



Neutral Citation Number: [2020] EWHC 728 (Pat)

Case No: HP-2017-000048

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: 20/03/2020

Before:

HIS HONOUR JUDGE HACON
(sitting as a Judge of the High Court)

Between:

CONVERSANT WIRELESS LICENSING S. A. R. L
(a company incorporated under the laws of Luxembourg) **Claimant**
- and -

(1) HUAWEI TECHNOLOGIES CO., LIMITED
(a company incorporated under the laws of the
People's Republic of China)
(2) HUAWEI TECHNOLOGIES (UK) CO., LIMITED
(3) ZTE CORPORATION
(a company incorporated under the laws of the
People's Republic of China)
(4) ZTE (UK) LIMITED **Defendants**

MR. ADRIAN SPECK QC, MR. THOMAS HINCHLIFFE QC, MR. THOMAS JONES
and MS. JENNIFER DIXON (instructed by EIP Legal) for the Claimant
DR. MICHAEL TAPPIN QC, MR. JAMES SEGAN QC, MR. STEPHEN MORIARTY
QC and MR. HENRY WARD (instructed by Allen & Overy) for the Huawei Defendants
MR. DANIEL PICCININ (instructed by BRISTOWS LLP) for the ZTE Defendants
MR. JAMES ABRAHAMS QC (instructed by Bird & Bird LLP) for Nokia in opposition to
ZTE's application for access to the Nokia Disclosed Documents

Approved Judgment

Transcript of the Stenograph Notes of
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Tel No: 020 7067 2900 DX: 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

HIS HONOUR JUDGE HACON:

1. This is a pre-trial review conducted by phone conference. In the course of the review Huawei and ZTE have, in effect, made an application to adjourn the trial until the current health crisis is at an end. There is no way of saying how long that might be, but it could well be 12 months, perhaps longer. No application notice that has been filed. Mr. Tappin QC explained to me that his clients, Huawei, and indeed all the parties, were under an obligation to review the best way forward, particularly given the guidance which has recently been published from the Lord Chief Justice and the Chancellor of the High Court. That, of course, is correct. It is in the context of that obligation that the application is made.
2. Mr. Tappin gave a number of reasons why it would be appropriate to adjourn the trial. He said that preparation is bound to be difficult if the members of the litigation team have to be physically separate and can only communicate remotely. He pointed out that key members of the team may fall ill. Mr. Piccinin for ZTE added that a member of the family of a member of the team may fall ill and enter self-isolation. Obviously, if that were to happen it would seriously disrupt the preparation of the trial by any party.
3. The trial is due to be heard in about five weeks' time, to last around four weeks. Mr. Tappin said it is not clear that the video technology could cope with a link to the court from a large number of separate sources. He said the bandwidth may not be available to achieve that. There will be, I am told, 9-10 counsel, 15-20 solicitors and there may be non-parties who will wish to follow the trial. High sums are at stake requiring a lot of time and money to be spent by the parties in preparation for the trial. Preparation may have to be abandoned if one or more individuals fall ill or the technology fails to function. Alternatively the conduct of the trial, after it has started, may have to be abandoned. Obviously, that would result in wasted time and costs.
4. Mr Tappin said that it would be difficult for counsel to conduct the case adequately. In particular cross-examination, which is likely to require other members of the litigation team to be close by to provide input, will have to be conducted without such support unless individuals gather together in breach of the current government guidelines. He also pointed out that there would be difficulties in trial management. China is several hours ahead of this country and the US is several hours behind. There are to be eight witnesses giving evidence from China, I am told, four from the United States. Dealing with two distant time zones will add to the difficulties. Mr. Tappin also said that it would be difficult to deal with witness giving evidence which may contain confidential information if all the participants at trial, including non-parties, are connected by video-link.
5. I am told that there will be 17 witnesses at trial in total. Had the trial gone ahead in the normal way, the best estimate has been that it would last about 12 days. Mr. Tappin said it is now not at all easy to work out a viable trial timetable if one has to factor in a video-link not just for the witnesses, but for all the various participants at the trial.
6. He also pointed out that the witnesses giving evidence from abroad will not be assisted by staff sent out from this country to help with the bundles and so forth, because there will be no travel to and from China or the United States in the next few

months. The technology will also need to cope with the need for interpreters for the Chinese witnesses. The interpreters will have to be connected remotely to the communication system used at trial.

7. Mr Tappin speculated that there may be diplomatic objections to an English court taking evidence, by link, from witnesses in China. I do not know how likely that is.
8. Mr. Tappin emphasised that at least in relation to some of the witnesses – he identified in particular a witness who will be giving economic evidence – it would be very difficult to cross-examine such a witness by video-link, given complexity of the evidence being given.
9. A final point was made: there is currently pending a judgment of the Supreme Court in these and other joined proceedings following a hearing in October last year. The broad issue is whether this court in this and other actions have jurisdiction to conduct a FRAND trial to settle a global licence. As Mr. Tappin correctly pointed out, it is possible that if the trial in the present action goes ahead, it may later turn out that this court has no jurisdiction.
10. Mr. Piccinin, for ZTE, endorsed what was said on behalf of Huawei. He made a particular point about ZTE's expert in the United States. Mr. Piccinin believes this expert is in his sixties speculated that it may be difficult for the expert to travel to a video-conferencing facility in the United States and thereby join the trial. Mr. Piccinin said his evidence is crucial to ZTE's case.
11. Mr. Speck QC, for Conversant, emphasised two matters. He said that the general advice being given by the Lord Chief Justice and the Chancellor of the High Court was that trials should carry on where that is possible. Secondly, he said there will be prejudice to Conversant if the trial were adjourned for a year or possibly more than a year.
12. Mr Speck made a further point, namely that there has been no application notice seeking an adjournment. He said that had Conversant been given proper warning of Huawei's application, it may be that Conversant could have made constructive suggestions as to how the trial should go ahead, dealing with the various points raised by Huawei. By way of example, while Mr Speck accepted that there will be many witnesses at the trial, he suggested that not all of them need be cross-examined and on closer inspection it may be possible for a ruling that cross-examination be limited in certain cases.
13. So far as prejudice to Conversant is concerned, an adjournment would prejudice Conversant in the same way as if Huawei and ZTE were engaging in hold-out. In fact, as I understand it, Conversant believes that they have been engaging in hold-out, although Mr. Speck was careful to emphasise that he was not suggesting that the application for an adjournment was done with that motive in mind, but he said the prejudice to Conversant would be just the same.
14. I find Huawei and ZTE's reasons for an adjournment compelling,. So much so that I would be minded to grant an adjournment, save for the point on notice raised by Mr. Speck. It seems to me that an application of such consequence as an application to adjourn a trial of this size should have been made by an application notice. This is

not merely a procedural point. Conversant has not been sufficiently forewarned of this application to adjourn and has not had the opportunity to think through its case in response. As matters stand, I find it difficult to imagine what Conversant could say to satisfy me that the trial could satisfactorily go ahead without a real risk of the trial having to come to a halt either before the trial starts or even during the trial, with all the consequences of wasted time and costs. But I accept that Conversant should have the opportunity to think through its position, although it should do it in short order.

15. I will, therefore, require Huawei and ZTE to file an application notice. I will give permission for it to be filed with short notice so that the application can be heard on Tuesday, perhaps, or Wednesday of next week, and then I will give a final decision on adjournment.
16. I would finally say, or rather repeat, that Conversant should be aware that I take the points raised, mainly by Mr. Tappin for Huawei, very seriously, and at the moment I am persuaded that this trial should be adjourned, but I will give Conversant the opportunity to convince me otherwise.

[Further Argument]

17. ZTE has an application for disclosure. There are, broadly, three relevant categories of material. First, there is a 2003 licence agreement between Nokia and Huawei. Secondly, negotiating documents which led to the conclusion of a 2017 licence agreement between Nokia and Huawei. Thirdly, Nokia seeks access to unredacted versions of evidence which have been filed in this action. Redactions have been made because some of the documents referred to in the evidence have been treated as confidential, and ZTE has not been part of the relevant confidentiality club. ZTE seeks disclosure of these documents and redacted material to its external lawyers and expert only.
18. The question which arises is whether any of the documents to which ZTE seeks access, or any of the redacted material to which it seeks access, may be shown to the trial judge and may thereby become relevant to anything the trial judge has to decide. If that is the case, the documents and redacted material might have an effect on ZTE's interest in the case. As a basic principle of justice, ZTE's external lawyers and its expert must have an opportunity to see and comment on any material which could have an effect on ZTE's interests at stake in the trial.
19. Much of Mr. Piccinin's submissions on behalf of ZTE were directed to the 2003 licence. He took me to redacted versions of evidence in the case which suggest that Conversant's expert has considered that licence, although it is not at all clear that he thought it was relevant to anything the trial judge has to determine.
20. Helpfully, during the hearing Conversant and Huawei have agreed to notify ZTE of any documents or other material which, (a) Nokia regards as confidential and, (b) will play no part in either Conversant's or Huawei's case at the trial. It seems to me that as matters stand there is no need for ZTE to see those documents or that material.
21. It was suggested by Mr. Piccinin that the simplest way of dealing with this issue may be to revise the relevant evidence to remove redactions so that ZTE's lawyers and experts see exactly the same versions as those which will be used and shown to the

trial judge. As a matter of natural justice, it seems to me that this is correct, and I will so direct unless Conversant and Huawei confirm that the material concerned is confidential to Nokia and will play no part in their case at the trial.

[*Further Argument*]

22. An issue has arisen as to whether ZTE should be entitled to rely on some of the evidence which it has filed. In support of its case on the correct means to assess royalty rates in the FRAND licence, ZTE has filed an expert report from David Yurkerwich, who has experience in the negotiation of transactions based on intellectual property. Mr. Yurkerwich outlines several alternative ways in which royalties could be assessed in the FRAND licence in suit. Conversant says that many of Mr. Yurkerwich's routes to the assessment of royalties are not supported by ZTE's pleaded case and raise matters which cannot be fairly explored by Conversant in the time remaining before trial.
23. I should say something about the parties' overall approaches to royalties in this case. Conversant argues that the court should begin with royalty rates settled in *Unwired Planet International Limited v Huawei Technologies Co. Ltd* [2017] EWHC 2988 (Pat) for 2G, 3G and 4G. Conversant says that these should be scaled according to the facts in the present case to arrive at the FRAND licence royalties.
24. Huawei favour as a starting point a particular licence in the evidence, using that as a comparable. The royalty rate would again be scaled according to the present case.
25. ZTE's pleaded case sets out a different approach, which carries the label the "top-down" approach. I will say something about it in a little more detail, although very much still in summary form.
26. Paragraph 30 of ZTE's draft amended Statement of Case, begins: "One appropriate framework for a method to carry out such an apportionment involves the following steps." The pleading then sets out eight steps of which I need only mention the first three.
27. Step 1 consists of assessing the maximum aggregate royalty which potential users of the standard in question would have been prepared to pay for the right to use that standard at the relevant time.
28. Step 2 consists of identifying a subset of the declared SEPs covering the standard which can be said to be truly essential. It is not necessary for me to go into how truly essential SEPs are identified, save to say that part of ZTE's case is that there tends to be an over-declaration of patents alleged to be standard essential. This, step 2, leads to the total number of truly essential SEPs.
29. Step 3 consists of assessing the number of truly essential SEP families applicable to each standard within the portfolio to be licensed. This is the number of portfolio truly essential SEPs. In broad terms, the appropriate royalty is calculated by reference to the proportion of total truly essential SEPs which are portfolio truly essential SEPs. Put another way, the number of total truly essential SEPs is the denominator; the number of portfolio truly essential SEPs is the numerator. The relevant royalty rate is thus calculated by reference to the numerator divided by the denominator. I say "by

reference to" because the case as pleaded is more nuanced than that, but this relationship between the portfolio SEPs and the total SEPs all I need be concerned with here.

30. Of particular importance is ZTE's pleaded case on how the denominator should be assessed. Paragraph 41 of ZTE's draft pleading is under the heading "Application of the example top-down methodology for Conversant's SEP portfolio". Paragraph 41 itself begins,:

"The section below applies the example top-down methodology set out above (at paragraph 30) to Conversant's SEP portfolio."

31. Paragraph 41.1 states that the application

"... is conducted on a provisional basis using such information as is available to ZTE in advance of disclosure of documents evidencing Conversant's technical assessment of the patents it has assessed to be truly standard essential (and thus relevant) and exchange of fact and expert evidence in these proceedings."

32. There follows an explanation of how this is all done. Paragraphs 43.4-43.6 explain how step 2 should be done in the context of the Conversant portfolio and provide as follows:

"43.4 **Step 2 (TotSEPs):** The focus of ZTE's business including in particular the location of the majority of its manufacturing and of its smartphone sales would in principle favour an assessment of the total number of Truly Essential SEPs which is based on China.

43.5 However, Conversant holds more claimed Truly Essential SEPs which are granted and unexpired in the USA than in any other jurisdiction (by some margin). In circumstances where there has been no detailed judicial assessment by a Chinese court of the total number of Truly Essential Chinese SEPs, the next best alternative for these purposes is to adopt the estimates of the total number of Truly Essential SEPs established recently by the US District Court for the Central District of California in *TCL v. Ericsson*. Paragraphs 23.9(c) and 33.4(b)(iii) are repeated.

43.6 The applicable numbers determined in *TCL v. Ericsson* are: (a) for 2G, 365 patent families; (b) for 3G, 953 patent families; (c) for 4G, 1,481 patent families."

33. ZTE has thus identified the best approach as being that which adopts the estimates stated by the US District Court for the Central District of California in the case *TCL v Ericsson*.

34. Mr. Yurkerwich presents five top-down models, i.e. five alternative means of arriving at royalty rates by the top-down approach. He says:

"Given the information available in this case (and particularly the fact that there are relatively few comparable licenses available which are informative about the value of the Conversant portfolio), I have prepared a series of top-down models (the '**Models**') to estimate FRAND rates that a willing licensor and a willing licensee would consider in license negotiations. In preparing these Models, I have considered the approaches taken in the Unwired Planet, TCL and Huawei Nanjing decisions, together with case-specific information, updated ETSI data and varied assumptions about the validity and essentiality of the claimed SEPs."

35. He then continues to explain his top-down models and summarises them in a table set out in his paragraph 171. One of the five models uses the estimates in the *TCL* case for assessing the denominator. All the other four use a denominator not identified in ZTE's pleading. These other four models use a denominator obtained from data published by ETSI. The ETSI denominator is explained by Mr. Yurkerwich in his paragraph 189. Mr. Yurkerwich goes on to say this:

"190. To assemble the data for this improved denominator, I used IPlytics, a third-party ETSI data provider. A third party is required in order to 'clean' the ETSI data to eliminate duplicates, incorrect patent numbers and abandoned patents; and to ensure accurate declaration, priority and grant dates for each of the patents. IPlytics is a leading SEP data and analytics company headed up by a team of economists, computer scientists and engineers. It is a member of ETSI, has prepared reports for public bodies such as the European Commission, and is well-known for having 'clean' SEP data. IPlytics is reported to have well-known customers including Volkswagen, Audi, Daimler, Intel, Qualcomm, Microsoft, Panasonic, Canon, LG, and Huawei.

191. My team exported every declaration made to the 2G, 3G and 4G standards as of November 6, 2019 from IPlytics, which included approximately 1.75 million declarations representing approximately 110,000 unique patents. We consolidated these 110,000 unique patents into approximately 27,000 patent families using their INPADOC ID. These 27,000 families form the basis for my recalculated ETSI Denominators [**Annex 13, ETSI Denominator, Step 1**].

192. In this export I was able to obtain various pieces of information, including the date of each declaration, the patent number of each declared patent, the technical specifications and versions/Releases each patent was declared to, the project each patent was declared to, which technical standard the patent was declared to, and which 3GPP group worked on each project. I note that not all of this information is available for each patent declaration, and my team (under my supervision) have filled the gaps where possible using the available information to

determine, for each patent, in which year it was granted and to which standard it is applicable (as further described below)."

36. Mr. Speck drew my attention to Mr Yurkerwich's paragraph 192 in which he talks of having filled in gaps. At paragraph 198, there is another indication that Mr. Yurkerwich has filled in gaps in the data points available. He continues with a detailed explanation of how he calculated his ETSI-based denominators.
37. Mr Yurkerwich provides a table in his paragraph 204 which sets out the denominators for each of 2G, 3G and 4G. These use as a source first, *Unwired Planet*, second the *TCL* judgment, thirdly, a judgment given by a court in Nanjing, and finally, his ETSI denominators. The point underlined by Mr. Speck was that the ETSI denominators, particularly for 4G, are significantly higher than those derived from *Unwired Planet* and *TCL*.
38. Mr Speck's first substantive argument was that Mr. Yurkerwich's approach to the calculation of the denominator by reference to ETSI data was not pleaded.
39. ZTE's response was that it is clear from its pleading that the calculation using the *TCL* numbers was only ever presented as an example of a top-down approach. Alternative calculations using that approach were contemplated in the pleading. I agree that the pleading, on its face, suggests a degree of flexibility in ZTE's proposed approach and I take Mr. Piccinin's point that in a FRAND case, precise pleading in advance of an expert's report can be difficult. But four of the current top-down models outlined by Mr. Yurkerwich are certainly not expressly foreshadowed in the pleading.
40. If necessary, I could require ZTE to redo its draft pleading, but I think the more important point raised by Conversant is whether there is time left before trial for it to deal with Mr. Yurkerwich's calculations so that they can be properly challenged at trial.
41. Mr. Speck for Conversant said that there is a number of difficulties which Conversant would face in dealing with Mr. Yurkerwich's calculations. The references to filling in gaps in the data in paragraphs 192 and 198 of the reports are unclear and do not state how this was done. Mr. Speck also says that Mr. Yurkerwich's appendices set out data sets running to hundreds of thousands of lines of data which could not be checked in the time available.
42. Mr. Yurkerwich used cut-off dates for his calculations in consultation with ZTE's technical expert. He also relies on evidence from a new expert, namely Dr. Irvine. There is an application notice before me today from ZTE seeking to adduce this new evidence from Dr. Irvine. This new evidence is resisted by Conversant in the grounds that it is outside that ordered at the CMC and sets up new evidence which Conversant is required to deal with before the trial.
43. It seems to me that Dr. Irvine's evidence is quite limited in scope. He explains the chronology of each of the 2G, 3G and 4G releases. Dr. Lawrance, a partner in Bristows, explains that Dr. Irvine's evidence provides a necessary support for an aspect of Mr. Yurkerwich's report.

44. Returning to Conversant's objections to Mr Yurkerwich's report, Mr Speck says that, as appears from paragraph 191 of Dr Yurkerwich's report, he relied on work done by on unidentified team. Mr Speck argued that Dr Yurkerwich seems not to have done all the work himself, although who did what is not clear.
45. Mr. Piccinin, in response to these difficulties raised by Mr Speck, submitted that the fact that Mr. Yurkerwich had used a team is irrelevant. The point is that Mr. Yurkerwich takes full responsibility for everything that was done, including where he was assisted by others. In support of this Mr. Piccinin pointed to evidence of Andrew Samm, filed on behalf of Conversant. Mr. Samm refers to work done by staff working under his direction. Mr. Piccinin said that, in this sense, the reliance by Mr. Samm on work done by others is not materially different from the position of Mr. Yurkerwich in this regard.
46. I was also taken to a report by Mr. Bezzant, filed on behalf of Conversant. Mr. Piccinin said that Mr. Bezzant carries out an analysis which is quite similar to that of Mr. Yurkerwich, save that he uses data taken from *Unwired Planet*. None of the precise details of that analysis were pleaded by Conversant. Mr. Piccinin said that if it were impossible to grapple with the exercise done by Mr. Yurkerwich, then the same could be said of the exercise done by Mr. Bezzant for Conversant.
47. I find it difficult to be sure of the extent to which Conversant would be in real difficulty in checking the assertions made by Mr. Yurkerwich, which is the central point. I was not pointed to any evidence which convincingly established that Conversant is incapable of dealing with Mr. Yurkerwich's evidence and I am not sure that the case being advanced by Mr. Yurkerwich is something that Conversant cannot deal with adequately before trial. I am also persuaded that Conversant has, at least to some extent, done something fairly similar to the work done by Mr. Yurkerwich, albeit, unsurprisingly, arriving at a different result and this part of Conversant's work was not foreshadowed in Conversant's pleading.
48. Earlier today there was debate about whether the trial date should be adjourned. That is a matter I will be resolving next Wednesday. I am sure that if the trial date is adjourned, Mr. Yurkerwich's evidence will cause Conversant no significant difficulty because there will plenty of time to deal with it. Even the trial is not adjourned, I am, on balance, not persuaded that Conversant will not be able to deal with the arguments advanced by Mr Yurkerwich. Therefore I make no direction which will restrict ZTE's ability to rely on the evidence of Mr. Yurkerwich and I allow the admission of the new report of Dr. Irvine.
