



Case No: HP-2021-000047

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: Wednesday, 22nd November 2023

Before:

MRS. JUSTICE JOANNA SMITH DBE
Hybrid via Microsoft Teams

Between:

**INTERDIGITAL TECHNOLOGY
CORPORATION
(and others)**

Claimants

- and -

**ONEPLUS TECHNOLOGY (SHENZHEN) CO.,
LTD.
(and others)**

Defendants

MR. NICHOLAS SAUNDERS KC, MR. CHRIS HALL and MR. EDMUND EUSTACE
(instructed by **Bird & Bird LLP**) for the **Claimants**
MR. COLIN WEST KC and MR. RAVI MEHTA (instructed by **Taylor Wessing LLP**) for
the **Defendants**

APPROVED JUDGMENT

**(permission to amend the amended responsive statement of case in respect
of FRAND issues)**

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

MRS. JUSTICE JOANNA SMITH DBE:

1. The next matter I need to deal with at this case management conference concerns the Defendants' application of 16th November 2023 for permission to amend their amended responsive statement of case in respect of FRAND issues by the addition of one allegedly comparable licence agreement in the form of the 2014 agreement with Samsung ("**Samsung 2014**"). The proposed amendment is the matter of a few words and is contained in paragraph 22 of the statement of case.
2. Turning to the grounds for the proposed amendment, the Defendants say that, having reviewed the claimants' evidence from its expert, Dr. Padilla, served on 20th October 2023, it is apparent that he has taken a new approach to assessing distinct periods of time which the proposed licence in this case (i.e. the suggested licence between the Claimants and the Defendants) should address separately, which he refers to as the 4G and 5G periods. The Defendants say this approach was not apparent from the Claimants' amended statement of case on FRAND. The Defendants submit that their own expert, Dr Lopez, considers that he will need to address Samsung 2014 in his evidence, particularly because it represents a large proportion of the units licensed by the Claimants during the 4G period. The Defendants point out that the potential for either expert to rely on additional comparables was made clear to the court and was agreed by the parties in a joint email dated 28th September 2023, which expressly referred to the possibility that the experts may find it necessary to refer to additional licences and made clear that this may precipitate a proposed amendment. The Defendants say they have followed this procedure in making the application that is before the court today.
3. I observe at this point that at present in the action the Claimants rely on five comparable licences while the Defendants rely on those five, plus one additional licence. The new proposed comparable in the form of Samsung 2014 would take the overall number to be addressed by the experts at trial to seven.
4. The Defendants say that this amendment and any consequential directions can be accommodated within the existing trial timetable which culminates in a trial that is due to start at the end of February 2024. They say that there will be no real prejudice to the Claimants by reason of the amendment and that the trial date will not be lost.
5. In summary, the Claimants dispute that their expert has raised anything new that would have come as a surprise to the Defendants. They complain that this application to amend the Defendants' statement of case is raised very late in an already extremely congested timetable. The Claimants' main objection appears to be that the Defendants' case on Samsung 2014 is opaque in that there is no explanation as to how Samsung 2014 will be used by the Defendants' expert or what it will go to. In other words, the Claimants cannot determine the impact of the proposed amendment going forward. Accordingly, on his feet today, Mr. Saunders suggested that this is an application that could be adjourned to the next case management conference fixed by me today to take place on 21st December 2023, by which time he submits that the Defendants' expert report will have been served (it is due to be served on 15th December 2023) and the Claimants will have a clearer understanding of the case management consequences of the inclusion of Samsung 2014 in that report.

The approach of the court to the application

6. The court may grant permission to amend under CPR 17.3. It has a broad discretion pursuant to that provision. I was not addressed by the parties on the principles that apply, but they are well known. Unless the proposed amendment is “very late”, in the sense that the trial date will be lost, the court should have regard to the overriding objective in determining the application. Mr. Saunders expressly confirmed in his submissions today that the Claimants do not suggest that this is a “very late” application in the sense that it necessarily jeopardises the trial date.
7. Amendment applications will always involve the court in striking a balance between injustice to the applicant if the amendment is refused and injustice to the opposing party and other litigants in general if the application to amend is permitted. It is often the case that, on an amendment application, the court will be required to consider whether the amendment has a real prospect of success, but that is not applicable here. Equally, the court is sometimes faced with complaints that the proposed amendment is insufficiently particularised or incoherent. That is also not really applicable here, although the Claimants do say that the amendment is opaque in the sense that I have identified. However, my understanding of that criticism is that it goes largely to the question of case management rather than to any imprecision in the words used to advance the amendment.
8. Turning then to my decision and dealing first with the question of lack of opacity: it has been common ground in this case that the parties will be unable to understand each other’s cases prior to the exchange of expert evidence. This much was acknowledged by Mellor J in his judgment at the CMC on 6th July of this year and lies behind his decision to require expert reports to be served sequentially.
9. The procedure that has been adopted in this case is that a discrete number of licences has been identified by the parties to be used as comparables, but always on the express understanding, as is clear from the 28th September 2023 e-mail to the court, that there would be scope for either party to rely on additional licences and to make an application to amend in order to do so.
10. I accept Mr. West's submission that the Defendants have followed that procedure here. There has been debate during the course of the hearing as to whether Samsung 2014 should have been identified by the Defendants and their expert at an earlier date and the claimants have cast doubt over the suggestion that the need for Samsung 2014 was only first identified upon service of Dr. Padilla's report. I am not in a position now to determine that debate and I do not consider that I need to do so. It is, in any event, somewhat sterile.
11. The question for the court, in my judgment, is whether it is consistent with the overriding objective to permit the amendment that is now sought at the time that it is sought. The rights and wrongs of why it is only sought now are not a significant factor in that evaluation, although they might have been had this been a “very late” amendment which had the potential to jeopardise the trial date.
12. Accordingly, the real issue for the court arises in the context of the balancing exercise that I identified earlier, which will include consideration of whether the burden on the Claimants would be significantly increased by this amendment such that the prejudice

to the Claimants of permitting the amendment would outweigh the prejudice to the Defendants of refusing it.

13. Turning then to that balancing exercise. On one side of the balance it is inevitable, in my judgment, that refusal of permission to amend would prejudice the Defendants. The Defendants' expert has said he wishes to rely on Samsung 2014 in providing his opinion on value and I have been told today by Mr. West that Dr Lopez considers Samsung 2014 likely to play an important part in his opinion, such that any opinion from him would be incomplete without reference to it. Although I have no evidence from the Defendants as to this latter point, there is no doubt on the available evidence that the Defendants' expert wishes to refer to Samsung 2014 and, in my judgment, I can properly infer that he considers it to be relevant to the exercise he must undertake. The agreed procedure to which I have already referred anticipates that this might happen and has made provision for it. All parties agree that this expert evidence lies at the heart of this case.
14. On the other side of the balance, the Claimants say they will be highly prejudiced if the amendment is allowed in that they will be required to divert resources into dealing with a yet further comparable licence at this late stage in the proceedings. They say that the time for production of their expert reply report on 16th January 2024 is already very tight and they do not have a clear understanding of how Samsung 2014 is going to be used by the Defendants' expert. They point out the complexity of "unpacking" these comparable licence agreements.
15. While these are significant considerations, I do not consider that they outweigh the potential injustice to the Defendants of refusing this application. My reasons are as follows:
 - (1) The Claimants are not approaching Samsung 2014 from a standing start. They have previously been required to consider this licence as a comparable in *InterDigital Technology Corporation v Lenovo Group Limited* [2023] EWHC 1583 (Pat). Witness evidence was adduced in those proceedings in respect of Samsung 2014 and the Claimants' expert (then acting) considered it for the purposes of his report. Mellor J dealt with it in detail in his judgment following the trial.
 - (2) Although I accept that the personnel have changed (the Claimants now have a different expert and the solicitor team has also changed since the *Lenovo* proceedings), nonetheless the Claimants are already in a good position to pick this up quickly. In her third witness statement, Ms. Stephens accepts that, in the context of the present proceedings, the Claimants' legal team and expert have already done some work in considering Samsung 2014.
 - (3) Against that background, I can see no reason why the Claimants' expert should not immediately be instructed to start "unpacking" Samsung 2014 with a view to forming his own opinion as to whether it is a reliable comparator and with a view, no doubt, to anticipating the arguments that may be raised in respect of it by the Defendants' expert. There is no need for this exercise to await sight of the Defendants' report on 15th December 2023. I accept that, following service of that report, Dr. Padilla will be required to prepare a reply on seven licences rather than six, but I have not been told that he considers this to be an impossible task, notwithstanding that it is plainly a complex one. I acknowledge that it may be unclear until service of the Defendants'

report exactly what the points relating to Samsung 2014 on which the Defendants' expert wishes to rely are. However, this will also apply to the other comparable licences and I do not consider that sufficient reason to kick this particular can down the road to the next case management conference. It is clear to me that, as acknowledged elsewhere, cases of this sort require robust case management and I do not think it helpful to spend court time and resources at the next hearing arguing about this very same issue. In any event, I agree with Mr. West that such a course would give insufficient recognition to the procedure agreed between the parties, as reflected in the 28th September 2023 email.

(4) As for consequential case management directions, I consider that it is clear from the submissions that I have heard that a practical way forward can be found in relation to the service of additional evidence relating to Samsung 2014.

(5) Thus the Claimants have already acknowledged that they can serve the negotiation summary schedule relating to Samsung 2014 used in the *Lenovo* litigation by the 1st December 2023. In addition, the Claimants' witness statements from the *Lenovo* action have already been disclosed in these proceedings and I see no sensible reason, and none was suggested, as to why these statements cannot be unredacted, in so far as they address Samsung 2014, and also served, in unredacted form, on 1st December 2023.

(6) Whilst I entirely accept that this may not amount to the full compass of additional evidence that the Claimants will wish to serve in relation to Samsung 2014, the Defendants have realistically accepted that any further evidence in the form of disclosure or witness evidence need not be served until 16th January of next year, at the same time as service of the Claimants' reply expert evidence. In my judgment, whilst this is tight, it is achievable. Mr. Saunders did not suggest otherwise.

(7) Mr. Saunders did raise the spectre of the Defendants wishing to serve yet further expert evidence following receipt of any such new witness evidence or disclosure, but I am bound to say that I can see no good reason why that would be necessary and I think it most unlikely that the court would permit the service of any such further expert evidence. The issues to which any new factual evidence is likely to go are, in any event, peripheral as has already been explored this morning in connection with the disclosure application and it is difficult to see how the court could be further assisted by any additional expert evidence from the Defendants. Mr. West expressly acknowledged today that he did not anticipate that such further material would affect the content of the expert reports.

(8) Mr Saunders also floated the possibility that the court will be faced with yet more new material upon receipt of the Defendants' expert report. However, given the procedure that has been agreed and given that the Defendants have expressly sought to comply with that procedure in relation to this amendment, the court would likely be very concerned if they subsequently seek to advance additional new material, relevant to the way in which they seek to advance their case, in respect of which no amendment application has been made. Subject to the specific circumstances, I suspect that the court is unlikely to have any sympathy with any such attempt.

(9) In her third witness statement, Ms. Stephens raised a point at paragraph 9, part of which is confidential, as to the potential delay in obtaining certain data relevant to the Claimants' expert and his team. However, assuming that efforts start now to obtain the

necessary licence to which reference is made in that paragraph, it should be available by the time of service of the Defendants' expert report on 15 December 2023 or shortly thereafter. I do not consider this to affect the analysis that I have already made.

16. In all the circumstances, I permit the amendment application and I order that the negotiation summary schedule relating to Samsung 2014 and unredacted witness statements from the *Lenovo* litigation be disclosed by 4 pm on 1st December 2024. I also grant permission for any further evidence from the Claimants in the form of documents or witness statements necessitated by reason of the amendment to include reliance by the Defendants upon Samsung 2014 to be served by 4 pm on 16th January 2024.

(For continuation of proceedings: please see separate transcript)