



Neutral Citation Number: [2020] EWHC 1318 (Pat)

Case No: HP-2019-000032

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST
PATENTS COURT

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Wednesday, 20th May 2020

Before:

MR. JUSTICE BIRSS
Remotely via Skype

Between:

- (1) **INTERDIGITAL TECHNOLOGY CORPORATION**
(a company incorporated under the laws of the State of Delaware)
- (2) **INTERDIGITAL PATENT HOLDINGS, INC.**
(a company incorporated under the laws of the State of Delaware)
- (3) **INTERDIGITAL, INC.**
(a company incorporated under the laws of the State of Pennsylvania)
- (4) **INTERDIGITAL HOLDINGS, INC.**
(a company incorporated under the laws of the State of Delaware)
- and -
- (1) **LENOVO GROUP LIMITED**
(a company incorporated under the laws of Hong Kong, China)
- (2) **LENOVO (UNITED STATES) INC.**
(a company incorporated under the laws of the State of Delaware)
- (3) **LENOVO TECHNOLOGY (UNITED KINGDOM) LIMITED**
- (4) **MOTOROLA MOBILITY LLC.**
(a company incorporated under the laws of the State of Delaware)
- (5) **MOTOROLA MOBILITY UK LIMITED**

Claimants

Defendants

**MR. RICHARD MEADE QC, MR. THOMAS RAPHAEL QC, MR. MARK
CHACKSFIELD QC and MR. THOMAS JONES** (instructed by **Gowling WLG LLP**) for
the **Claimants**

MR. DANIEL ALEXANDER QC and MR. JAMES SEGAN QC (instructed by **Kirkland
& Ellis International LLP**) for the **Defendants**

Approved Judgment

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MR. JUSTICE BIRSS:

1. The question I have to resolve is a case management issue in this dispute about standard essential patents. Essentially, there are three options before the court. One is to schedule the FRAND trial after two technical trials. Currently, there are two scheduled technical trials dealing with patent infringement/essentiality and validity concerning patents from the portfolio held by the patentee. They are in the lists for March 2021 and June 2021. The first proposal is to schedule the FRAND trial to come after the second of those. That would mean the FRAND trial would come would be from October 2021, although it may be later, depending on all the practical matters that the listing of a case requires. That is the first option.
2. The second option is to put the FRAND trial after all five of the technical trials which are currently proposed. It would involve actually listing the three outstanding technical trials (currently they are not listed), which would then come after the two currently listed technical trials, and then listing the FRAND trial after that. This would put the FRAND trial back, at least, I would say, for another year, well into 2022, probably the back end of it.
3. The third option is to not make a decision about any further listing of trials - the three outstanding technical trials and, in particular, the FRAND trial. Instead the option involves putting off those decisions until October.
4. I should make clear that these proceedings are currently taking place without prejudice to the defendants' position in relation to jurisdiction. The position at the moment is that the Supreme Court have not yet given their decision on the jurisdiction question in the Unwired Planet / Conversant appeals. That decision may have a profound effect on these proceedings or it may have no effect at all. On the state of the law as it stands, at the level of the Court of Appeal, the court has jurisdiction to determine the issues in the way that they are currently set up. I propose to manage this case on the basis of the law as it currently stands. I will take into account the uncertainty about the outcome in relation to the Supreme Court in making these case management decisions.
5. The first thing I can tell you I am not going to do is put this listing question off until October. This is a matter which needs to be resolved now. Putting it off helps no-one. I am not satisfied that delaying it any further is in the interests of justice, having regard to the overriding objective.
6. The choices therefore are either to list the FRAND trial after the two technical trials or to list the FRAND trial after the five technical trials. There are two proposed reasons why I should list the FRAND trial after the five technical trials.
7. First, it is said that it would make sense to do that because it may be that even if, for example, the patentee wins the first technical trial, nevertheless some useful information relevant to the FRAND trial may come from the fact that the patentee may have lost one or more of the other technical trials. I do not accept that in this case because the patent portfolio under consideration is large. This is not a case like the Conversant/ Unwired Planet cases, where the portfolios were small. I am told that the number of patents in the InterDigital 3G portfolio in issue in this case is something in the order of 155 families and in the 4G portfolio, also in issue, is more than 400 families. These are large numbers.

8. Listing five technical trials may well be a sensible way of trying to resolve the disputes, but it is in no sense a meaningful way of gauging the strength of the portfolio as a whole, statistically or otherwise. Mr. Alexander's clients would be perfectly entitled at a FRAND trial to make the point as a matter of rhetoric that patents within the five tested have been found to be invalid. However assuming that the FRAND examination has been conducted anything like the way it was done in Unwired Planet or based on some sort of metric for determining a portfolio strength, while it may be useful rhetoric, counting the outcomes of 5 cases is never going to be solid evidence of that. Things might be very different if one was dealing with a small portfolio, but we are not. Nor have I forgotten that despite the size of InterDigital's portfolio, Lenovo contends that the portfolio is very weak. Overall, I do not regard this first point as a good reason for adopting the approach of listing the FRAND trial after all five technical trials.
9. The second reason, and perhaps I think really the most important issue, relates to the position internationally. It is submitted by Lenovo that the significant advantage of listing the FRAND trial after the five technical trials arises from the fact that there are now proceedings, both in the USA (Delaware) and in China, which may give some indications relating to FRAND. It is said therefore that the court should schedule the FRAND trial in order to take into account.
10. It is clear that the court can and, if it is otherwise in accordance with the overriding objective, will attempt to manage the proceedings in order to factor in decisions of foreign courts which are relevant to the issues. See for example the judgment of Henry Carr J in Conversant v Huawei & ZTE [2018] RPC 16. Decisions on validity are less likely to be relevant, because the mechanism that was used in Unwired Planet takes into account the fact that the parties are always able to challenge validity in another jurisdiction. And again on that score, if the court was dealing with a small portfolio, that might also be a different matter, but it is not.
11. This overall dispute or, if you will negotiation, has been going since 2014, even on Lenovo's view. (InterDigital say it has been going for longer.) That is six years ago. These UK proceedings were issued in the summer of 2019. However the proceedings in China and in the USA which have a potential to produce results which may have some relevance to FRAND rates and/or give a view about what is or is not FRAND, were commenced by Lenovo extremely recently. I think, in Delaware in early April, possibly late March, and in China, I think they were commenced on 10th April and not notified to the patentee until something like 19th April. It is therefore extremely difficult to work out exactly when they will be resolved, and exactly what shape those proceedings will take by the end.
12. However on the evidence before me, if I manage these proceeding to schedule the FRAND trial to be reasonably sure that it took place after both the Delaware action brought by Lenovo and the FRAND issues in China, that would involve putting off the FRAND trial for something of the order of three or four years, possibly two years, but in any event, a very long time. Even if I just took Lenovo's time estimates which are not accepted by InterDigital, it would still involve putting this off for a significant period of time. That is a factor I am entitled to take into account.
13. Mr. Alexander submitted that while the courts are not required by legal principle to list cases so as to take account of foreign decisions, nevertheless they should, if it was not unreasonably prejudicial to do so. I do not accept the submission put in that way. The

courts will manage cases in accordance with the conventional case management principles, applying the overriding objective and taking into account the possibility that a decision elsewhere may produce a useful result, but it is not a trump card. The reason I do not accept the submission is not because I think the court should do something which is prejudicial, on the contrary, of course it should not. The point is that the submission is the wrong way of looking at it. The court will take into account foreign decisions if it reasonably can, but in this case that would involve an enormous delay to these proceedings which I am not prepared to countenance.

14. The realistic likelihood is that if I schedule the FRAND trial after the two technical trials, it will go ahead. It will also obviate the need for further technical trials. If the patentee loses both of the two technical trials then matters will have to be revisited, but it seems to me that is the most appropriate course.
15. Right, what is next?

(For further proceedings: please see separate transcript)

16. Dealing with these points in order, I agree with Mr. Meade that if a methodology is being advanced as part of the case as to why the offer is FRAND, the wording that has been proposed by InterDigital ought to require it to be pleaded but it does not do any harm to make it clear that that is necessary.
17. It is not proportionate at this stage to start getting involved in requiring people to disclose internal methods that they may have used to reach results which they want to put forward. That is a different issue and I am not prepared to make an order in terms of (b) if that is what it means. I am sure wording can be dealt with for that.
18. I am not prepared to make the order in terms of (c). That seems to be entirely disproportionate and probably irrelevant to a large extent.
19. As far as (d) is concerned, the same goes as for (b). In other words, if the claimant is going to rely on some external evaluation of what has been described as strength, such as saying that this portfolio has X number of truly essential patents or whatever, then it needs to be covered, but what this does not require is for the patentee to include any further evaluations which it may be aware of. That is not what it is about. I do not believe the wording does that, because it says “in so far as any reliance is placed”.
20. So far as (e) is concerned, I am not concerned with the way it is drafted. It seems to me that what the claimant should do is provide a list of the transactions entered into which only indicates the parties and the dates of those transactions. The other information is not proportionate, certainly not at this stage, if it ever would be. However a list of transactions with the parties is useful. It is actually a form of early disclosure more than anything else, but it seems to me that that is a useful thing to do.
21. I am not prepared to make an order in terms of (f). I do not really understand why that could possibly be relevant - what negotiations may or may not be going on with other parties. That is certainly not something that should be ordered at this stage.
22. As far as (g) is concerned, it was suggested that what this required of the patentee was to give information which the patentee was also seeking from the defendant. That is

not right. What the patentee is asking the defendant to do is to state whether it would be prepared to be bound by the FRAND licence in this jurisdiction. Manifestly, the patentee is prepared to be bound by that. Accordingly, there is no reason why it needs to say that in this statement of case. There is no reason why it needs to answer any wider question.

23. That is my decision.

(For further proceedings: please see separate transcript)