Neutral Citation Number: [2021] EWHC 2694 (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: 05/10/2021

Before:
MR. JUSTICE MEADE

- -

Between:

(1)OPTIS CELLULAR TECHNOLOGY INC
(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 **Claimants**
(A company incorporated under the laws of the Republic of Ireland)
- and -
(1)APPLE RETAIL UK LIMITED
(2)APPLE DISTRIBUTION INTERNATIONAL
(A company incorporated under the laws of the Republic of Ireland)
(3) APPLE INC **Defendants**
(A company incorporated under the laws of the State of California)

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MS. SARAH FORD QC, MS. ISABEL JAMAL and MS. JENNIFER DIXON (instructed by **EIP Europe LLP and Osborne Clarke LLP**) for the **Claimants in Trial F**
MS. MARIE DEMETRIOU QC, MS. SARAH LOVE and MS. LIGIA OSEPCIU (instructed by **Wilmer Cutler Pickering Hale and Door LLP**) for the **Defendants in Trial F**
MR. FRED HOBSON (**instructed by Enyo Law LLP**) for **Mr. Michael D. Friedman (of Optis)**
MR. EDWARD CRONAN (instructed by **Bird & Bird LLP**) for **Sisvel and Mr. Mattia Fogliacco**

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Approved Judgment

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

1. The hearing before me today, and this judgment, concerned and concerns a reported unauthorised disclosure of the result of what, in this litigation, is called Trial F. In this judgment, I will use "leak", interchangeably with "unauthorised disclosure".

2. Before me today, Optis is represented by Ms. Ford QC, and Ms Jamal; Apple by Ms. Demetriou QC, with Ms Love and Ms Osepciu; Sisvel, whose role I will explain when I come to it, by Mr. Cronan; and Mr. Friedman, the managing director of Optis, who is separately represented, for reasons that will become apparent, by Mr. Hobson.

3. It is right to record, at the outset of this judgment, that the solicitors particularly involved are known to me personally, and have been for a long time. That is Mr. Moss of EIP, Mr. Trenton of WilmerHale, and Ms. Mutimear and Mr. Vary of Bird & Bird, who act for Sisvel. That will have been known to all of the parties at all times, and is not uncommon in patent matters, but I think it is right to acknowledge it explicitly in this case, where the conduct of the legal representatives, and in particular EIP, is under scrutiny. I also know Ms. Rajendra of Osborne Clarke (who also represent Optis) quite well, although my acquaintance with her does not go back quite as far.

4. Trial F took place before the long vacation, and it concluded at the end of July. At the very end of the hearing I said that I would give judgment in September, if possible. My draft judgment was provided to the parties on the late afternoon of 20th September 2021, and on the morning of 22nd September I received an e-mail from Mr. Moss of EIP, which said as follows:

> Dear Judge
>
> I am writing to advise you that yesterday evening I was informed by a senior member of the management at Optis that he had just been contacted by a third party who “congratulated” him on the outcome of Trial F. Accordingly it would appear that there has been a breach of the confidentiality directions contained in the draft judgment which you circulated earlier this week.
>
> I have checked with all members of the Claimant’s legal team and they have each advised me that they are not aware of any breach of these confidentiality directions. In addition when I contacted the Claimant’s representatives to advise them as to the outcome of the Trial, and also when I sent them the draft judgment, I made it absolutely clear that the judgment and its contents were strictly confidential and could not be disclosed outside of the Claimants until the formal hand down on next Monday, 27 September. I am advised by the Claimants that they have adhered strictly to this direction. I am also advised that when contacted by the third party, my client responded to the effect that the judgment was confidential and that they (the third party) should not be aware of it or its contents.
>
> Please indicate what, if any, further steps you would wish us to take in relation to this issue.
>
> A copy of this email is being sent to the Defendants’ representatives.

5. I will go further into the detail of what then happened later in this judgment, but suffice to say for the moment that over the next few days I directed that certain enquiries should take place. I did not constrain the parties from making other enquiries, but I did ask them to look into certain things which, I have to say, I thought were fairly obvious, but worth spelling out none the less.

6. In the course of those enquiries, I was informed by EIP that the third party referred to in Mr. Moss's e-mail of 22nd September was Sisvel. Sisvel is a current litigant in SEP patent infringement proceedings in the Patents Court (represented by Bird & Bird), and known to me and, as will become apparent, to the other parties. I ought also to record that Unwired Planet (and Sisvel, to a much more limited extent) are past clients of mine, when I was in practice at the Bar. The parties have been able to make observations about my conducting the trials in these proceedings given my past relationship with Unwired Planet, but in the end no objection was made. I have never met Mr Friedman of Optis or Mr Fogliacco of Sisvel (to whom I refer below) and I did not know who they were prior to the present situation.

7. As of today, it is accepted, on the part of Optis, EIP and Optis' managing director, Mr. Friedman, that there was, in fact, no leak at all, or that if there was a leak it was Mr. Friedman who, albeit he says as a result of a misunderstanding, communicated the result of Trial F to Sisvel, and not the other way around.

8. In between 22nd September, when I was first informed (I should rather say, misinformed), and today, there has been a massive waste of time and money, and much completely unnecessary heartache and worry. It was almost inevitable, once a potential leak was reported to me, that everybody who saw the draft judgment was going to be the subject of enquiries, which could be painful and uncomfortable, and, indeed, on the strength of Mr. Moss's evidence, have been.

9. Despite the fact that it is now clear that there was no unauthorised disclosure, or that if there was it was outbound from Optis, and not inbound from Sisvel, I have thought carefully about what to do, and I do not consider that the fact that it has been established that there was not a leak is good enough to let the matter lie there. It needs articulating what happened, so that lessons can be learned for the future, to indicate my disapproval of what has happened, and to make clear, publicly, those people, which is the vast majority of people involved, to whom it is clear that no blame attaches. Hence this judgment.

10. The draft judgment in Trial F had the following notice on it (my clerk's email address is omitted for this judgment but was included as sent):

IN CONFIDENCE

This is a judgment to which the Practice Direction supplementing CPR Part 40 applies. It will be handed down remotely on 27 September 2021 at 10.30am. This draft is confidential to the parties and their legal representatives and accordingly neither the draft itself nor its substance may be disclosed to any other person or used in the public domain. The parties must take all reasonable steps to ensure that its confidentiality is preserved. No action is to be taken (other than internally) in response to the draft before judgment has been formally pronounced. A breach of any of these obligations may be treated as a contempt of court. The official version of the judgment will be available from the Courts Recording and Transcription Unit of the Royal Courts of Justice once it has been approved by the judge.

The court is likely to wish to hand down its judgment in an approved final form. Counsel should therefore submit any list of typing corrections and other obvious errors in writing (nil returns are required) to the clerk to Mr Justice Meade, via email at [*omitted*], by 4pm on Thursday 23 September 2021, so that changes can be incorporated, if the judge accepts them, in the handed down judgment.

11. It is in a fairly standard form, apart, possibly, from the timing given for corrections and the the hand down, and I will return to that at the end of my judgment.

12. Practice Direction 40E, concerning reserved judgments, says the following:

> *Availability of reserved judgments before handing down*
> 2.1
> Where judgment is to be reserved the judge (or Presiding Judge) may, at the conclusion of the hearing, invite the views of the parties' legal representatives as to the arrangements made for the handing down of the judgment.
> 2.2
> Unless the court directs otherwise, the following provisions of this paragraph apply where the judge or Presiding Judge is satisfied that the judgment will attract no special degree of confidentiality or sensitivity.
> 2.3
> The court will provide a copy of the draft judgment to the parties' legal representatives by 4 p.m. on the second working day before handing down, or at such other time as the court may direct.
> 2.4
> A copy of the draft judgment may be supplied, in confidence, to the parties provided that –
> (a) neither the draft judgment nor its substance is disclosed to any other person or used in the public domain; and
> (b) no action is taken (other than internally) in response to the draft judgment, before the judgment is handed down.
> 2.5
> Where a copy of the draft judgment is supplied to a party's legal representatives in electronic form, they may supply a copy to that party in the same form.
> 2.6
> If a party to whom a copy of the draft judgment is supplied under paragraph 2.4 is a partnership, company, government department, local authority or other organisation of a similar nature, additional copies may be distributed in confidence within the organisation, provided that all reasonable steps are taken

> to preserve its confidential nature and the requirements of paragraph 2.4 are adhered to.
> 2.7
> If the parties or their legal representatives are in any doubt about the persons to whom copies of the draft judgment may be distributed they should enquire of the judge or Presiding Judge.
> 2.8
> Any breach of the obligations or restrictions under paragraph 2.4 or failure to take all reasonable steps under paragraph 2.6 may be treated as contempt of court.
> 2.9
> The case will be listed for judgment, and judgment handed down at the appropriate time.

13. I have also been referred to *DPP v P (No 2)* Practice Note 2007 EWHC Civ 1144 (Admin) which concerned an earlier version of the Practice Direction, and my attention has also been drawn to a relevant part of the Patents Court Guide, paragraph 18, which says that a confidential draft judgment should only be shown to people for the purpose of taking instructions.

14. There was wide communication of the draft judgment in the present case, and in retrospect it is possible to say that it was wider than necessary, but that is not the cause of the problems that have occurred, and although I will say a little bit about the practice of disseminating draft judgments at the end of this judgment, I make no criticism of any of the people involved over the number of recipients of the draft judgment, in itself.

15. The reasons for the practice of giving judgments in draft are many. From the Court's point of view, it enables the correction of typos and it also enables corrections of more substantive errors. Speaking personally, I appreciate the opportunity to make these corrections. I do not like to send judgments out with typos in. I catch as many as I can, but I can never be sure of catching them all, so I am grateful when my attention is drawn to others. When there is a more substantive error, I appreciate the opportunity to consider whether it is an error and whether to correct it. I do not think there was any truly substantive error in my judgment in Trial F. Of course, Apple are appealing the result, but what I mean is I do not think there was any substantive error of undisputed fact. I was, for example, asked to point out that my judgment in Trial B is, in fact, under appeal in relation to the estoppel issue, which I had not previously been aware of, because I had not been asked for permission to appeal on that. In any event, I was asked to correct it because Apple subsequently sought permission to appeal from the Court of Appeal and I was happy to do that. There were a couple of other instances where the parties thought that I could do better justice to the way that they had expressed their submissions, and likewise I did that in some instances where I though the point made was a fair one. So those are two of the benefits for the court of the provision of draft judgments. Personally, I find the practice helpful.

16. For the parties, there are a number of benefits, a major one of which is to prepare to deal with the consequences of the judgment when it is made public,

because steps in the litigation have to be taken, permission to appeal has to be considered, and the presentation by the winning and losing litigants of the judgment to their investors and other stakeholders has to be considered.

17. All of this requires a relationship of trust in both directions. One of the issues with draft judgments is that it can be easily appreciated that giving away the result is all too easy to do. The result of a trial can be communicated in a single word, usually, and it can also be communicated by nothing more than the mood of the winning or losing party or representative, if they are asked. This requires a great degree of caution. Speaking for myself, I have never, in fact, come across a leak of the result of a draft judgment, but I think all practitioners know the care that is needed, for reasons I have just given.

18. It is also right to say that in many types of litigation, and in intellectual property litigation in particular, it is not just draft judgments that contain confidential information. There is also confidential disclosure about, for example, the alleged infringer's product or process, and in SEP litigation confidential disclosure of commercial information such as, in particular, comparable licence agreements. What I have just said is true of this litigation.

19. I have, in the course of my practice at the bar and my short time on the bench, come across the occasional accidental breach of confidentiality provisions relating to confidential disclosure. When that happens, what is essential is to find out what happened with care, urgency and rigour, and to address it, and to make clear and complete disclosure to the court and the opposing party (this does not extend to privileged information and EIP has justifiably redacted privileged sections of its communications with Optis from the evidence). This can be embarrassing and painful, but it is essential. It is the obligation, in my view, of a party, as recipient of the confidential information, to do this if there is believed to have been a breach. It has often been observed, but perhaps not sufficiently thought about, that for this reason, among others, the receipt of the other side's confidential information is a burden as well as a benefit. All these considerations apply to draft judgments if there is a (suspected) leak.

20. I return to the chronology of what happened in this case. I have said already that my draft judgment was provided to the parties by e-mail late in the afternoon of Monday, 20th September. In terms of the Practice Direction, the judgment was not expected to attract the highest degree of confidentiality, because, so far as I understood it, although it was said by both sides to be an important judgment for SEP/FRAND litigation, and the amounts of money at stake were said, in particular by Optis, to be large, the result was not price-sensitive because Optis is not publicly traded and Apple is a sufficiently large company that even the amounts of money being talked about were, I assume, not regarded as material. There was, therefore, the standard warning on the front of the judgment.

21. The judgment went to barristers' clerks and thence to the parties' solicitors. I am told in evidence that EIP called Optis and e-mailed Optis, and the e-mail in question contained two warnings in bold text, one of them in red, pointing out the confidentiality of the judgment.

22. On Tuesday 21st September, one of the counsel for EIP told another barrister (not acting for Optis) that hand-down would be on 27th September. I do not regard the date of a hand-down to be confidential, and I do not regard either of those counsel as having done anything even arguably wrong in discussing the date of the hand-down, but I will come back to the practice in this regard at the end of my judgment. Quite apart from anything else, I had of course, as I have said already, said at the end of the trial that I would give judgment in September, and the days of September were ticking down to the month's end.

23. That day, Bird & Bird, who I have already said represent Sisvel, were holding calls and conferences in other matters, and were told by the second barrister to whom I have already referred that the hand-down would be on 27th September. That was passed on to Mr. Fogliacco, who is the CEO of Sisvel. As a SEP patent owner Sisvel had an obvious interest in the result.

24. Mr. Fogliacco sent an e-mail to Mr. Friedman (with whom he was friends and a commercial contact), which is one of the most central documents in this matter, and it was a short e-mail. It said:

"*Hi Micheal (sic)"* [that is Mr. Michael Friedman], *"I hear Monday will be a big day for you guys. Keeping my fingers crossed! Best, M.*"

25. That is M for Mattia Fogliacco. The subject of the e-mail was "Monday: big day!"

26. Almost immediately, Mr. Friedman called Mr. Fogliacco on WhatsApp, and Mr. Fogliacco's uncontradicted evidence is that it was very rare for him to receive calls on WhatsApp. He has provided a call log, which appears to justify that. Mr. Friedman's account is that he had assumed, from Mr. Fogliacco's e-mail, that Mr. Fogliacco already knew the result, and Mr. Friedman says that is because he did not understand that it was possible to know when a hand-down would be without knowing the contents. I have considerable difficulty with this explanation because Mr. Fogliacco's e-mail is forward-looking, and quite clearly expresses, by saying, "Keeping my fingers crossed", that Mr. Fogliacco did not know the result but was hoping that Optis would win because that would be good for Sisvel.

27. In any event, very shortly, Mr. Friedman called Mr. Fogliacco. It is critical to what I am going to say that although there was an incoming e-mail from Mr. Fogliacco, as I have described, the call that took place was outgoing from Mr. Friedman to Mr. Fogliacco. It is, in my view, entirely unacceptable that Mr. Friedman phoned Mr. Fogliacco, whatever his appreciation of the situation. If he thought Mr. Fogliacco knew the result, then Mr. Friedman's proper course was to contact Optis' lawyers, and if he thought that Mr. Fogliacco did not know the result, then he had no business contacting him at all in a conversation that was bound to touch on the outcome of the case.

28. The embargo on draft judgments does not prevent a party who knows the result from speaking to other commercial partners, of course, but to undertake voluntarily a communication which is bound to be focused on the result of a trial is unacceptable.

29. Mr. Friedman followed up the call by reporting to Mr. Moss by text. The texts were as follows.

    i) Mr. Friedman said, "*Sisvel just called to congratulate us on your win. Apparently Meade's office leaks like a sieve*".

    ii) Mr. Moss responded, "*I cannot believe that! Nor can I believe it was Meade's office!*"

    iii) Mr. Friedman said, "*Who knows, what I was told. Said he heard from lawyers that are friends of Meade*".

    iv) That took place at 6.12 on the Tuesday, English time, and some hours later, as 23.12 Mr. Moss replied, "*Having discussed this with Isabel* [Jamal, Optis' counsel], *we feel we are obligated to bring this to the attention of the judge. Just going to say Optis contacted by third party and it is apparent there has been a breach, without naming names*".

    v) Mr. Friedman replied, "*Whatever you need to do. We were contacted. We have clean hands*".

    vi) Mr. Moss said, "*Absolutely, but if it comes out later and the judge finds out we know and did not tell him, we do not look good*", and Mr. Friedman replied, "*Do what is right*".

30. It is accepted by Mr Friedman that the statement, "*Meade's office leaks like a sieve*", was not something that was said by Mr. Fogliacco; it was, Mr Friedman claims, his interpretation of the tone of what happened. Mr. Fogliacco, unsurprisingly, says that he did not say that, and I believe him.

31. It is important, in my view, to observe that Mr. Moss's first thoughts were that he did not believe a key aspect of what he was being told, namely where the leak had come from.

32. There was no call, telephone call, no voice call, as I understand it, between Mr. Friedman and Mr. Moss at this stage. There was a discussion on the morning of the 22nd, according to Mr. Moss's 23rd witness statement but, as I understand it, that must have been after the initial e-mail to me, to which I have already referred, and quoted.

33. Mr. Moss's initial e-mail to me did not name Sisvel. It did not mention the assertion that the leak had been from my office. It did not mention that he, Mr. Moss, did not believe what he had been told. Furthermore, the e-mail contains the following sentence: "*I am also advised that when contacted by the third party, my client responded to the effect that the judgment was confidential and that they (the third party) should not be aware of it or its contents*". Mr. Moss says in his evidence that he has provided for the purposes of this hearing that that was an assumption that he had made, and that he should not have made the assumption. However, I have to say that the sentence does not disclose that it was an assumption. It gave me the impression, as I would expect to have been the case, but in fact was not, that

Mr. Moss had positively been told by Mr. Friedman that that is what he had aid to the unnamed third party.

34. At this point, it is fair to record that Mr. Moss did not know about the e-mail from Mr. Fogliacco, and did not know that the call that had taken place, the voice call on WhatsApp, had been initiated by Mr. Friedman. However, of course, Mr. Friedman did know both those things.

35. I pause at this stage in the chronology to make a few observations. First, all of the unpleasantness that has followed could have been avoided if a careful call had taken place between EIP and Mr. Friedman; if Mr. Friedman had given the situation any serious attention; and if the crucial documents, of which there are only two -- the e-mail and the WhatsApp log -- had been brought to EIP's attention,

36. Second, there is now general agreement about what happened on the call. The agreement may sound very strange, but I am satisfied that it is the best approximation to the truth that can be achieved and, in particular, I accept Mr. Fogliacco's account. Mr. Fogliacco is clear that he did not know the result of the judgment going into the call, and that the result of the judgment was not communicated to him during the call. This is consistent with the careful account that was provided in due course, as I will come to, by Bird & Bird. Mr. Friedman now says that the two gentlemen must have been at cross-purposes, and that whilst he thought that Mr. Fogliacco knew the result, that may have been lost in the noise, and that whilst he -- that is Mr. Friedman -- probably did say the result or convey it by his tone, Mr. Fogliacco was treating a positive outcome of the Trial for Optis as hypothetical, and Mr. Friedman was treating it as actual. In the tangled circumstances of this history, as I say, I think this is the best explanation that can be had. So far as there is a discrepancy between Mr. Fogliacco and Mr. Friedman about what happened on the call, I accept Mr. Fogliacco's evidence, mainly because he has been reliable in everything else he said, and because of the much greater care with which his account was assembled than that of Mr. Friedman.

37. One thing that was explained to me during the hearing today is that Mr. Friedman has a number of different relevant business interests, and Mr. Fogliacco was focusing on a different one, potentially, than the direct impact on mobile telecoms SEP licensing that Trial F covered.

38. Third, my impression of the state of play at EIP at this stage is that they were misinformed by Mr. Friedman, in a very unfortunate way, but that Mr. Moss was very rattled by what had happened and made decisions which have turned out to be bad ones. What was needed, and I think obviously so, was a careful discussion with Mr. Friedman. That is what I would have expected in the case of accidental disclosure of confidential information, and that is my experience of situations where it has happened. I think it would have been obviously better to tell me everything that Mr. Moss knew straight away, including Sisvel's identity, and the distasteful suggestions that had been made about the leak from my “office” or through my “friends”. One of the reasons why I say it is obvious that this should have been made apparent to me is that it would

most certainly have affected the directions that I gave about looking into the matter.

39. I acknowledge that the decision that I had to be informed was undoubtedly a correct one, but its execution was seriously mishandled.

40. In any event, I gave some directions on 22nd September, and that included for Mr. Moss to prepare a list of each person in the legal team, and at Optis, who were known to have been told about the draft judgment. This is one instance where I would have given a different direction if I had been aware of what had been said. I drew attention to the fact that Mr. Moss's e-mail did not name the person at Optis who was contacted or the third party, and I asked Mr. Moss to explain why not.

41. Mr. Moss replied in fairly short order, and he identified Mr. Friedman. Mr. Moss said that he had not yet spoken to Mr. Friedman about this (as I have said, they did talk later on that morning) because he is located in the United States. Mr Moss' email said "*He*" -- that is Mr. Friedman -- "*informed me by text. His text said the contact was by a representative of Sisvel*", but Mr. Moss did not know the name of the person concerned.

42. I did not spell it out at that stage, but I assumed that contact would be made by either EIP or Optis directly to Sisvel to try to address the situation and find out what had happened and possibly to stem any further disclosure. Later, it was pointed out to me, by Bird & Bird, through a letter that of 1 October they sent to EIP, that EIP was well aware that Bird & Bird acted for Sisvel in FRAND SEP matters in litigation taking place in London because EIP had asked Bird & Bird for the skeletons in that case.

43. In any event, I also had an interchange with Apple (I ought to say that all communications were copied to all parties) who started looking into the matter and, in due course, late on the 22nd, Mr. Trenton of Apple confirmed to me that no one had perpetrated a leak from the Apple side.

44. It has been suggested by EIP on behalf of Optis that I could have considered bringing forward the hand-down to prevent anybody who knew the result having an unfair advantage. I did actively consider this but I thought it was unfair to Apple to do it because Apple, as not entirely the losing party, because it won some arguments, but the one for whom there was more likely to be a commercial difficulty from the judgment, was entitled to the time that I had given to prepare to deal with the consequences of the judgment in the way that I described earlier.

45. In any event, unfortunately, communications went rather slowly because Mr. Moss kept having to go back to Mr. Friedman for instructions, and there was also the time difference to deal with. This was no excuse for not having a long and detailed discussion with Mr. Friedman to find out exactly what had happened. Mr Friedman said (through Counsel at the hearing before me) that there was not a detailed discussion until 29 September. EIP and Osborne Clarke disagree and say it was earlier. It is odd that they cannot even agree

about this, and perhaps it depends what one means by "detailed", but in any event it was much later than it should have been.

46. I then gave further directions on the 23rd September, but I said that it seemed clear there had been a breach of the conditions of confidentiality. As it turns out, that was wrong, although, in my defence, at the time I did not even turn my mind to the possibility that a leak would be reported to me when there simply had not been one. However, I said that whilst it was serious, it might have been accidental. I directed that the partners at each firm should make a witness statement, listing who had been aware of the judgment, and requiring each such person to be asked if they knew how the leak had taken place. This is another juncture at which my directions would have been different if I had been given the complete story on the 22nd September.

47. I said at paragraph 6 of my directions that I awaited hearing from Mr. Moss, following his earlier e-mail, when he had not spoken to Mr. Friedman. I said that I imagined consideration would have been given to asking the individual at Sisvel how they knew and, if so, then I would like to know the answer. Mr. Moss gives evidence in his 23rd witness statement about a call that took place with Mr. Friedman at this time. I think my statement that I thought consideration would have been given to asking an individual at Sisvel was a little bit understated. I certainly expected that that was very likely to have happened.

48. The next important event, in my view, is one of the most serious in this whole sorry tale because, on 24th September, I received a further e-mail from Mr. Moss:

> Dear Judge
>
> I am taking the step of sending this to you direct rather than through the usual channel for reasons which will become apparent. Please note also that this email is being copied only to Mr Trenton at Wilmer Hale and Ms Rajendra at Osborne Clarke.
>
> I am responding to point 6 of your email of yesterday. The individual at Sisvel who contact Mr Friedman is Mr Mattia Fogliacco, who I understand is the CEO of Sisvel.
>
> In your email you said "I imagine consideration will have been given to asking the individual at Sisvel how they knew, and if so then I would like to know the answer." I myself have not spoken to Mr Fogliacco; I have no acquaintance with him and have never spoken or met him. However, I understand from Mr Friedman that when Mr Foglacco called to congratulate Optis on the outcome of Trial F, he, Mr Friedman, did ask Mr Fogliacco the source of his information. The response which Mr Friedman received was that Mr Fogliacco "heard from lawyers that are friends of Meade".
>
> In this connection I attach to this email a screen shot from my phone timed at 6.12 pm on Tuesday which sets out my exchange of texts with Mr Friedman when Mr Friedman informed me what had happened.
>
> I have subsequently spoken with Mr Friedman and he has confirmed that he did not obtain from Mr Fogliacco any other information or details regarding the source of the information.

> As regards the rest of your email we have noted the directions given and of course Optis has no objections to them. Ms Rajendra and I will deal with the issues further in the witness statements which you have directed we should provide.
>
> However, there is one further matter which Mr Friedman has asked me to make clear to you immediately. He, and to the best of his knowledge, his colleagues at Optis, have not made any outbound communications in relation to the draft judgment since I notified them of it on Monday. The call which has given rise to this current situation was an inbound call from someone with whom Mr Friedman regularly speaks on matters of mutual interest, for obvious reasons, and who is also a friend, which call Mr Friedman accepted in the normal manner, not knowing in advance what was going to be said.
>
> Yours sincerely
>
> Gary Moss

49. This e-mail provided me with some, but not all, of the text messages passing between Mr. Moss and Mr. Friedman on the 21st. It cut off with the last message at 23.12, where Mr. Moss said that he and counsel felt obligated to tell me. It, therefore, drew to my attention for the first time the statements by Mr Friedman about my office leaking like a sieve and so forth.

50. There are two matters about this e-mail that I feel particular discomfort over. The first one is that, unlike every other e-mail up until that point and, indeed, pretty much every e-mail that I receive from any party ever about litigation, this e-mail was sent direct to my email address and not copied to my clerk. The e-mail began by pointing out that that was an unusual step. In the context, I could only assume that that was being done because the attached texts accused my "office", which in context could really only have meant my clerk, of perpetrating the leak and I was being invited to consider what to do about that without alerting my clerk.

51. Mr. Moss, in his evidence, says that that course was taken to limit the number of people who knew about the texts between Mr. Friedman and Mr. Moss, because of their sensitive content. That is certainly not how I perceived it. Mr. Moss says there was no intention to point the finger at my clerk. I suppose I can only accept that, but I think a moment's thought would have allowed him to appreciate that that is how I would see it. It was obvious that I would have to speak to my clerk about it, and there was, therefore, no point at all in limiting circulation in this way.

52. The e-mail notifying me does not expressly state that Mr. Moss did not believe the statement about my office, although that is in his text messages, and he has since clarified that he thought it was complete nonsense, which I think, and thought, it obviously was (one reason, leaving aside the inherent unlikeliness is that in this country High Court judges do not have "offices"). But that could not undermine the seriousness with which it had to be taken. Nor did his e-mail express his confidence in my clerk. That only comes in his later

evidence. At best, this was a disastrous lack of thought, which has caused, as will be understood, a great deal of concern and indeed distress, on my part, and more importantly on the part of my clerk.

53. My clerk has been a clerk for a long time, and before that worked in a very challenging part of the public service for many years, and this allegation should never have been made. Once made, it should have been handled in a totally different way. It is fortunate -- and I will not go into the details -- that owing to the chronology of the way that the judgment was sent to the parties, it was very easy to establish that the assertion was impossible, as well as nonsensical, but that was not to be known to EIP or to Mr. Friedman or Optis when the assertion was made. I simply cannot understand how Mr. Friedman could possibly have, with any care, captured what was said between him and Mr. Fogliacco as amounting to an assertion that my office leaks like a sieve.

54. I have only been a judge a short time, but I am not naive enough to think that parties do not say very disobliging things about judges when they are unhappy with the way a hearing has gone, or disappointed in a result. However, this was a party who saw itself as winning, making an assertion not about me, or at least not just about me (though I was also implicitly accused via my friends), but about an entirely innocent third party.

55. The second troubling thing about this e-mail which is of the gravest concern is the last paragraph. This records Mr. Moss actively saying something that he records Mr. Friedman having asked him to make clear to me immediately. So it is not an explanation that I had called for, it is a point actively being made by Optis on its own initiative and for its own benefit. What it said was that he (Mr Friedman), and everybody else at Optis, had not made any outbound communications in relation to the draft judgment since being notified of it, and that the call which has given rise to the current situation, was an inbound call from someone with whom Mr. Friedman regularly speaks, and it goes on to say "*which call Mr. Friedman accepted in the normal manner, not knowing in advance what was going to be said*."

56. This paragraph is, I am afraid to say, obviously and completely untrue, based on the materials known to Mr. Friedman at the time. It is not an adequate explanation that he had misunderstood the e-mail from Mr. Fogliacco, indeed it does not even mention an e-mail from Mr. Fogliacco, the existence of which Mr. Friedman had not made known to EIP at this stage. It consciously and specifically calls out the call as being inbound to Mr. Friedman, and it says that Mr. Friedman *accepted* the call, which is not true, and, most specifically, although these things all go together, it says at the end that Mr. Friedman did not know in advance what was going to be said. That last statement, in particular, makes it clear that this explanation is untrue, because having initiated the call, Mr. Friedman was the only one who knew what the topic of discussion was going to be. I consider that this e-mail constitutes the deliberate putting forward, via EIP, by Mr. Friedman, of an explanation that he knew was not true. I emphasise that whilst I have said that Mr. Moss has made some errors of judgment, he was, at this point, acting on his instructions, and he did not know, as I have said already, perhaps more than once, of the existence of the e-mail from Mr. Fogliacco.

57. Apple then provided a witness statement disclosing the enquiries that it had made, all of which, as it how turns out, were completely unnecessary. Then, on 27th September, Mr. Moss provided a twenty-third witness statement. I will not go through all of it, because its main function was to list out all the people who had seen the draft judgment, and to say that they had been asked if they knew how Sisvel had received the information, and they all stated that they had not. At paragraph 17, Mr. Moss emphasised that Mr. Friedman understood the obligations of confidence, having previously received drafts of judgments in the *Unwired Planet* litigation, and in technical trials A and B, and Mr. Moss records having told Optis that they could not inform the entity responsible for the management of Optis' investors' interests until the hand down. At paragraph 18, Mr. Moss exhibits, with redactions of certain information, because of privilege, the warnings about confidentiality to which I have already referred.

58. At paragraph 21, Mr. Moss says that when he received the information on the evening of Tuesday, 21st September, that is the text, he was personally shocked and concerned, and considered it was his duty and responsibility to inform the court of what he knew. I take the view that Mr. Moss did not do that, because he left out crucial information, in particular the name of Sisvel and the assertion that the leak had come from my office. Then Mr. Moss went on to say that there could be no commercial advantage to Optis in the disclosure of the content of the draft judgment. I must say I am not entirely convinced about that, because it is accepted that the outcome of Trial F could have a significant impact on Optis' future efforts to licence its portfolio, but that is not really pertinent to what I am considering now.

59. On 28th September, having taken stock of the materials I had seen, I noted that nobody had explained how Sisvel had got the judgment, and said that I would now have to engage with Sisvel and Mr. Fogliacco myself and asked for their contact details. I said at that stage that I was conscious that Sisvel and Mr. Fogliacco had not had an opportunity to comment, and so I reached no conclusion about what had happened and then I said "*other than it appears reasonably clear that there was a leak*".

60. As it turns out, even that conclusion was not to be taken for granted, for reasons that I have touched on. In my own defence I will just say that on the information I have been given it was inconceivable that there might not have been a leak. However, I will also say that I later pointed out to Sisvel, via Bird & Bird, that as matters had further developed I realised that that could not be taken for granted, and that I would be maintaining an open mind about whether there even was a leak.

61. I wrote to Sisvel, via Bird & Bird, in very similar terms. Again, I said that I thought that it would seem clear that there was an unauthorised disclosure. As I say, I later modified that. I stressed again that if there had been an unauthorised disclosure, it might have been a mistake.

62. What then happened was that Bird & Bird, through Ms. Mutimear and Mr. Vary, acted urgently to confer with Mr. Fogliacco. I will not go into the detail, but in brief they did what I would expect any adviser to do in this

situation, which is that they dropped everything, as did Mr. Fogliacco, and investigated with care what had happened. This led to a letter from Bird & Bird summarising the events, which I received on 29th September, signed by Ms. Mutimear, which with laudable understatement opened by saying that my e-mail had come as rather a shock. It then related the sequence of events that I have touched on earlier, in terms of Mr. Fogliacco knowing the date of the hand down, but not the result, and it verified what had happened with appropriate e-mails between the firm and Mr Fogliacco, Mr. Fogliacco's e-mail to Mr. Friedman, a detailed witness statement of Mr. Vary and a careful witness statement from Mr. Fogliacco, who, I should say, explained that whilst he is Italian, he speaks and writes English fluently. I mention that because it is relevant to assessing whether there could have been a linguistic problem when he spoke to Mr Friedman. Clearly there was not.

63. Mr. Fogliacco was clear in his witness statement, and I accept, that he did not know the result of Trial F going into the call with Mr. Friedman and that he did not learn the result during it. That has been amplified a little bit by Mr. Cronan in his oral submissions today, which are consistent with Mr. Fogliacco's written evidence, which I accept, about the fact that Mr. Friedman has a number of different roles as well as managing director of Optis, including one for what is called Hilco IP Merchant Capital LLC, and this goes some way to explain how it is that the two gentlemen can have been at cross-purposes. As I have already said, Mr. Fogliacco provided a WhatsApp log showing that Mr. Friedman had called him, and not the other way around, and it also verifies that Mr. Fogliacco is an infrequent user of WhatsApp. I have not been told, on behalf of Mr. Friedman, why he chose to use WhatsApp.

64. I gave some further directions on 29th September, which is where I pointed out that I understood that it was not accepted that there had been a leak at all.

65. Mr. Friedman then provided a witness statement of 30th September, which I have been told was made without sight of Mr. Fogliacco's witness statement. He began by apologising. He went on to say that his text message was inaccurate and he acknowledged, for the first time, the existence of the inbound e-mail from Mr. Fogliacco, which, for reasons that I find very hard to understand, he had not even told EIP or Ms. Rajendra about until 28th September. He offered the explanation that he thought that Mr. Fogliacco knew the result of Trial F and Mr. Friedman's explanation for that is that because he did not have much experience with UK procedural rules, he assumed that if someone knew when the judgment was coming out, they must also know the result. I find this explanation extremely hard to accept. I find the premise that that was Mr. Friedman's understanding of the procedure difficult to accept, but, in any event, the e-mail is very clear that Mr. Fogliacco was keeping his fingers crossed, i.e. he did not know the result. I have already commented negatively on what happened on 24th September, but Mr Friedman's attitude, at all times, seems to have been quite remarkably casual.

66. Mr Friedman's statement then says that when the call took place, Mr. Fogliacco congratulated Mr. Friedman. That is now accepted not to be the case. Then he said, in paragraph 8:

> "*It then occurred to me*", [i.e. during the call, while the call was ongoing], "*that I had been told by Optis' solicitors that the result of Trial F was strictly confidential.*"

67. I pause at this stage to say, and repeat, that it was quite wrong of Mr. Friedman, on any view, to have called Mr. Fogliacco, and it is absurd, if it is the case, that the penny only dropped during the call that there might be a confidentiality problem. It is in this paragraph that Mr. Friedman acknowledged that the words "*Meade's office leaks like a sieve*" did not come from Mr. Fogliacco but from an impressionistic appreciation of what Mr. Fogliacco might have had to do to get to know the result. I have already said that none of that was supportable. Mr. Friedman said that he was surprised that Mr. Moss would feel compelled to draw the whole episode to the court's attention. I do not understand his surprise. It seems to me obvious that anybody acting with integrity would expect that that had to happen.

68. Then he provided his explanation of the 24th September e-mail, whose words he says were not precise. I do not accept that they were not precise; they were flatly wrong. He said what he meant was that "we" – Optis -- had not instigated any communication and that it started with Mr. Fogliacco's e-mail. Then he acknowledged that he had not made Optis' solicitor aware of that. None this explanation makes any sense in light of the specific content of the e-mail of 24th September, and none of it causes me to doubt the conclusion that I have already stated, that Mr. Friedman was authorising the provision of information to me that he knew was not true.

69. It is said, in Mr. Moss's later evidence, and not contradicted by Mr. Friedman, that Mr. Friedman was concerned, and expressed his concern more than once, that the matter was "*escalating*", and also said that the discussion with Mr. Fogliacco was "*just locker room chat among guys discussing the football game*". I find both of these statements distasteful and extraordinary. The matter was escalating because Mr. Friedman inaccurately had said that a leak had taken place from the court. There can be no more inaccurate description of the appropriate way to go about matters concerning a confidential judgment than to call it "locker room chat". This, plus the fact that Mr. Friedman took so long to get on top of the detail, lead me to conclude that, apart from his wrongful approval of the information given to me on 24th September, his attitude to the whole affair was deplorably casual and showed no appreciation of the importance of the confidentiality of the draft judgment, or of making assertions of the kind that he did.

70. I gave directions for this hearing on 1st October, and I flagged that the two matters I was particularly concerned about were the repeated stress on there being no outbound communication from Optis and the way in which the information about what had happened was provided to me piecemeal.

71. Mr. Friedman provided a further witness statement on 1st October, a short one, which says that a fair reading of what had happened was that Mr. Fogliacco and he "*spoke past each other*". He accepted Mr. Fogliacco's evidence that he did not know the outcome of Trial F. He thought, none the less, that Mr. Fogliacco did know the answer. He says, as I think I have

already recorded, that he, that is Mr. Friedman, was talking about an actual situation and Mr. Fogliacco about a hypothetical one.

72. Bird & Bird corresponded with EIP on 1st October and made the very fair point that EIP knew that Bird & Bird were acting for Sisvel and that EIP could have taken steps to contact Sisvel, and/or Bird & Bird, to prevent further dissemination, and that the misunderstanding would have been discovered much more quickly if they had. I agree with that.

73. Therefore, my overall conclusions are that significant errors of judgment were made on the part of EIP. The point to learn is that in a situation such as this what must be done is to immediately put the greatest possible focus into finding out every detail of the relevant facts and communicating anything that could conceivably be relevant to the court, even if it is painful or embarrassing to do that. However, I do accept that these decisions were made when the time frame was short, in circumstances of stress, brought about by the seriousness of the assertions that had been made, and there is no point at which EIP, or Ms. Rajendra, said anything to me that was consciously wrong. They passed on Mr. Friedman's incorrect instructions on 24th September, but it was what they were instructed at the time.

74. Mr. Friedman's conduct I have commented on in a number of points in this judgment. It was deplorable and far short of what the court is entitled to accept of a person who is in the privileged position of having a draft judgment.

75. I make clear, in case it is not clear already, that no professional representative (I include barristers' clerks) who had the judgment leaked it to Sisvel or anyone else. I have no doubt that they found it awkward to be interrogated about it, and I have no doubt, and Mr. Moss's 24th witness statement verifies this, that there has been a bitterly unpleasant atmosphere as a result. The blame for that, I am afraid, lies almost entirely with Mr. Friedman.

76. There are two other matters that I want to comment on.

77. The first is the number of people who saw the draft judgment. I do not know exactly how many it was, but it was scores of people. The reason for that is that most of the barristers' chambers and solicitors' firms who received the judgment use what are called e-mail exploders, where a single inbound e-mail to a central address is promulgated to a wider dissemination list. In the case of EIP, for example, that was almost two dozen people, and although they each had some reason to be involved with the litigation in some way, they really did not need to see the judgment and they did not need to be involved for the purposes of giving instructions.

78. I think this use of e-mail exploders, and provision of draft judgments to an excessive number of people, is not in the spirit of the Practice Direction, or of the Patents Court Guide, and thought should be given to curtailing it. However, I do make clear that it seems it has over time become a fairly general practice, and that there was nothing malicious in doing it, on anyone's part, in the course of this case. I will give thought to it myself, and no doubt the parties and others reading this judgment will too. Clearly, a way of

disseminating a judgment only to those people who really need to give instructions has to be found, and the responsibility to a considerable extent must lie with the parties, who need to communicate with judges' clerks a more concise list of people who really need to receive draft judgments.

79. I also said that I would comment briefly on the confidentiality of the intended date of the public hand-down. I have already said there is no confidentiality in that, as I see it, because it is the date of an intended public hearing. Mr. Cronan, in his skeleton, has helpfully pointed out that the Court of Appeal has a practice of listing forthcoming judgments, and he also points out that although intended hand-downs get listed in the Rolls Building lists, those lists do not reach far enough into the future to catch judgments such as the present, where the hand-down was a week away from the date of the communication of my draft judgment. Thought needs to be given to this as well, and no doubt will be.

80. Reverting to the (mis-)reported leak I have to consider what to do about this situation,. As I said in the course of argument, it has not been lost on me that the Practice Direction indicates that breaches of the restrictions of confidentiality are ultimately backed by the sanction of contempt, and I assume this is probably why Mr. Friedman has been separately represented. Mr. Hobson, for Mr. Friedman, has indicated, very fairly, that without the benefit of cross-examination, I cannot be certain what happened in relation to some of the events, and I have thought about that carefully in expressing my judgment. Even with cross-examination I think elements of doubt would remain, especially as to the call between Mr Friedman and Mr Fogliacco. I do feel able to make the findings that I have, in particular about the communication on 24th September and Mr Friedman's knowledge at the time of the true position. However, to try truly get to the bottom of this in every detail would require cross-examination, and I think it would be disproportionate to escalate this to a consideration of contempt proceedings. Furthermore, it would be a very big distraction from the real substance of this important litigation. I consider that the expression of my findings and my severe dissatisfaction in the course of this judgment is an adequate sanction in itself, and I also intend to deal with costs, but I think it is best now to draw a line under this very unedifying episode.

81. Postscript: After the conclusion of this judgment I heard argument on costs and directed that Optis was to pay the costs of Sisvel and Apple on the indemnity basis. Optis did not oppose paying the full sum claimed by Sisvel. Apple did not have time to prepare a costs schedule but I have given them time to do that and intend to assess it summarily as soon as possible.

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