Intellectual Property Office

BL O/588/16

14 December 2016

PATENTS ACT 1977

REQUESTER	Fox International Group Limited
ISSUE	Whether certain documents on the file of patent number GB 2 456 085 should be kept confidential
HEARING OFFICER	J E Porter

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") has requested that a number of documents on the patent file at the Office be kept confidential.

2 In particular the request for confidentiality concerns a copy of a Statement of Case relating to court proceedings. This copy was filed at the Office by Fox's patent attorneys, Bromhead Johnson, in accordance with rule 63.14 of the Civil Procedure Rules. The Statement of Case relates to a dispute between Fox (the claimants in the court proceedings) and Spomb (the defendants) regarding the validity of the patent. The request for confidentiality also extends to correspondence between Fox's attorneys and the Office in relation to the status of the Statement of Case, and other related documents on the patent file.

3 No agreement could be reached between the Office and Fox about the confidentiality request and so the matter was referred to me for a decision. I invited further submissions and requested clarification of some issues in my letter of 25 July 2016. The attorneys responded in their letter of 19 August 2016 and requested that a decision be made based on the papers on file. They additionally requested that that letter, as well as this decision, be kept confidential.

The Law

4 Section 118 governs matters of confidentiality in relation to patents. Section 118(1) reads:

> *118.-(1) After publication of an application for a patent in accordance with section 16 above the comptroller shall on a request being made to him in the prescribed manner and on payment of the prescribed fee (if any) give the person making the request such information, and permit him to inspect such documents, relating to the application or to any patent granted*

in pursuance of the application as may be specified in the request, subject, however, to any prescribed restrictions.

5 The "prescribed restrictions" are set out in rule 51 of the Patents Rules 2007. The relevant parts of rule 51 read as follows:

> *51.- (1) For the purposes of section 118(1) the prescribed restrictions are those set out in paragraphs (2) and (3).*
>
> *(2) […]*
>
> *(3) Unless in a particular case the comptroller otherwise directs, no document may be inspected –*
>
> > *[…]*
> >
> > *(b) where that document is treated as a confidential document under rule 53;*
> >
> > *(c) where –*
> >
> > > *(i) that document was prepared by the comptroller, an examiner or the Patent Office other than for internal use, and*
> > >
> > > *(ii) it contains information which the comptroller considers should remain confidential;*
> >
> > *[…]*
>
> *(4) In this rule references to a document include part of a document.*

6 Rule 53 reads:

> *53.- (1) Where a person files a document at the Patent Office or sends it to an examiner or the comptroller, any person may request that the document be treated as a confidential document.*
>
> *(2) The comptroller must refuse any request where it relates to—*
>
> > *(a) a Patents Form; or*
> >
> > *(b) any document filed in connection with a request under section 74A.*
>
> *(3) A request to treat a document as confidential must—*
>
> > *(a) be made before the end of the period of 14 days beginning immediately after the date on which the document was—*
> >
> > > *(i) filed at the Patent Office, or*
> > >
> > > *(ii) received by the comptroller, and*
> >
> > *(b) include reasons for the request.*
>
> *(4) Where a request has been made under paragraph (1), the document must be treated as confidential until the comptroller refuses that request or gives a direction under paragraph (5).*
>
> *(5) If it appears to the comptroller that there is good reason for the document to remain confidential, he may direct that the document shall be treated as a confidential document; otherwise he must refuse the request made under paragraph (1).*
>
> *(6) But where the comptroller believes there is no longer a good reason for the direction under paragraph (5) to continue in force, he must revoke it.*
>
> *(7) In this rule references to a document include part of a document.*

7 Rule 53 therefore allows confidentiality to be requested in respect of documents filed at the Office but does not extend to documents issued by the Office. However, rule 51(3)(c) allows the comptroller to prevent the inspection of certain documents prepared by the Office and issued externally.

8 As noted by the attorney in his submissions of 19 August 2016, the period for making a confidentiality request under rule 53(3)(a) may be extended under rule 108(1), which reads:

> *108.-(1) The comptroller may, if he thinks fit, extend or further extend any period of time prescribed by these Rules except a period prescribed by the provisions listed in Parts 1 and 2 of Schedule 4.*

9 Other relevant provisions of rule 108 are as follows:

> *(5) Any extension made under paragraph (1) or (3) shall be made –*
>
> *(a) after giving the parties such notice; and*
>
> *(b) subject to such conditions,*
>
> *as the comptroller may direct, except that a period of time prescribed by the rules listed in Part 3 of Schedule 4 may be extended (or further extended) for a period of two months only.*
>
> *(6) An extension may be granted under paragraph (1) or (3) notwithstanding the period of time prescribed by the relevant rule has expired.*

10 Rule 53 is not listed in any of Parts 1, 2 or 3 of Schedule 4, and so the 14 day period for making a confidentiality request may be extended under rule 108(1) at the comptroller's discretion, for more than two months, and notwithstanding that the period has expired.

11 In terms of the relevant law as I have set it out above, I did not detect any disagreement between the attorney and the Office. However, the attorney argues that also relevant in this case is a Consent Order from the Intellectual Property Enterprise Court (IPEC) obtained under the Civil Procedure Rules ("CPR").

12 CPR 5.4C(1) reads:

> *(1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of –*
>
> *(a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;*
>
> *[…further provisions not relevant…]*

13 CPR 5.4C(4) then states that:

> *(4) The court may, on the application of a party or of any person identified in a statement of case –*
>
> *(a) order that a non-party may not obtain a copy of a statement of case under paragraph (1);*
>
> *(b) restrict the persons or classes of persons who may obtain a copy of a statement of case;*

> *(c) order that persons or classes of persons may only obtain a copy of a statement of case if it is edited in accordance with the directions of the court; or*
>
> *(d) make such other order as it thinks fit.*

14 The IPEC Consent Order is dated 8 September 2015. By consent between Fox and Spomb it is ordered that:

> *"Pursuant to CPR 5.4C(4) a non-party may not obtain a copy of any statements of case which are on the court file because the statements of case contain commercially sensitive information".*

15 Other than an explicit statement that there be no order as to costs, that is the extent of the Consent Order.

The Facts

16 Copies of the Statement of Case and its Annexes were filed at Office on 14 March 2014, as required by CPR 63.14. These documents were open to public inspection until the attorney, Mr Crouch of Bromhead Johnson, wrote to the Office on 18 February 2015 and requested that "all documents...in regard to the above patent [i.e. the patent in suit] and dated beyond 26 February 2014" be removed from Ipsum and be made unavailable for public inspection.

17 On 10 March 2015 the Office wrote to say that, if this request for confidentiality was being made under rule 53, then it was out of time and would therefore be refused. Perhaps somewhat confusingly, the letter nevertheless went on to allow Fox to "expand your reasons to support your request to remove the documents from Ipsum".

18 The Office quite properly removed the documents in question from Ipsum while Fox was given the opportunity to make further submissions about their availability. The documents in question have remained unavailable to the public entirely while the matter is resolved. In light of the Office's response on 10 March 2015, the attorney wrote again on 22 April 2015 and enclosed various attachments, including a licensing agreement between Spomb and Fox. The Office responded on 6 July 2015 but maintained its position in relation to the documents in question.

19 The letter of 18 February 2015 contained a request for that letter itself to be kept confidential. I haven't been able to discern an explicit response from the Office regarding this request. Mr Crouch's letter of 22 April 2015 also contained a request for that letter and the various attachments to be kept confidential. The Office indicated in its letter of 6 July 2015 that it agreed to these being kept confidential.

20 On 16 September 2015 Mr Crouch supplied a copy of the IPEC Consent Order in support of his request for the documents in question to be kept confidential. The Office replied on 27 October 2015 giving the view that, on the basis of that Order, the Statement of Case and Annexes would not be open to public inspection. Nevertheless, the letter indicated that other documents covered by the request for confidentiality would be open to public inspection.

21 As I have already noted, once the matter was referred to me, I sought clarification on a number of points in my letter of 26 July 2016. Mr Crouch provided further

submissions in his reply of 19 August 2016. He clarified that requests for confidentiality of all of the documents in question are made on the basis both of the Consent Order and under rule 53. He also noted that extensions are available (as discussed above) to allow for rule 53 requests to be made beyond the 14 day period.

22 What I must do, on the basis of the various submissions and documents provided by Fox's attorney, is to decide which of the documents should be kept confidential and on what basis.

Analysis

23 I will deal first with the arguments concerning the Consent Order. To be clear, I do not think that the attorney is arguing that the CPR in a general sense bind the comptroller or govern how the comptroller's tribunal or rights-granting functions operate. That must be right. Although the CPR have a significant influence on proceedings the comptroller, the comptroller is not bound by the CPR and their associated Practice Directions in this respect, but is governed by the relevant patents legislation (and in particular Part 7 of the Patents Rules 2007, which is to an extent modelled on the CPR).

24 What the attorney submits is that the Order itself binds the Office and, in doing so, prevents the Office from allowing non-parties to access or have copies of the Statement of Case (and other documents) held on the patent file at the Office. In other words, his submission is that these documents should be treated as confidential by the Office as a result of the Order.

25 To support this argument, he points out that the wording of the Order is not in terms of prohibiting obtaining a copy <u>from</u> the court, but more widely prohibits obtaining copies of documents (from anywhere) which are <u>on</u> the court file. Whilst acknowledging that the CPR provision under which the Order is made is headed "Supply of documents to a non-party from the court records", Mr Crouch points to CPR 5.4C(4)(d), which enables the court to "make such other order as it thinks fit". Thus his argument is that the Order is not restricted to the obtaining of a copy of the relevant documents from the court but instead "is believed to extend to obtaining of a copy [of such documents] from any source".

26 As a result Mr Crouch's position is that, if the Office does not maintain the confidentiality of the Statement of Case and associated documents, then it will undermine the Order and so cause the attorneys and Fox inadvertently to be in breach of the Order. Furthermore, Mr Crouch contends that, since the Order imposes a duty on the comptroller to maintain the confidentiality of these documents, "any action to undermine the Order may similarly place the comptroller in contempt of the Court".

27 I have considered Mr Crouch's arguments carefully, but on balance I am not persuaded that his view of the Order's scope and effect is the correct one.

28 One point is that the Order is clearly and unambiguously made "pursuant to CPR 5.4C(4)". Part 5 of the CPR concerns "Court Documents" and, as noted above, CPR 5.4C then concerns "Supply of documents to a non-party from court records". CPR 5.4C(4)(a) says that an Order can be obtained to stop a non-party from obtaining a

"copy of a statement of case under paragraph (1)", and paragraph (1) clearly refers to obtaining documents "from the court records".

29 However, Mr Crouch contends that the Order uses the wider power under CPR 5.4C(4)(d) to "make such other order as [the court] sees fit". In my view, there are a number of difficulties with this contention.

30 First, I incline to the view that the wider power under 5.4C(4)(d) is not an entirely unconstrained order-making power, but should properly be read within the confines and scope of the CPR Part and rule in which it is placed. The Part and rule concern access to documents from the court. That restricts the (4)(d) power to one for making other orders which relate to the issue of non-party access to documents from the court.

31 Second, and even if I am wrong on that point, Mr Crouch's argument that the Order binds the comptroller appears to hinge on the reference in the Order to a copy of documents "on" the court file, rather than it referring to a copy of documents "from" the court file. However, on a plain reading I think it entirely reasonable that the reference to not obtaining a copy of documents "which are on the court file" should be taken to mean a ban on obtaining copies from the court.

32 It would I think be surprising if the court had chosen to make a wider order, and to prevent the comptroller from providing copies of documents in accordance with usual practices under the patents legislation, without any further indication that this was the intention. I think it is asking the plain meaning of the reference to documents "on the court file" to bear far too much weight if it is to be interpreted as meaning that there is a wide order which bans the comptroller (or anyone else) from making copies available.

33 Although not determinative of the point, it would also be surprising if the court had chosen to make a wide order affecting the comptroller in this way without allowing the comptroller to make submissions on the point first.

34 All of this points clearly to the Order being one which puts a stop to the usual arrangements by which non-parties can obtain copies of the relevant documents from the court files, but which goes no further. So I am not persuaded that the Order goes beyond restricting access at the court to the relevant documents found on the court files.

35 Since the Order does not bind the comptroller in the way that Mr Crouch suggests, it follows that the comptroller cannot in my view breach the Order simply by making documents available to the public, in accordance with the patents legislation, and in the usual way.

36 I should add one further point here. Mr Crouch argues that, because the CPR at rule 5.4C(1) makes clear that documents other than the Statement of Case itself are not generally available under the CPR from the court, the Office should not "ride roughshod" over this provision by making those other documents available to the public.

37 My view of that point is similar to my conclusion on the Order. The CPR does not bind the comptroller or attempt to define how he should operate under the law. Once the documents are properly in the possession of the comptroller, having been filed at the Office as required, the comptroller is bound by the patents legislation in terms of how he must treat those documents. That is true whether the document supplied is a Statement of Case or anything else.

38 The next question is therefore whether the comptroller should make the various documents publically available, under the terms of the patents legislation. The documents sent in by Fox are unarguably ones which relate to a patent, and so which must be open to the public under section 118(1) unless a prescribed restriction applies. One of the prescribed restrictions is that a document is confidential under rule 53. I will therefore go on to consider the rule 53 requests made in relation to each of the relevant documents.

39 First, I must consider for each document whether a confidentiality request has been made under rule 53 in time and, if not, whether to exercise discretion favourably to allow the period for making that request to be extended. As noted above, the 14 day period may be extended at the comptroller's discretion and notwithstanding that the period has expired.

40 It is clear that a number of requests were made on time. These include documents such as the attorney's letters of 18 February 2015, 22 April 2015, 10 November 2015 and 19 August 2016 – where the request was contained in each case in the letter concerned. In terms of late requests, the most notable is the request in relation to the Statement of Case and its Annexes, which was made 11 months after the documents were filed at the Office.

41 The attorney's view is that the Statement of Case (and other documents) should be kept confidential in order to enable Fox [redacted] much later than the time at which the documents were filed at the Office, Fox could not have foreseen at the time of filing those documents that it would later come to the agreement with Spomb and that, in Fox's view, [redacted]. It therefore seems reasonable to me to exercise discretion favourably to extend the period for making the confidentiality request on this basis.

42 This applies equally to the other documents filed at the Office alongside the Statement of Case on 14 March 2014. I therefore exercise discretion favourably to extend the period prescribed in rule 53 for these requests too.

43 There are then some letters from the attorney to the Office, and accompanying documents, filed in August and September 2015. These include the letter dated 16 September 2015 which is accompanied by a copy of the Consent Order. A specific request for these documents to be kept confidential was not made until the attorney's letter of 10 November 2015. There is also an email acknowledgement sent by the attorney on 5 November 2015. There appears to be no specific confidentiality request on 10 November 2015, or at another time, in respect of this email.

44 I have been provided with no submissions as to why an explicit confidentiality request was not made within the prescribed period. In contrast to the situation

discussed in relation to the Statement of Case, no explanation is immediately apparent. However, it is necessary to consider the general request for confidentiality made in the attorney's letter of 18 February 2015. In particular it says that, notwithstanding that the CPR required Fox to serve on the comptroller a copy of the claim form and other documents:

> "*…we respectfully request that all documents available for inspection on Ipsum in regard to the above patent and dated beyond 26th February 2014 be deleted from that website and removed from those documents available for public inspection…*"

45 Although the request is worded broadly (in that it is not explicitly restricted to documents relating to the litigation involving Fox) it is clear that – at the time the request was filed – the documents within the scope of the request were all ones which concerned that litigation. Some were documents provided to the comptroller by Fox, and others were documents generated by the Office.

46 I think it reasonable to conclude on the balance of probabilities that, in light of subsequent correspondence and the wide-ranging way in which the request was framed, the attorney was operating on the understanding that the request for confidentiality extended generally to all documents relating to the litigation and settlement, and so it extended to cover further documents sent to the Office by Fox in relation to this matter. In certain cases, the attorney made an explicit further request, but I am content that the original request can be said in any event have covered implicitly the ongoing correspondence on the matter which the attorney was engaged in.

47 On that basis, I consider it reasonable to take the view that confidentiality had been requested for the attorney's letters to the Office, and the accompanying documents, filed in August and September 2015 – including the copy of the Consent Order – and also that the request covered the email acknowledgement sent by the attorney on 5 November 2015.

48 I must now decide for each document whether, in accordance with the wording of rule 53, there is "good reason for the document to remain confidential".

49 Firstly I consider the Statement of Case and its Annexes. The attorney asserts that these documents contain information which is commercially sensitive and so they should not be accessible by non-parties. Furthermore, as I have already noted, his view is that allowing these documents to be available to the public would [redacted].

50 I make no finding in relation to that second point. On the first point – that the Statement of Case and Annexes contain commercially sensitive information – there are factors which weigh against keeping these documents confidential. One such factor is that these documents have already been publically available. I can see that it is not out of the question for something which was not initially commercially sensitive to become so at a later date, although this is not something which has been specifically argued in this case. Another factor is that no further details have been given as to which specific parts of these documents may be sensitive.

51 However, I think that significant weight on the other side should be given to the fact that the IPEC agreed to issue the Consent Order on the basis of the commercially

sensitive nature of these documents. In my view I should for this reason, and on the balance of probabilities, regard the Statement of Case and its Annexes as being commercially sensitive. Thus I agree that the Statement of Case and its Annexes should remain confidential under rule 53.

52 I turn next to the licence agreement (and its schedules) made between Fox and Spomb. The agreement contains, amongst other things, [redacted] On that basis I have no difficult in agreeing that it should be kept confidential under rule 53.

53 It now remains for me to decide whether the associated correspondence on file between the attorney and the Office should be treated as confidential.

54 On this point, the attorney submits that all correspondence on this matter should be treated as confidential. In his submissions he proposes that the Consent Order prevents not only the Statement of Case being available to the public but also "information provided in our continued correspondence regarding the confidentiality in this matter, whether issued by the UKIPO or by ourselves".

55 *Prima facie*, I have serious doubts that the definition of "statement of case" relied upon by the attorney and found in CPR rule 2.3(1) would be regarded by the courts as meaning that information given in correspondence with a third party (in this case, the Office) and provided outside of the court proceedings would be included within the meaning of a "Statement of Case". But I do not need to consider this point further, as I have already concluded that the Consent Order puts a stop to the usual arrangements by which non-parties can obtain copies of the relevant documents from the court files, but does not go beyond this and so does not in itself prevent the comptroller from providing access to patent documents in accordance with the patents legislation. The question which remains is therefore whether the correspondence in question should be treated as confidential under rule 53.

56 Here, the attorney's arguments focus on the settlement between the parties, which [redacted]

57 I have considered these arguments carefully, and have reached a number of conclusions. I set these conclusions out, before going on to apply them to the particular pieces of correspondence.

58 First, so far as I am aware, the IPEC proceedings were not themselves confidential. For example, there was no indication that the proceedings were confidential when the Statement of Case was provided to the Office on 14 March 2014. The court documents, as I have already noted, were available for public inspection from that time until February 2015.

59 It follows that I do not think there is any reasonable basis for removing from the open part of the file any references to the proceedings having existed. I am also not persuaded that continuing to reflect the simple fact that the proceedings existed can in any reasonable way be regarded as somehow putting Fox in a position where they [redacted] This is particularly the case since, as I have said, the existence of the proceedings appears to be a matter of public record in any event.

60 Second, turning to the agreement, I note that Mr Crouch quotes only the first part of [redacted] The full clause reads (my emphasis added):

[redacted]

61 It follows that I can see no good reason for agreeing to the confidentiality request insofar as it relates to simple references in correspondence to the existence of the agreement or the licence. However, I agree entirely that information contained in the correspondence which discloses anything about the content or terms of the agreement should be kept confidential. That includes any correspondence which discloses or discusses [redacted]

62 Finally, I can see no good reason for keeping from public view the plain fact that a confidentiality request has been made by Fox. It is of course right that parties are able to keep certain information on a patent file from the public eye in appropriate circumstances. Whilst there may be situations where the very existence of a confidentiality request could fall within that category, it seems to me that this should only occur in the most extreme of cases. Such a situation means, essentially, that information which the public would expect to be available was not only hidden from their view, but they would have no idea that this had occurred, or why. Except in the most compelling of circumstances, it seems reasonable to me that the public should at least be aware that there is some information which they would usually be able to access, but which in a particular case has been kept confidential.

63 I now apply these conclusions to the specific pieces of correspondence in question.

64 The letter of 14 March 2014 accompanied the Statement of Case served on the comptroller in accordance with CPR. It said, briefly, that this was what was being done, and referred to the claim number. In accordance with my conclusions above, there is no good reason for keeping this letter confidential under rule 53.

65 The letter of 18 February 2015 contained the initial confidentiality request. It recounts the requirement under the CPR for Fox to have supplied previously the Statement of Case, makes the confidentiality request itself, talks briefly about balancing the rights of third parties with Fox's rights, and mentions [redacted]. In accordance with my conclusions above, none of this should be kept confidential under ruljame 53, except a part of the final sentence, which could be said to give the reader a small insight into the content of the

agreement. Thus, the remainder of the sentence which starts after the words “public inspection” on the penultimate line should be kept confidential under rule 53.

66 The letter of 22 April 2015, which accompanied the copy of the agreement supplied to the Office, should similarly be redacted to the extent that it discusses the content of the agreement (but not simply its existence). This means redacting the passage which starts with the words immediately after “available to public inspection” in the third paragraph and which ends at the end of the first paragraph on page two of the letter.

67 I then turn to the letters of 5 August 2015, which do no more than request a hearing in respect of the confidentiality request and make clear that the request is for removal of the documents in question from public inspection – not just a request for removal from the online document inspection service Ipsum. Following my reasoning above, there is no good reason for these letters to remain confidential under rule 53.

68 The next incoming letter, of 16 September 2015, accompanied a copy of the Consent Order. This is one point on which I am going to seek Fox’s further submissions. It is not clear to me whether the Consent Order itself, or the fact of its existence, is regarded by the issuing court as being in the public domain or not. If, under the court’s rules or practice, it can be shown that the Order is confidential, then I will direct in due course that it should remain confidential under rule 53. Furthermore, if it can be shown that the fact of the Order’s existence is confidential under the court’s rules or practice, I will direct that any reference in the correspondence to its existence should be kept confidential under rule 53.

69 The attorney’s email of 5 November 2015 briefly acknowledges receipt of copies of documents sent by the Office. The text of the Office’s email is replicated in the acknowledgement. There is nothing in this email chain which necessitates being kept confidential under rule 53, in accordance with my analysis above.

70 The attorney’s first letter of 10 November 2015 refers to the Consent Order and quotes from it. It also makes some arguments for confidentiality based upon that Order. Whether this should be kept confidential is dependent upon the status of the Order itself. I make no decision at this stage in relation to this letter – pending any submissions on the status of the Consent Order. The attorney’s second brief letter of 10 November 2015 very briefly confirms that the confidentiality request extends to the two letters of that date. There is no good reason for this second letter to be kept confidential under rule 53.

71 The attorney’s email of 17 August 2016 states that a decision on the papers is requested, and not an oral hearing, and briefly explains why. I can see no basis for this request to be kept confidential, in accordance with my above reasoning.

72 Finally, in terms of incoming correspondence, there is the attorney’s letter of 19 August 2016. In large part, this discusses the Consent Order and makes submissions as to its effect on the parties and the comptroller. It follows that, as with other correspondence which refers to the Order, I make no decision in relation to this document, pending further submissions.

73 I will now deal briefly with outgoing correspondence from the Office in relation to this request. My approach will be that, where outgoing correspondence discloses material which is to be kept confidential under rule 53, then that material should equally be kept confidential in outgoing correspondence, using the power given to the comptroller in rule 51(3)(c).

74 On 13 August 2014, the Office wrote to Fox and Spomb, acknowledging that the material served on the comptroller by Fox had been placed on the patent file and made open to inspection, and confirming that Patents Journal advertisement and update to the Patents Register had been done in the usual way. On 10 March 2015, the Office made an initial response to the confidentiality request of 18 February 2015. It pointed out that the request was made out-of-time but sought further reasoning. It is clear from my reasoning above that neither of these outgoing letters should be kept confidential.

75 On 6 July 2015, the Office responded to the attorney's letter which provided a copy of the licence agreement. That letter refers to the settlement of court proceedings, the existence of the agreement, and the confidentiality requests. In discussing the Office's view on the confidentiality requests, the second paragraph on page 2 of the letter could be regarded as disclosing something about the content of the agreement. That paragraph alone should be kept confidential under rule 51(3)(c), but not any of the rest of that letter.

76 The Office's letter of 27 October 2015 responds to the attorney's providing of the Consent Order, and his arguments based upon it. Following my reasoning above, 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 of the letter. Whether those references should be redacted will depend on any further submissions I receive on the status of the Consent Order, as discussed above.

77 On 5 November 2015, the Office sent to the attorney – by way of confirmation – copies of the documents which would be on the public part of the file but for the confidentiality request. There is nothing in the brief covering email which merits being kept confidential. Clearly the copied documents that were sent back to the attorney will need to be kept confidential or redacted to the same extent that the versions of the documents supplied to the Office will be kept confidential or redacted.

78 The Office's letter of 27 November 2015 gives a preliminary view of the arguments that had been put to the Office in relation to the CPR rule regarding the availability of statements of case. There is no disclosure of the Order, nor any mention of the agreement or its contents. There is no good reason for keeping the letter confidential under rule 51(3)(c).

79 Finally, there is the Office's letter of 25 July 2016. This clarified the actions that had been taken thus far, and sought submissions on a number of specific points, following my review of the papers. For the reasons given above, there is nothing in the letter which should be kept confidential under rule 51(3)(c), save once again that I will consider – after any submissions – whether the references to the Consent Order contained in paragraph 5 and in the first three paragraphs on page 3 should be redacted.

Conclusions and next steps

80 I have concluded that:

i. the Consent Order does not in itself prevent the comptroller from providing access to patent documents in accordance with the patents legislation;

ii. the incoming documents in question are all the subject of a rule 53 request, with extensions of time granted where necessary;

iii. there are good reasons why the contents of the Statement of Case (and its Annexes), and the contents of the licence agreement, should be kept confidential under rule 53;

iv. there is no good reason why information disclosing the mere existence of the proceedings, licence agreement and confidentiality requests should itself be kept confidential under rule 53;

v. there are good reasons why some limited redactions under rule 53 and rule 51 should be made to certain pieces of incoming and outgoing correspondence, where they contain information about the content of the licence agreement.

81 The remaining question is the status of the Consent Order.

82 **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 question of whether, under the court's rules or practices, the content or existence of the Consent Order is regarded as confidential**.

83 Following any such submissions, I will issue a supplementary decision with regard to what further redactions of the incoming or outgoing correspondence are appropriate under rules 51 and 53.

84 Once that supplementary decision has been issued, I will seek Fox's submissions on the extent to which the two decisions should themselves be redacted before being made public.

Appeal

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

Dr J E PORTER
Deputy Director, acting for the Comptroller