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Case No: HP-2019-000014

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY (ChD)
PATENTS COURT

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

Date: 13/04/2021

Before:

MR. JUSTICE MELLOR

Between:

- (1) MITSUBISHI ELECTRIC CORPORATION
(a company incorporated under the laws of Japan)
- (2) SISVEL INTERNATIONAL SA
(a company incorporated under the laws of Luxembourg)
- and -
- (1) ARCHOS SA
(a company incorporated under the laws of France)
- (2) SUN CUPID TECHNOLOGY HK LTD
(a company incorporated under the laws of Hong Kong)
- (3) NUU MOBILE UK LIMITED
- (4) ONEPLUS TECHNOLOGY (SHENZHEN) CO., LTD
(a company incorporated under the laws of the Republic of
China)
- (5) OPLUS MOBILETECH UK LIMITED
- (6) REFLECTION INVESTMENT B.V.
(a company incorporated under the laws of the Netherlands)
- (7) GUANGDONG OPPO MOBILE
TELECOMMUNICATIONS CORP, LTD
(a company incorporated under the laws of the Republic of
China)
- (8) OPPO MOBILE UK LTD
- (9) XIAOMI COMMUNICATIONS CO LTD
(a company incorporated under the laws of the Republic of

Claimants

China)
(10) XIAOMI INC
(a company incorporated under the laws of the Republic of
China)
(11) XIAOMI TECHNOLOGY FRANCE SAS
(a company incorporated under the laws of France)
(12) XIAOMI TECHNOLOGY UK LIMITED

Defendants

MS. SARAH ABRAM and MR. EDWARD CRONAN (instructed by **Bird & Bird LLP**) for
the **Claimants**

MR. DANIEL PICCININ (instructed by **Taylor Wessing LLP**) for the **Fourth to Eighth**
Defendants

MR. DANIEL ALEXANDER QC and MR. WILLIAM DUNCAN (instructed by **Kirkland**
& **Ellis International LLP**) for the **Ninth to Twelfth Defendants**

Hearing date: 1st April 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this
Judgment and that copies of this version as handed down may be treated as authentic.

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 2pm on Tuesday 13th April 2021.

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THE HON MR JUSTICE MELLOR

MR. JUSTICE MELLOR:

1. This judgment is an amalgam of a series of rulings I made on 1st April 2021, expanded to give further detail of my reasoning. The hearing on 1st April was a continuation of the third CMC in the FRAND part of this case which took place originally on 2nd March 2021. I issued a short judgment arising from that first hearing on 4th March 2021 ([2021] EWHC 493). I repeat the relevant background from that judgment because most of it is equally pertinent now:

“3. The Claimants originally set out their case on FRAND in a Statement of Case dated 13th March 2020. At this stage, the Claimants alleged that the MCP Pool licence was FRAND, as demonstrated by the fact that numerous implementers had signed up to its terms. The Claimants relied on 23 licenses they alleged to be comparable.

4. After the Defendants served their Responsive Statements of Case on FRAND in May 2020, the Claimants brought the matter back before Mann J at a second CMC in July 2020, complaining that the Defendants’ Statements of Case were deficient. Mann J agreed and ordered the Defendants to serve revised Statements of Case on FRAND articulating their positive cases. These revised Statements of Case were served on 18 December 2020. As I understand the position, the reason for the delay was a dispute over confidentiality, on which Sir Alastair Norris gave a judgment on 9th October 2020 and an appeal to the Court of Appeal was dismissed on 19th November 2020, although a refinement to the confidentiality regime was suggested and has been adopted. The time taken up resolving those confidentiality issues has resulted in significant compression of the steps which needed to be taken in the lead up to this CMC.

5. Having received the Revised Responsive Statements of Case on FRAND from the two sets of Defendants, I understand that the Claimants wrote on 23rd and 24th December 2020 raising a series of questions arising from these revised statements of case. The Defendants rejected all criticisms by letters dated 6th January 2021. Against that backdrop, the Claimants then served an extensive Reply Statement of Case on 9th February 2021. Although the Defendants complain that the Reply Statement of Case sets out two new cases which ought to have been pleaded in the Claimants’ original statement of case, they do not seek any relief in that regard.

6. Then on 12th and 15th February 2021, the Claimants served three Requests for Further Information (‘RFI’). One of the 12th February RFIs was directed to Xiaomi and it is said raises over 100 individual requests.

7. The other RFI dated 12th February is directed to Oppo's Revised Responsive Statement of Case on FRAND, and the RFI dated 15th February is directed to Oppo's schedules to that Statement of Case. Between them the RFIs raise over 100 requests of Oppo.

2. I went on in that Judgment to explain why I ordered the Xiaomi Defendants to answer two particular requests – Requests 14 and 15. These requests concerned certain essentiality rates pleaded by Xiaomi, which were 18.15% for the MCP Pool and 23.5% for the 3G/4G stack, and for two particular entities. (I interpolate that the figure of 18.15% has now been identified to include a typographical error and the correct figure is 18.5%). In brief, my reason for ordering those requests to be answered was so that the Court was in a position to exercise its active case management powers in relation to any 'patent counting' case which Xiaomi might be running, for the reasons set out by Arnold J (as he then was) in *TQ Delta v ZyXEL Communications UK Ltd* [2018] EWHC 3651. As I said at [16] of my previous judgment:

In agreement with the indication given by Arnold J. in *TQ Delta*, I take the view that at least the methodology sought to be employed in any essentiality review should be pleaded. If pleading out the methodology requires a worked example yielding a particular figure like 18.15%, so be it. It can be made clear that the precise methodology may change along with the particular inputs when it comes to expert evidence, but I remain of the view that at least the basic methodology needs to be pleaded.

3. I reinforced the point at [19]:

If it is not already clear from what I have said above, the methodology proposed to be employed in any essentiality review must be pleaded as soon as possible so that the evidence required to prove the results of such a review can be identified and suitable case management directions can be given in good time within the directions down to the FRAND trial already in place.

4. I will assume that the Xiaomi Defendants responded as best they could to Requests 14 and 15, but in their responses, they made the valid point that their case on essentiality would depend on how the Claimants sought to justify their case on essentiality. One of the two new cases which had emerged in the Claimants' Reply Statement of Case on FRAND was that they alleged a 100% essentiality ratio for the MCP Pool.
5. At this hearing, the Claimants sought to downplay the significance of that plea. They were very keen to emphasise that in their original FRAND statement of case they pleaded that the terms of the MCP Pool licence are FRAND and in support of that they pleaded specifically that at least one member of each of the said patent families is subject to an independent review process for determination of essentiality to the UMTS and/or LTE standards.

6. That point was made in support of a submission by the Claimants that the Claimants' primary case has always been based on the MCP Pool licences that have already been entered into plus some further comparables. They say that the issue that has now arisen about the 100% essentiality ratio is not really part of their primary case and is at the outer edge of the FRAND case.
7. It is true that this essentiality ratio forms part of the Claimants' alleged 'proper' top-down cross-check. It is pleaded in this way, at [135](b)(v) of the Claimants Reply Statement of Case on FRAND (with information alleged to be confidential redacted):

(v) No reduction for non-handset or non-essential patent families is appropriate for the MCP numerator. The MCP Pool only comprises families which relate to handset technology, and families within the MCP Pool are subjected to detailed essentiality analysis such that an assumed essentiality rate of 100% is appropriate. Further, or in the alternative, the Claimants will say that any essentiality analysis of the kind performed, and at the level of detail performed, such as to assess an industry wide essentiality rate would result in a 100% essentiality rate observed in the MCP Pool by reason of the aforesaid. In respect of the said detailed essentiality analysis performed on MCP Pool patents:

(I) Unless the patentee can prove that its patent family has been confirmed as essential by another major Pool (such as Avanci or Via), at least one patent from each family is submitted to an independent third-party patent consultant for review, to determine its essentiality before being admitted to the MCP Pool. A fee being payable for each patent reviewed.

(II) Such consultants comprise specialist law firms and/or patent attorneys (listed in the Response to Requests 4-8 in the Claimants' Response to the Fourth, Sixth and Eighth Defendants' Request for Further Information Concerning the Claimants' Statement of Case on FRAND dated 7 May 2020).

(III) The hours spent on each review varies xxxxxxxxxxxxxxxxxxxxxxxx, depending on the complexity of the patent and the volume of materials which may be submitted in support. This is considerably more time than is afforded in many of the third-party patent reviews often relied upon as part of an essentiality evaluation for a top-down analysis, whether as part of litigation or in real world negotiation.

(IV) In addition, the Second Claimant and its affiliates have submitted its patents in the MCP Pool to the Avanci patent Pool, access to which requires passing Avanci's independent essentiality review process. The Second Claimant

understands that a similar number of hours evaluation is carried out in the review process as on the MCP Pool review. Again, this is considerably more time than is afforded in many of the third-party patent reviews often relied upon as part of an essentiality evaluation for a top-down analysis, whether as part of litigation or in real world negotiation.

8. This pleading makes it clear that the 100% essentiality rate depends on the various types of review processes mentioned and, with the *TQ Delta* guidance in mind, it raises the question of how the Claimants propose to prove this part of their case at trial. The significance of the plea will emerge at trial. Unless it is withdrawn, the Defendants are obliged to take the plea seriously and respond as necessary.
9. As part of their response, the Xiaomi Defendants pursue at this hearing a combination of requests for further information and requests for disclosure of the Claimants, all of which relate to the Claimants' assertion of a 100% essentiality rate. As the Xiaomi Defendants put it:

“RFI requests, 10, 15 and 16 all seek to identify the proportion of patents purchased by the MCP Pool entities which have been “discarded” as being non-essential, as a result of their essentiality review process and which, as a result, do not form part of the MCP Pool portfolio”

[In terms of disclosure,] Request 11 seeks documents concerning “The methodology for choosing the patents within the portfolios purchased by the Second Claimant. For example, any patent lists put forward to the Second Claimant and details of any “pick rights” the Second Claimant was able to exercise prior to patent purchase”. Request 12 seeks documents concerning “The essentiality and/or validity review documents relating to such reviews carried out on portfolios purchased by the Second Claimant prior to assignment.”

10. I will come to the detail of those requests later, because some aspects go too far. However, it is clear that at least the Xiaomi Defendants are trying to understand how the various review processes relied upon have enabled the Claimants to generate a portfolio in the MCP Pool which has an essentiality ratio which is around 7 times the average in the 3G/4G field (which the Claimants plead is around 16%, as I understand it).
11. For their part, the Claimants (a) resist these requests saying they are all irrelevant and (b) accuse the Xiaomi Defendants of proposing to conduct a review of 50-100 patents from the MCP Pool as part of their case on essentiality.
12. It was my pre-reading of the Skeleton Arguments for this hearing (and the way these requests and other points were discussed) which indicated to me that we reached, in my view, a bit of an impasse because, for their part, the Claimants seem to be somewhat unwilling to reveal their hand on the essentiality rate aspect of this case. For their part, in the previous judgment, to which I have referred, I ordered the Xiaomi Defendants to respond to the Claimants' requests 14 and 15, but it remains to

be seen whether the Xiaomi Defendants for example, are able to justify conducting or are allowed to conduct a review of 50-100 patents from the MCP Pool. Much, it seems to me, depends on how the Claimants rely on the alleged ‘independent reviews’. For example, if the Claimants rely only on the mere fact that reviews have been carried out, without regard to the validity of the reviews themselves, a proportionate response is likely to be different to the situation if the Claimants were to rely on the reviews as establishing essentiality.

13. The purpose of requests 14 and 15 put forward by the Claimants was to find out what case the Xiaomi Defendants proposed to run on any sort of essentiality review that they proposed to conduct. As I indicated in the course of the hearing, they of course have responded by pleading out in fairly general terms what they contemplate by way of an essentiality review. But, as I have mentioned, they make a rather obvious point that the essentiality review that they might conduct depends very much on what case the Claimants are going to put forward. The result, as I described it, was that we have reached a bit of a logjam or a Gordian Knot and so, as I see it at this CMC, part of the court's task is to remove the logjam and keep things moving, bearing in mind that we have relatively little time in the timetable in which to develop the pleadings into a state where they are fit for purpose.
14. The logjam concerns both the state of the pleadings and disclosure. Although matters were argued in the opposite order, I will discuss the RFIs and requests for disclosure first because that discussion feeds into the order I made in the course of the hearing for an exchange of statements of case on essentiality.

The Xiaomi RFIs and requests for disclosure.

15. The Xiaomi RFIs 10, 15 and 16 form part of a group of RFIs directed at paragraph 135(b)(v) (I), (III) and (IV) of the Claimants’ Reply FRAND Statement of Case (quoted above). The requests with the existing responses are as follows:

“10. Please explain how many patents have been submitted for evaluation by the MCP Pool.

Response

The relevance of this request is not explained or understood. As set out at paragraph 5(a)(ii) of the Claimants’ Statement of Case on FRAND and paragraph 135(b)(v) of the Claimants’ responsive Statement of Case on FRAND, at least one member of every family in the MCP Pool is subject to a third party assessment and/or has been assessed and accepted into another Pool. In as much as the Xiaomi Defendants’ request is directed at patents wider than those which have been admitted to the MCP Pool, that is, such as to include patents which are not part of the MCP Pool, the number of such patents which have been submitted for an assessment of their essentiality is irrelevant to the issues to be decided.

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15. Please explain which patents within the MCP Pool which have been reviewed by an independent third-party consultant have been: a) approved as essential; and b) rejected as non-essential.

Response

As the Claimants have explained at paragraph 5(a)(ii) of the Claimants' Statement of Case on FRAND and paragraph 135(b)(v) of the Claimants' Reply, at least one member of every family listed in the MCP Pool brochures is subject to a third party assessment and/or assessment and acceptance into another Pool, which acts to confirm the good faith belief of the patent owner that its patent is essential. If a patent is considered not to be essential by the third-party reviewer it is not listed in the MCP Pool patent brochures. However, pursuant to the terms of the MCP Pool Licence, if it is in fact essential, e.g. to a part of the standard not considered by the reviewer, it is nonetheless included in the licence grant under the MCP Pool Licence, even though it is not listed in the MCP Pool patent brochures (as explained in the Claimants' response to requests 4 – 5 of the Oppo/OnePlus Defendants' RFI dated 22 April 2020).

16. Please explain how many patent families are owned by each member of the MCP Pool which are declared as essential to 3G and 4G cellular technologies but do not form part of the MCP Pool and please explain the sources used for this determination.

Response

The relevance of this request is not explained or understood. The patents not included in a licence to the MCP Pool patents are not the subject of the question before the court, namely the terms of the FRAND licence to the patents that are included in a licence to the MCP Pool. It is noted that the licences offered under the MCP Pool extend to other patents owned by the Pool members which are essential even if they are not listed in the MCP Pool patent brochures, subject to clause 1.12 of the MCP Pool Licence, which is addressed at paragraph 40 of the Reply and in the Claimants' response to requests 4 – 5 of the Oppo/OnePlus Defendants' RFI dated 22 April 2020.

16. I have set out the two Xiaomi requests for disclosure in issue above. As I observed at the hearing, request 11 in particular was overly broad and I proposed to address it on the basis that it read as follows:

“The methodology for choosing the patents for inclusion into the MCP Pool within the portfolios purchased by the Second Claimant. For example, any patent lists put forward to the

Second Claimant and details of any “pick rights” the Second Claimant was able to exercise prior to patent purchase”.

17. What these various requests are really getting at is whether and, if so, by what process(es) patents were selected for inclusion into the MCP Pool. The point that Mr. Alexander (for the Xiaomi Defendants) is pursuing is how did the MCP Pool come to be so enriched beyond the normal essentiality rate. The Claimants rely, as I indicated earlier, on an independent review for essentiality. It seems to me that that type of review must have resulted in some form of selection process, because if it did not result in a selection process, it gives rise to a rather strong inference that the independent review was just a rubber-stamping exercise. So let me assume that was not the case. The independent review for essentiality must have necessarily resulted in some form of selection process as to which patents were to be included in the MCP Pool and which were not.
18. Either way, it seems to me to be the case that the processes by which the independent review was undertaken is highly relevant to the court's determination of whether it can rely on the Claimants asserted essentiality ratio of 100% or whatever lower percentage it may turn out to be. I entirely accept that the patents not included in the MCP Pool are themselves irrelevant, but I can see a case for saying that the discard rate may be of some relevance to the point as to whether the asserted essentiality rate of 100% can be sustained or not.
19. In the course of her argument in reply, Ms. Abram (for the Claimants) offered to provide a list of each owner in the MCP Pool, dividing their patents into those included in the Pool and those which were not, which I think would go some way to addressing what I might call the ‘discard rate’ issue. However, I still remain of the view that request 11 as modified is a suitable request for disclosure; in other words, the Claimants should produce documents evidencing the methodology for choosing the patents for inclusion into the MCP Pool within the portfolios purchased by the second Claimant, for example, any patent list put forward to the second Claimant and details of any pick rights the second Claimant was able to exercise prior to patent purchase. The amendment that I have made to that category ought to cut down the level of inquiry because it only applies to patents which were actually included into the MCP Pool. So whether the selection was on purchase or post purchase, documents evidencing the methodology should be disclosed. It seems to me that those documents ought to be readily available. After all, that must be an important part of what the business of the Claimants actually is.
20. Going back to the RFI requests, I think request 10 is too broad because it is detached from the actual selection exercise of inclusion into the MCP Pool, so I will not order that to be answered.
21. In relation to request 16, I think that is adequately covered by the offer that Ms. Abram made in her reply.
22. In terms of request 15, I have seen the response and Mr. Alexander stresses that what he is interested in is effectively the reject rate. I am very cautious about this reject rate because the proportionality of this information depends very much on a rather clean universe against which any reject rate can be assessed. I am not persuaded that an answer to request 15(b) is proportionate, bearing in mind the offer that was made

by Ms. Abram which will give the Defendants at least some information on which to determine at least some reject rate in relation to the patents owned by each patent owner in the Pool.

23. That leaves the request for disclosure request 12. It seems to me, as drafted, that request is far too broad and to the extent that it covers any relevant documents, they should be covered by request 11 as amended.
24. In terms of RFI request 15, I think the way forward is Ms. Abram will provide those lists as offered but, in addition, the answer to request 15(a) should form part of the Claimants' statement of case, as I discuss next.

Statements of Case on essentiality

25. On the current state of the FRAND pleadings, it seems to me that neither the Claimants nor the Xiaomi Defendants have yet set out their case on essentiality at a sufficient level of detail to enable the Court either (a) to case manage this part of the case effectively or (b) to make appropriate findings of fact at trial.
26. For these reasons I am going to order an exchange of statements of case on the allegations relating to essentiality ratios. For their part the Claimants must start the process by serving a statement of case and in broad terms it is going to be a statement of case along the following lines. Of course what I am going to outline will have to be the subject of embodiment in a minute of order and agreement, but the statement of case has to basically cover the following subjects:
 - i) First, the Claimants need to set out what their case is as to the essentiality rate of the MCP Pool. I add that this must include any alternative case the Claimants wish to run at trial.
 - ii) Second, to specify what any such case is based on in terms of the sources of analysis and the nature of the materials that they rely upon;
 - iii) Third, how any such case interrelates with the Claimants' case on what is called the stack, in other words, how their essentiality ratios compare with the general essentiality ratios amongst 3G and 4G technologies generally;
 - iv) Fourth, how any such case interrelates to the essentiality rate of any other patent holder; and
 - v) Fifth, the Claimants must set out details of the processes by which patents were selected for inclusion in the MCP Pool. This will include the Claimants' response to RFI Request 15(a).
27. In terms of how specific this statement of case needs to be, I emphasise that this statement of case needs to set out precisely the findings of fact which the Claimants will be asking the court to make at the trial. It must be apparent to the informed reader how the case is going to be proved at trial. I am not going to order that the statement of case needs to explain the Claimants' position on privilege or waiver of privilege, as the Oppo Defendants requested. That is not for a statement of case, although I would encourage the Claimants and the Defendants for that matter, to explore the privilege

issues and waiver issues in correspondence as quickly as possible to keep things moving.

28. So the Claimants will have to serve that statement of case within a time to be agreed and the Defendants must then respond in a statement of case in which they will need to set out what their approach to any essentiality analysis is going to be, at an equivalent level of detail. I emphasise that both these statements of case will need to be what I call *TQ Delta* compliant, in the sense that they need to set out sufficient information so that the court can actively case manage this aspect of the case and, as I emphasised to the Claimants in the course of argument, the Defendants' ability to respond adequately in their statement of case will depend very much on the quality and the precision of the statement of case that the Claimants provide.
29. I am afraid that after these statements of case have been served, it will be necessary for the parties to come back for a further CMC at which the Court will have to consider the admissibility of the materials that are sought to be relied upon and equally what the Defendants will need to do on their side. Again, I emphasise I think we are now short of time in this case for these issues to be adequately identified in time for the expert evidence which is due to be served on 7th June 2021. For preference and because these issues are involved, this further CMC should, if possible, be listed before me. If I am not available in the appropriate timeframe, it will have to be listed before another Judge.

Three further Xiaomi requests

30. I now have to deal with three further requests. The first is Xiaomi's request for disclosure 9, which reads as follows:

“The declared patent database results (in native format) which were used to determine the number of 3G and 4G declared SEPs held by Sisvel and other licensees and licensors referred to in Appendices 1-16 and to determine the relevant denominator figures referred to therein. Together with each of the databases (in native format) produced for, and showing the results of, each step as set out in Appendix 18 (and summarised in paragraphs 9 and 15 of that Appendix).
31. Appendix 18 to the Claimants' Reply FRAND Statement of Case sets out the Claimants' calculations for the denominators and the numerators used in their top-down approach. In short, what the request is getting at is the various filters applied in each step taken in the two parts of Appendix 18, as summarised in the tables set out in paragraphs 9 and 15 respectively.
32. As I understand matters, the Claimants are content to disclose the lists of patents, provided the disclosure is mutual. So, Ms Abram argues that whatever I order in relation to this request should apply equally in reverse in relation to Xiaomi's filtering of the IPlytics database. There is no counter-application before me, but no doubt what I rule on request 9 will be taken to apply to IPlytics.
33. I understand that there may be certain difficulties in recreating the application of these filters, but it seems to me that it will greatly assist and ease the task of the experts to

have these lists so that they can assess the effect of various filters on the analysis and therefore I am going to order the various lists and the filters to be disclosed.

34. The second part of this concerns Xiaomi's RFI requests 32 and 33 and a particular licence entered into by Sisvel of its own patents with a party I will call Y. It also concerns a previous licence entered into by a party I will call X with the same counterparty Y. The issue is over whether the Sisvel licence is a good or a poor comparable. The Claimants have pleaded that it is not a good comparable for reasons which in part relate to the previous licence granted by X to Y, and, secondly, because of an amendment to that licence which was made at the same time as Sisvel's license to Y.
35. The argument that has taken place has revealed that requests 32 and 33 are not particularly precisely drafted and so there was some uncertainty as to really what Xiaomi were after.
36. In relation to one of the requests, 32, I think what is now sought is some explanation of the proportion of patents now in the MCP Pool which were previously licensed to Y and it seems to me the Claimants must have an idea of what that proportion is, so I am going to order them to reveal in answer to request 32 what that proportion was.
37. As I said, request 33 relates to an amendment to a licence. As I understand it, the objection, or at least part of the objection to this request, is that it would require the unpacking of a different licence that would be potentially expensive, disproportionate, but essentially irrelevant to the issues in this case. For that reason, I think an answer to request 33 is going to be disproportionate and therefore I decline to order it.
38. I invite the parties to draw up and agree an Order giving effect to my rulings, as reflected in this Judgment. If agreement is not possible, brief written submissions can be made.
