



PATENTS ACT 1977

REQUESTER Fox International Group Limited

ISSUE Whether an IPEC Consent Order on the file of patent number GB 2 456 085 should be kept confidential

HEARING OFFICER J E Porter

SUPPLEMENTARY DECISION

Introduction

- 1 Patent number GB 2 456 085 was granted on 15 June 2011 to Mr Bryan Houghton, and was assigned to Spomb Fishing Limited ("Spomb") on 14 February 2014. A third party, Fox International Group Limited ("Fox") requested that a number of documents on the patent file at the Office be kept confidential. In my decision of 14 December 2016 (BL O/588/16 — the "substantive decision"), I set out my conclusions as to whether all but one of these documents should be kept confidential.
- 2 However, I did not decide whether the content or existence of a Consent Order from the Intellectual Property Enterprise Court (IPEC) should be kept confidential. This was because it was not clear to me whether the Consent Order itself, or the fact of its existence, is regarded by the court as being in the public domain or not.
- 3 I therefore sought submissions from Fox on whether, under the court's rules or practices, the Order itself (or the fact of its existence) is regarded as confidential. I have received no further submissions on this point; the attorney contacted the Office briefly on 25 January 2017 to confirm this.

The Law

- 4 The relevant law is set out in paragraphs 4 to 15 of the substantive decision.

The Facts

- 5 The IPEC Consent Order between Fox and Spomb was supplied to the Office by Fox's attorney Mr Crouch on 16 September 2015, in support of his request that various other documents on the file be kept confidential.
- 6 As I have already noted, in the substantive decision I did not determine whether the Consent Order itself should be treated as confidential.

- 7 In the substantive decision I also noted a number of other documents on file which make reference to the Consent Order, the treatment of which depends on my conclusions regarding the Order. These documents are:
- a) the incoming letter of 16 September 2015 which accompanied the Consent Order;
 - b) paragraphs 1 and 2 of the Office's letter of 27 October 2015, responding to the attorney's providing of the Consent Order;
 - c) the attorney's first letter of 10 November 2015 which refers to the Consent Order and quotes from it;
 - d) a number of paragraphs in the Office's letter of 25 July 2016; and
 - e) the attorney's letter of 19 August 2016 which discusses the Consent Order and makes submissions as to its effect on the parties and the comptroller.
- 8 Copies of the Consent Order, the 16 September 2015 letter and the 27 October 2015 letter were also sent by the Office, along with copies of other documents, to the attorney on 5 November 2015.

Analysis

- 9 Although the attorney has not provided any further submission on the status of the Consent Order, I must nevertheless consider whether it should be treated as confidential. It therefore falls to me to decide this outstanding point on the basis of the information that I already have before me.
- 10 As discussed in my substantive decision, the comptroller is governed by the relevant patents legislation in respect of the material available on the patents file and is not bound by the CPR. Thus the confidentiality of the Consent Order (just as for the other documents in question) is determined under the relevant provisions of the patents legislation, and not determined by virtue of any effect on the comptroller of the Order itself or the CPR. See paragraphs 23 to 38 of the substantive decision.
- 1 1 The only outstanding question is therefore whether the comptroller should make the Consent Order, and the various documents which refer to it, confidential under the terms of the patents legislation.
- 12 The Consent Order was filed at the Office in support of a confidentiality request about proceedings relating to the patent. The Order therefore relates to a patent and must be open to the public under section 1 1) unless a prescribed restriction applies. As set out in the substantive decision, one of the prescribed restrictions is that a document is confidential under rule 53.
- 13 In my substantive decision I decided, on the balance of probabilities, that a request for confidentiality under rule 53 had been made in relation to the attorney's letters to the Office and accompanying documents, including the copy of the Consent Order. See in particular paragraph 46 of the substantive decision. I must now decide for the Consent Order whether, in accordance with the wording of rule 53, there is "good reason for the document to remain confidential".

- 14 I said in paragraph 68 of the substantive decision that, if it was shown that the contents of the Order are confidential under the court's rules or practice, I would direct that it should remain confidential under rule 53. I further stated that, if it was shown that the fact of the Order's existence is confidential under the court's rules or practice, then I would direct that any references to the Order's existence would also be kept confidential under rule 53.
- 15 The question is therefore whether I have any basis (in the absence of any submissions on the point) for concluding that the Order's contents or existence is confidential under the court's rules and practice.
- 16 First, I consider the content of the Order itself. The words of the Order, header, court stamp and other parts do not contain any statement or, in my view, any implication that the Order is confidential.
- 17 Second, as noted in my substantive decision, so far as I am aware the IPEC proceedings were not themselves confidential. I concluded that there was no reasonable basis for removing from the open part of the file references to the existence of those proceedings. See paragraphs 58 and 59 of that decision. So there is no basis from that viewpoint for concluding that either the contents or the existence of the Consent Order is confidential.
- 18 Third, the Order makes no reference to material, such as the contents of the licence agreement, which I determined in the substantive decision should remain confidential. The Order does refer to the existence of a statement of case but, as set out in the substantive decision, the fact of the statement of case's existence is, in itself, not confidential — it is the contents of the Statement of Case which the IPEC has considered to be confidential and these are not discussed in the Order. So this provides no good reason to treat the contents of the Order as confidential.
- 19 Finally, I have considered the relevant provisions of the CPR which were relied upon by Fox more generally — CPR 5.4C(1) and (4). No submissions were made earlier or at this stage about whether these provisions mean that an Order made under those rules is confidential. Having considered the provisions again, I can see no suggestion in those provisions that an Order made under those rules is to be treated as confidential.
- 20 In light of the above I find nothing which provides a good reason to treat the existence of the Consent Order or its contents as confidential under rule 53. Having reached that conclusion, I now consider the remaining correspondence on file which makes reference to the Consent Order, as listed in paragraph 7 above.
- 21 Given that I have found no reason to regard the Consent Order or the fact of its existence as confidential, I can find no reason to direct that the attorney's letter of 16 September 2015 should be treated as confidential under rule 53.
- 22 In the substantive decision, I stated at paragraph 70 that whether the attorney's first letter of 10 November should be kept confidential is dependent of the status of the Order itself. In line with my reasoning above regarding the Order, I also find no reason to direct that the attorney's first letter of 10 November 2015 should be treated as confidential.

- 23 Finally, in terms of incoming correspondence, there is the attorney's letter of 19 August 2016 which refers to the Consent Order and makes submissions as to its effect. Again, following the reasoning above, I find nothing in the letter which leads me to conclude that it should be treated as confidential.
- 24 My approach in relation to communications from the Office is the same here as in the substantive decision. Outgoing correspondence disclosing material which is to be kept confidential under rule 53 should also be kept confidential, using the power given to the comptroller in rule 51 (3)(c).
- 25 I considered the bulk of the Office's letter of 27 October 2015 in paragraph 76 of the substantive decision and determined that there is nothing in the content which should be kept confidential, with the possible exception of the references to the existence of the Consent Order in paragraphs 1 and 2. Following my determination above, I see no reason to treat those paragraphs of this letter as confidential under rule 51(3)(c).
- 26 Finally, there is the Office's letter of 25 July 2016. In paragraph 79 of the substantive decision I found nothing in the letter which should be kept confidential under rule 51 (3)(c), except potentially the references to the Consent Order. Having considered these paragraphs in light of my conclusions on the treatment of the Consent Order, I can see no reason for them to be kept confidential.
- 27 The copies of the Consent Order, 16 September 2015 letter and 27 October 2015 letter sent to the attorney on 5 November 2015 are to be treated in line with my determinations above.

Conclusions and next steps

- 28 Further to my conclusions as set out in paragraph 80 of the substantive decision, I have now concluded that there is no good reason why the content or existence of the Consent Order should be kept confidential. Fox's confidentiality request relating to the Order and to the related correspondence is, to this extent, refused.
- 29 **I direct that Fox has 28 days beginning immediately after the date of this decision to provide any submissions it wishes to make on the extent to which the substantive decision and this decision should themselves be redacted, before being made public.**

Appeal

- 30 Any appeal must be lodged within 28 days after the date of this decision.

Dr J E PORTER

Deputy Director, acting for the Comptroller