Neutral Citation Number: [2020] EWHC 741 (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: 25/03/2020

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

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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**

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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 LLP**) 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**

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Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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HIS HONOUR JUDGE HACON:

1. On 20th March 2020, there was a part hearing of the pre-trial review in this FRAND action. The defendants, Huawei and ZTE, proposed that because of the current health crisis, the trial should be adjourned. I call it a proposal because there was no Application Notice. The claimant, Conversant, reasonably objected that since no application notice had been filed, it was being bounced into dealing with what was, in effect, a highly important application to adjourn without being given the opportunity properly to deal with the matter. I directed that Huawei should serve an application notice with permission to serve short, and that the question of adjournment should be more fully argued today. The Application Notice was filed and served, and I now deal with the question of adjournment.

2. In my judgment given on 20th March I summarised the reasons advanced by Huawei and ZTE for an adjournment and said that I found them compelling. In the few days since then, it appears that Conversant has come, at least in part, to agree. Conversant accepts that it is not practical for the trial to go forward in the usual way. Instead there is an alternative proposal. It is that rather than abandoning any prospect of a trial for another 12 months or more, in the unusual circumstances of the current health crisis the trial judge should deal with the issues at trial largely on paper.

3. In broad terms, the proposal is as follows: the parties would file reply evidence still outstanding in the usual way. They could then put written questions to experts who have given evidence for other parties should they wish to do so. This procedure is available pursuant to CPR 35.6. There would follow detailed written submissions from the parties. These would be full written arguments, as opposed to skeleton arguments in support of subsequent oral submissions. The trial judge would be provided with a reading guide. Full written submissions in answer would follow. The court would then undertake its reading of the submissions and evidence. The court might wish to ask written questions. In addition, Conversant propose that short, focused hearings on particular issues, as proposed by the judge or the parties, could be arranged. These would be conducted by Skype or using other suitable technology. The idea, as I understand it, would be to limit such hearings to the resolution of specific issues, presumably as ultimately directed by the judge. The hearings thus conducted would be relatively brief. Any cross-examination permitted by the court would be focused and time-limited. Thereafter, the judge would draft and deliver the judgment.

4. Mr. Tappin QC, who appears for Huawei, raised several objections to this proposed way forward. First, he pointed out that nowhere in the recent guidance from the Lord Chief Justice or from the Chancellor, issued in response to the current health crisis, is there any mention of trials being conducted on the papers (as opposed to interim hearings being decided on paper).

5. Mr. Tappin submitted that there were good reasons for this. He took me to the judgment of the Supreme Court in *Al Rawi v Security Service* [2011] UKSC 34, reported at [2012] 1 AC, 531. At paragraph 10 of his judgment, Lord Dyson said:

> "There are certain features of a common law trial which are fundamental to our system of justice (both criminal and civil).

> First, subject to certain established and limited exceptions, trials should be conducted and judgments given in public".

Lord Dyson then went on to enumerate other features of a common law trial conducted in this country. He said this at paragraph 13:

> "Another aspect of the principle of natural justice is that the parties should be given an opportunity to call their own witnesses and to cross-examine the opposing witnesses. As was said by the High Court of Australia in *Lee v. The Queen* (1998) 195 CLR 594, at para 32: 'Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial'."

Lord Dyson stated at paragraph 19:

> "In proceedings which are not regulated by statute or statutory rules, it might be thought that there are no limits to the inherent power of the court to regulate its own procedure and that it has an untrammelled power to manage litigation in whatever way it considers necessary or expedient in the interests of justice."

He continued:

> "[21] But even in an area which is not the subject of statute or statutory procedural rules, there are limits to the court's inherent jurisdiction to regulate how civil and criminal proceedings should be conducted. In my view, there is considerable force in what Professor Martin Dockray said in 'The Inherent Jurisdiction to Regulate Civil Proceedings' (1997) 113 LQR 120, 131: '... a matter which is procedural from the position of an applicant may be constitutional in the eyes of the respondent. The fact that procedural law can be described as subordinate or adjectival because it aims to give effect to substantive rules should not conceal the truth that procedures can and do interfere with important human rights, while the means by which a decision is reached may be just as important as the decision which is made in the end. Where procedure is as important as substance, procedural change requires the same degree of political accountability and economic and social foresight as reform of an equivalent rule of substantive law. Major innovations in procedural law should therefore be recognised as an institutional responsibility, not a matter on which individual judges should respond to the pleas of particular litigants. Procedural revolutions should appear first in statutes or in the Rules of Court, not in the law reports.
>
> [22] For example, it is surely not in doubt that a court cannot conduct a trial inquisitorially rather than by means of an adversarial process (at any rate, not without the consent of the

> parties) or hold a hearing from which one of the parties is excluded. These (admittedly extreme) examples show that the court's power to regulate its own procedures is subject to certain limitations. The basic rule is that (subject to certain established and limited exceptions) the court cannot exercise its power to regulate its own procedures in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice. To put the same point in a different way, the court must exercise the power to regulate its procedure in a way which respects these two important principles which are integral to the common law right to a fair trial".

6. Mr. Tappin submitted that the points there made by Lord Dyson still hold good now as they did when that judgment was given, notwithstanding the health crisis.

7. Mr. Tappin further argued that evidence was filed in the present case on the assumption that cross-examination will go forward in the usual way. Cross-examination should provide an important means for each party establishing its case. The court's assessment of the correct FRAND royalty would depend on which party's case is the more compelling. That in turn will depend on which party's evidence is the more compelling, as tested by cross-examination. I was shown an example of a dispute as to a fact raised by Conversant's expert. Mr. Tappin said that this was just one example of many areas of factual disagreement between the experts which would have to be tested by cross-examination in order for the court to reach a reliable assessment as to which side's evidence was the more satisfactory.

8. Mr. Tappin submitted that the scope of the claims cannot be understood without disputes to the technical background to those claims being resolved and that could only be properly done if there is cross-examination.

9. The next areas of dispute highlighted by Mr Tappin were those concerned with the non-implementation of the relevant technology by the defendants and the validity of the claims of the patents in Conversant's portfolio, both of which also will affect the value of the portfolio. He submitted that the arguments could not be adequately assessed without being tested by cross-examination.

10. Mr. Piccinin, for ZTE, endorsed what Mr Tappin had said. He submitted that the question of how royalties would have been determined between a willing licensor and a willing licensee is at root the principal question which the court will have to decide. There is a real diversity of evidence on this issue which can only be satisfactorily assessed by the trial judge following proper cross-examination. It is important to resolve not just what the experts say about this but why they say it. Mr. Piccinin added that oral argument in the usual way will be needed to help the trial judge with the issues which have to be resolved.

11. Mr. Tappin had points on the practicalities of Conversant's new proposal. He criticised the timetable proposed as being unworkable. An example he gave was the inadequate time to prepare evidence for what Mr. Tappin characterised as "monster written submissions" that would be required in the absence of oral argument.

Mr. Piccinin, on this topic, emphasised that the intensity of the paper trial process proposed by Conversant would put an intolerable burden on the family life of the legal teams on all sides.

12. I think that if these practical difficulties were the only criticisms of Conversant's proposed way forward, they could probably be resolved by careful review and amendment. However, as I have indicated, they are not the only criticisms.

13. Mr. Hinchliffe QC, who appeared for Conversant, submitted in response that the *Al Rawi* judgment does not prevent this court adopting a procedure according to Conversant's proposal. He accepted that the court's judgment at trial will depend upon the cogency of evidence presented but he said that the proposed way forward would allow for that. He directed my attention, in particular, to the central issue, that is to say, the valuation of Conversant's patent portfolio. There are two aspects to this: first, the number of truly essential patents in that portfolio and secondly, the validity of those patents or rather the likely strength of a validity attack on each of the patents.

14. As to the latter, Mr. Hinchliffe said that the evidence is that the total time that would be spent on each patent in a negotiation between willing licensor and willing licensee, with regard to validity, would be one to two hours. The evidence presented to the judge at the FRAND trial should permit the replication of something akin to a meeting between a willing licensor and willing licensee. In the real world, this would not have been a mini-trial on the validity of each patent. It follows, that assessing the strength of the portfolio does not and should not require detailed cross-examination of the sort suggested by the defendants. Conversant's proposed way forward would be more appropriate.

15. I should begin by saying that I commend Conversant's legal team for thinking about ways to deal with the difficulties imposed by the current health crisis. It is and will continue to be helpful to the conduct of litigation in the present circumstances for parties to make practical and imaginative proposals as to how best to move litigation forward until the crisis is resolved.

16. I also accept that Conversant may suffer serious prejudice if the FRAND trial is just put on ice for the time being. I have seen evidence from Boris Teksler, who is the Manager of Conversant, and President and CEO of its parent company. Mr. Teksler's evidence is that other potential licensees are unwilling to agree a licence pending settlement of terms under the relevant patents as settled by the court. He also pointed out that delay pushes the defendants' sales into becoming past sales which are liable to give rise to a lower royalty. Mr. Hinchliffe characterised this as money lost that can never be recovered

17. Another point made by Mr. Teksler is that there is a risk that owners of patent portfolios, such as Conversant, can have their financial resources drained while the resolution of licences is left pending. The fate of *Unwired Planet* seems to have been a case in point. However, Mr. Teksler did not say that Conversant is likely to find itself in that position at any particular time in the future.

18. I take the view that for the reasons given by Mr. Tappin and Mr Piccinin, practicalities aside, there are formidable barriers in the way of Conversant's proposals. Since the start of the health crisis developments in the guidance given courts' as to the

conduct of hearings and trials have been rapid. But so far, anyway, these have not included a change in the Civil Procedure Rules which would make it appropriate for the conduct of a FRAND trial, such as the present one, to go forward largely on paper. It may be that the approved means of conducting trials will continue to change but I do not accept that either the Civil Procedure Rules or the guidance of the Lord Chief Justice or the Chancellor permit a trial with the characteristics of a substantial FRAND trial to be conducted largely on paper.

19. It may be, as Mr. Hinchliffe submitted, that less cross-examination is required than the defendants suggest and it may well be that this FRAND trial, though it could never be straightforward, is in danger of becoming unnecessarily complex. But in my view, there are bound to be issues, a significant number of them, which will require cross-examination in the usual way.

20. In addition, I am satisfied that a good deal of time and costs may be wasted if the trial was to go ahead in ignorance of the law as will be stated by the Supreme Court in the current appeal before that Court.

21. I will therefore vacate the current trial date. The trial is adjourned. However, I will give the parties permission to re-apply after judgment from the Supreme Court. At that stage, it will be made clear over which issues this court has jurisdiction and, therefore, which matters fall to be decided. If any further application is made at that stage, self-evidently it must be made consistently with the guidance then in force.

22. It may be that it will be useful for some further steps to be taken in the immediate future. I have in mind for instance the service of reply evidence, but I will be guided by further submissions of the parties on that matter.
