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No. NSD 1288 of 2025

Federal Court of Australia

District Registry: New South Wales

Division: General

CPC PATENT TECHNOLOGIES PTY LTD (ACN 615 736 028)

Appellant

APPLE PTY LIMITED (ACN 002 510 054) and another

Respondents

Apple's submissions in reply on security for costs of the appeal

1 These are Apple's submissions in reply in respect of its application dated 4 December 2025 seeking security for their costs of this appeal, and responding to CPC's submissions in answer dated 19 December 2025 (**AS**), and the affidavit of Michael Williams of the same date (**Williams**) made on behalf of CPC.

2 As submitted in chief, Apple seeks security of $1 million, based on an estimate of costs of $1.2 million for defending the appeal. Those costs represent the reality that this is large scale patent litigation, as set out in Apple's submissions in chief dated 15 December 2025 (RS[4]-[6]). Consistently with that, Apple's costs of defending the proceeding at first instance were about $8.69 million **(Sanders [24])** and CPC's costs of the first instance proceeding were higher, at about $10.49 million.[1]

3 Tellingly, Williams contains no estimate of CPC's expected costs of the appeal. That would have been one clear way to assess whether Ms Sanders' estimate is excessive. Instead, Mr Williams:

(a) says at [26] in general terms, unconnected to these specific proceedings, that he would expect that the "recoverable costs of a 2-day intellectual property hearing

[1] The Affidavit of Michael Williams made 22 August 2025 in NSD 998/2021 (the first instance proceedings) states at [16] that "the costs incurred by CPC in relation to its infringement claim (including issues of construction, but excluding issues of validity) was at least $5.9mil" and the Affidavit of Michael Willams made 19 November 2025 in NSD 998/2021 states at [19] that "the costs incurred by CPC in relation to Apple's invalidity claim was approximately $4.59 million".

with senior and junior counsel briefed would typically be $250,000 to $300,000 (ex GST)". Notably, contrary to this typical case, CPC itself has two senior counsel and junior counsel briefed in this proceeding. More fundamentally, Mr Williams does not engage with the scale of these patent proceedings in referring to his "typical" estimate, nor the amount of costs which he expects CPC to incur; and

(b) refers at [29] (and see AS [10]) to amounts of security awarded in other appeals from first instance "patent infringement and/or invalidity" cases, without even suggesting that those cases are of comparable complexity, measures of which are set out at RS [4]-[6]. Plainly they are not. Indeed, the amounts of security awarded in those cases is well below even half of the sum ($250,000-$350,000) which Mr Williams himself says represents the recoverable costs of a "typical" 2-day appeal in an intellectual property case.

4 Indeed, instead of disputing the reasonableness of Ms Sanders' overall estimate, AS [20], [21] is limited to disputing the proposition that 80% of that estimate is likely to be recoverable. But the matters raised in support of that contention do not withstand scrutiny.

5 In particular AS points to the fact that Apple will have three senior counsel briefed, as distinct from two senior counsel and one junior. But it ignores the fact that the additional senior counsel (Mr Creighton-Selvay) is the junior counsel who appeared at first instance, having been appointed senior counsel in the meantime. Plainly, to take a different approach and brief instead a junior with no knowledge of the first instance proceedings would be a considerably less efficient course from a costs perspective.

6 AS [21] also appears to suggest that Ms Sanders' estimate was based on the proposition that Apple would be required to physically prepare the appeal books. That is not the case. Apple, as Respondent, will be required to be involved in determining the appeal book contents; the estimate reflects no more or less than that.

7 Otherwise, AS [21] merely states that the practitioner's rates as used in Ms Sanders' estimate may exceed the National Guide, but that is one of the reasons why a discount is taken. Here a percentage of about 80% has been used. In that respect, AS [20] states that recoverable costs "can be as low as" 65% (though Mr Williams also acknowledges that they can be as high as 85%: Williams [28]). Even if one were to take for the sake

of argument the bottom end of the range at 65% (which would not be justified, for the reasons given), that would still yield a figure of more than $780,000.

8 More generally, AS [17] suggests that further detail should be provided in order to break down the estimate. But, as AS [6] accepts, the Court takes a broad brush approach to determining an appropriate amount of security. And that has a sound basis: the purpose of an application for security for costs is not to provide information at the level of detail which would be required for a bill of costs, and to require an applicant for security to provide details of those kinds would make the application impractically costly and protracted.

9 AS makes two further points. The first is that the payment of $1 million by way of security would prejudice CPC in the conduct of its appeal (AS [14]). But the evidence in support of that allegation is in entirely conclusory terms on information and belief as follows (Williams [33]):

I am informed by Kevin Dart, director of CPC, that an order requiring CPC to pay $1 million by way of security for costs, would be highly prejudicial to the conduct of its appeal, because it would deprive CPC of funds that it is intended will be directed to prosecuting its appeal and defending the cross-appeal and contention raised by Apple.

10 That evidence does not disclose: (a) the amount of costs which CPC is expected to incur in relation to the appeal; (b) the specific arrangements it has with its litigation funders for funding the appeal (the identity of whom is set out at Sanders [18]); (c) the amount of funding available to it to prosecute the appeal, including any limit on that funding and the reasons for it; and (d) why it is that the payment of security for costs of $1 million will create any difficulty for CPC in prosecuting its appeal and defending the cross-appeal and notice of contention. Without exposing those matters, the conclusory assertions at Williams [33] carry no weight.

11 The second point is that a discount should be made for “Apple’s cross-appeal and notice of contention, which is substantive and not purely defensive”. That is unsound. The submission is said to rely on *Farmitalia Carlo ERBA SrL v Delta West Pty Ltd* (1994) 28 IPR 336 at 346. At 345 the Court said this:

…to the extent that some of the costs of the party seeking security will relate to a case that is not essentially defensive, a deduction should be made. An example is Sloyan,

supra, where, to the extent that a building proprietor's counterclaim for damages exceeded the amount claimed by the builder, security was not ordered. See also Interwest v Tricontinental Corp Ltd (1991) 9 ACLC 1218; 5 ACSR 621 *at* 1227. *For the reasons already mentioned, that factor is not present in the instant case.*

12 The "reasons already mentioned" were that the respondent's case of invalidity was, in substance and in form, a defence to the claim (see at 341). Similarly, there is in this case no counter-claim for damages of the kind mentioned in *Farmitalia*, and no basis in this case for suggesting that Apple's notice of contention and cross-appeal are anything but defensive in the same way.

13 As to the notice of contention. Grounds 1 to 4 relate to points of non-infringement. They are, of course, defensive. Ground 5 relates to the invalidity case, which, in substance and in form, operates as a defence to the infringement case, just as in *Farmitalia*. As to the cross-appeal, grounds 1 to 4 are expressly only pressed to the extent it is necessary to do so, that is, if CPC's claim constructions (contrary to the trial judge's conclusions) are accepted.[2] That is obviously a defensive position. Ground 5 is simply a corollary of ground 1 of the notice of contention. Accordingly, there is no basis for any discount by reason of Apple adopting an allegedly non-defensive position.

A R Lang

23 December 2025

[2] As set out in those grounds, it is largely the case that the primary judge, having decided questions of construction in Apple's favour, chose not to decide certain grounds of invalidity which were pressed only on the basis of CPC's constructions. (It may be noted in this respect that Mr Williams concedes that Apple advanced certain invalidity grounds on the premise of CPC's claim constructions at Williams [19], though he rather inaptly uses the term "abandoned" in the chapeau of that paragraph.) It is to be expected that, as part of Apple's defensive position on the appeal, it takes the position that, if CPC's claim constructions are preferred, then those grounds of invalidity will need to be decided, either by remitting them to the primary judge or by the Full Court.