proceedings are hereby varied.
2. The orders concerning disclosure herein are without prejudice to the parties' ongoing obligation to disclose known adverse documents.

The Parties' Positive Cases

3. The parties shall, by 26 November 2021, set out their positive cases in respect of the issues to be determined at Trial E. Such positive cases shall be set out by way of:
 - a. Position statements stating the parties' cases; and
 - b. The written evidence of fact and expert opinion relied upon in support of the same.
4. The parties shall, by 26 November 2021 provide disclosure of documents upon which they rely in support of their said cases and any known adverse documents in respect thereof, in each case insofar as such documents have not already been disclosed.
5. The parties shall, by 29 October 2021, identify by name, job title and field of expertise (where applicable) the witnesses on whose evidence

they anticipate they will rely upon pursuant to paragraph 3(b) above. CVs shall be provided upon request.

Requests for Information

6. The parties may, by 28 January 2022, request from the other more information concerning the positive cases set out pursuant to paragraph 3 above including by way of requests for disclosure and inspection of documents. Such requests must be made in writing and must concern matters reasonably necessary for the requesting party to understand the case of the other and/or to advance their own case.
7. If a party fails to respond to a request within a reasonable period or declines to provide the answer and/or disclosure and inspection requested, the requesting party may make an application to the Court for directions (as to which see paragraph 10 below).

The Parties' Responsive Cases

8. The Parties shall, by 25 March 2022, set out their responsive cases in respect of the positive cases set out pursuant to paragraph 3 above. Such responsive cases shall be set out by way of:
 - a. Responsive position statements stating the parties' responsive cases; and
 - b. The written evidence of fact and expert opinion relied upon in support of the same.
9. The parties shall, by 25 February 2022, identify by name, job title and field of expertise (where applicable) of any witnesses on whose evidence they anticipate they will rely upon pursuant to paragraph 8(b) above (if not already identified). CVs shall be provided upon request

Ongoing Active Case Management

10. The parties may, by application in writing to the Docketed Judge on 3 days' notice, apply for further directions and or resolution of matters arising out of compliance with this order, for determination on the papers or at a short hearing to be held at the start or end of the court day, at the Court's convenience and direction. Any matter deemed not appropriate for such determination (whether upon a representation by the parties to that effect or of the Court's own volition) shall be listed to be heard as an application by order.
11. There shall be listed 3 further case management conferences as follows:
 - a. For 1 day, in early October;
 - b. For 3 days, in early December; and
 - c. For 3 days, in early May.

Trial

12. The listing of Trial E shall be varied as follows:
 - a. The week commencing 6 June 2022 shall be set aside for the Court's pre-reading.
 - b. The trial shall take place in 20 sitting days over the 5 weeks between 13 June 2022 and 15 July 2022, with the Friday of each week taken as a non-sitting day.

Matters not Affected by the Directions in this Order

13. The existing disclosure and inspection regime set out in the Order of Mr Justice Birss dated 14 December 2020, the Order of Mr Justice Meade dated 25 February 2021 and the Joint Disclosure Review Document filed on 19 March 2021 shall not be affected by this order.

The parties shall continue to provide disclosure and inspection as required by the aforementioned orders by 28 July 2021.

14. The trial Directions set out in paragraphs 27-34 of the Order of Mr Justice Birss dated 14 December 2020 shall not be affected by this order. The parties shall continue to prepare trial bundles, skeleton arguments and trial technology according to that order, and the PTR listed according to the said order shall remain effective.
15. The confidentiality regime set out in the Order of Mr Justice Meade dated 9 June 2021 shall continue to apply to materials already provided by and to the parties. Such regime shall also apply to any materials provided by or to the parties in compliance with this order.
16. The standing CPR 31.22 order set out in the Order of Mr Justice Birss dated 14 December 2020 shall not be affected by this order. Materials that have been disclosed, read to or by the Court, or referred to at a hearing which has been held in public, may not be used other than in these proceedings without further order of the Court.

The Parties' Applications

17. The parties' applications recited above otherwise remain undetermined, save for paragraphs 2 and 6 of the Claimants' application notice of 4 June 2021 and paragraphs 1 and 3 of the Defendants' application notice of 10 July 2021.

General

18. This order shall be served by the Claimants on the Defendants.
19. Costs in the case.

Service of this Order:

The Court has provided a sealed copy of this order to the serving parties solicitors;

EIP, Fairfax House, 15 Fulwood Place, London WC1V 6HU; Ref: 720.LM(GB)21.

Appendix A

1. Order of Mr Justice Morgan dated 5 February 2020
2. Order of Mr Justice Birss dated 2 July 2020
3. Order of Mr Justice Birss dated 2 December 2020
4. Order of Mr Justice Birss dated 14 December 2020
5. Order of Mr Justice Meade dated 25 February 2021
6. Order of Mr Justice Meade dated 9 June 2021