Neutral Citation Number: [2023] EWHC 2871 (Pat)

Case No: HP-2023-000025

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: Friday, 3rd November 2023

Before:
MR. JUSTICE MEADE
Hybrid via Microsoft Teams

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Between:

PANASONIC HOLDINGS CORPORATION **(a company incorporated under the laws of Japan**	**Claimant**
- and -	
(1) XIAOMI TECHNOLOGY LIMITED **(2) XIAOMI INC.** **(a company incorporated under the laws of the People's Republic of China)** **(3) XIAOMI COMMUNICATIONS) CO. LTD** **(a company incorporated under the laws of the People's Republic of China)** **(4) XIAOMI HK LIMITED** **(a company incorporated under the laws of Hong Kong Special Administrative Region of the People's Republic of China)** **(5) GUANGDONG OPPO MOBILE TELECOMMUNICATIONS CORP, LTD** **(a company incorporated under the laws of the People's Republic of China)** **(6) OPPO MOBILE UK LTD** **(7) UNUMPLUS LIMITED**	**Defendants**

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MS. ISABEL JAMAL and **MR. DAVID GREGORY** (instructed by **Bristows LLP**) for the **Claimant**
MR. JAMES SEGAN KC and **MS. LIGIA OSEPCIU** (instructed by **Kirkland & Ellis International LLP**) for the **Xiaomi Defendants (D1-D4)**
MR. ANDREW LYKIARDPOULOS KC (instructed by **Pinsent masons LLP**) for the **Oppo Defendants (D5-D7)**

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Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MR. JUSTICE MEADE:

1. This is a SEP/FRAND case of a generally familiar kind in which Panasonic is the patentee and holder of a portfolio which is large (at least numerically), although Oppo makes the point that it has not been tested in litigation before. There are two distinct groups of defendants who I will refer to as "Xiaomi" and as "Oppo". Those are respectively the first to fourth defendants and the fifth to seventh defendants.

2. The positions taken by Xiaomi and by Oppo respectively are quite different. Xiaomi has made clear that it will commit itself to take a FRAND licence on the terms settled by this court in due course at a FRAND trial, which everybody agrees must take place, but whose timing is the subject of dispute that I will come to. Xiaomi neither wants nor requires any technical trials.

3. Oppo, on the other hand, is not prepared to commit itself to take the licence determined at trial, for a number of reasons that have been ventilated in other judgments of this court in other litigation, where Oppo is the defendant. It wants technical trials because it makes the point, as I have mentioned already, that the portfolio has not been tested in litigation.

4. All sides have referred to my recent judgment in *Nokia v Oppo* [2023] EWHC 1912 (Pat) where I said that in future the court will need to look again at the sequencing of trials in this kind of litigation and consider putting FRAND early or first. All sides have responded to that in their different ways.

5. The parties are agreed that whenever the FRAND trial should be (which as I said already is a matter for dispute), two technical trials may take place subsequently (although Xiaomi has no interest in their results for reasons I have touched on) and that the start of the technical trials should be linked to the start of the FRAND trial

6. In *Nokia v Oppo* I said that the court ought to consider holding technical trials at the same time as or very close in time to FRAND trials to reduce the overall delay. In the circumstances of this case, it seems to me that having the technical trials slightly after the FRAND trial will serve that purpose because it seems all too likely that the judgment in the FRAND trial will take longer to prepare for whichever judge has that task than the judgments in the technical trials. Viewing the matter in the context of the overall length of this kind of litigation, that seems to me to be fairly close to simultaneous.

7. I have referred already to Oppo's attitude to the technical trials. In previous litigation, including the *Nokia v Oppo* litigation, this matter has come up and I have commented unfavourably on Oppo's attitude. Today, Mr. Lykiardopoulos KC, who appears again for Oppo, as he did in *Nokia v Oppo*, albeit instructed by different solicitors, makes the following points. First of all, he says that Oppo has taken on board earlier comments, at least to the extent that in litigation with InterDigital, where it is dealing with a portfolio that had been tested, it agreed to go straight to FRAND and I agree that that is a powerful point.

8. Mr. Lykiardopoulos also makes the point, which I have touched on twice already, but mention again at the risk of repeating myself, that the Panasonic portfolio is not tested. This also seems to me to be reasonable, as long as it is kept under review. I hope that if, at some point, it becomes apparent to Oppo that it is bound to infringe at least some patents that are valid and essential, it takes a fresh view about whether technical trials are indeed necessary.

9. Had there been more of an argument over this, I would have been willing to consider different trial sequencing. Had, for example, the parties not agreed and had I decided, which I have not yet come on to, to hold the FRAND trial in, say, October 2024, then I would have been willing to consider holding technical trials closer in time to that date, including, if necessary, in September 2024. I maintain the view expressed in *Nokia v Oppo*, in general terms, that it is better to keep the pressure on to encourage implementers, where possible and where the circumstances are right, to draw stumps on technical trials.

10. However, for the reasons I have touched on already, which differentiate the present case from *Nokia v Oppo*, I am satisfied that Oppo, at the moment, is taking a reasonable approach and, as I have said already, the regime agreed by the parties for the timing of the technical trials, relative to the FRAND trials, will have the effect of the resolutions coming at a similar time and, in any event, all the parties are happy with the situation.

11. These are some rather long reasons simply to justify doing what the parties agree is appropriate, but I think it is important to let the profession know the Patent Court's likely approach in this developing field.

12. The other issues that I have to deal with and which arise on two applications made by Xiaomi, my having decided that FRAND will go first, is first of all whether the FRAND trial should be expedited and, secondly, whether there should be, to put it somewhat loosely, conditions imposed on Panasonic.

13. I have said already that Xiaomi has indicated that it will bind itself to take a FRAND licence as determined by this court, and Panasonic's pleading, in particular paragraph 27 of the Particulars of Claim, said that Panasonic wanted a FRAND determination and was willing to grant a licence on terms decided by the court here.

14. None the less, timing remains important, at least so far as Xiaomi sees matters, because as well as these proceedings, there are multiple proceedings started by Panasonic in the UPC and in German national courts and Xiaomi perceives a risk that if the FRAND trial is too far off and if Panasonic remains completely free to seek the full range of relief in those proceedings, it might obtain an injunction from the German court in advance of the inevitable determination of a licence in the UK. Xiaomi says that it is concerned that, in those circumstances, it might be forced either to agree to *supra*-FRAND rates or even to leave the market in some or other jurisdictions.

15. It is no part of my function to criticise the German courts and I am certainly not going to do that, but I must recognise that Xiaomi has expressed that concern.

16. Without in any way undermining what I have said about Oppo's position being reasonable, in overall terms, at least, Xiaomi's conduct has been what the Patents Court would ideally like to see, which is an acceptance by an implementer that it needs a licence and will take one on FRAND terms decided by the court, without the trouble of numerous technical trials that use up court time and costs for the parties.

17. I say that that characterises Xiaomi's conduct in overall terms, because as least so far as the parties see it, the devil is in the detail and while the parties have been in discussions about the procedural regime for the litigation between them, there is not an overwhelming atmosphere of trust and Panasonic expresses the concern that despite giving an undertaking, Xiaomi might resile from it. In particular (there are other reasons as well) Panasonic, through Ms. Jamal, who appears for it today, has expressed the concern that if Xiaomi does not move swiftly to take the licence determined by the court it, Panasonic, might indeed need to obtain relief in Germany or in the UPC.

18. The parties have been in discussion about a regime to deal with these concerns. I use "discussion" in a loose sense, because it has taken place through the mode of solicitors' correspondence, which has been, as ever, slow in its turnaround and rather argumentative. However, through the hearing today, the parties' positions have converged and Panasonic, without committing itself to any precise form of words, has indicated a willingness to agree to refrain from at least enforcing any injunction it gets in Germany, so long as Xiaomi does not resile from its undertaking. Mr. Segan, KC, who appears for Xiaomi, has first of all emphasised that Xiaomi has no intention of resiling from its undertaking and, second, has indicated that Xiaomi is prepared to enter into the licence determined by this court at first instance straightaway, reserving its right to have that licence varied on appeal, if appropriate. So far as I am aware, and this is no criticism, that point had not been made clear until today and Ms. Jamal, quite reasonably, to my mind, makes the point that that is an important clarification from Panasonic's point of view.

19. The parties' positions as to the date of the FRAND trial and as to its expedition are as follows: Xiaomi sought expedition of the FRAND trial to either July 2024 or to the Michaelmas term of 2024 and I made it clear that July 2024 would involve grave disruption to the Patents Court diary and was not realistic, so argument has focused on the Michaelmas term. Panasonic resists expedition, says that the FRAND trial cannot be ready for the Michaelmas term 2024 anyway, and urges on me the setting of the FRAND trial for February 2025. I should make it clear that, after some discussion through the means of the skeletons and in court, Panasonic has clarified that it means exactly February 2025 and not some time in or after February 2025.

20. It seem today me ever more clear during the course of the argument today that if a regime could be arrived at, preferably by agreement and probably necessarily by agreement, whereby Panasonic and Xiaomi were both completely certain that a global FRAND licence would be the result of the FRAND trial, then the argument about whether the FRAND trial should be expedited and when it should take place would be less important because Xiaomi's key concern about being injuncted in Europe would be addressed.

21. Significant progress was made on that during the short adjournment when both counsel, but in particular, Ms. Jamal, considered the matter with their respective clients. Mr. Segan made the point after the short adjournment that whatever Panasonic might say, there is a binary yes/no decision for me to make about timing of the FRAND trial. He is right about that, but I think it would be very undesirable for me to make that decision on the assumption that no regime of the kind that I have indicated could be put in place; only therefore to make a case management decision of profound importance, at least for these parties and probably for the court, which would have been different, and I would go so far as to say better, had I known the parties were confident that a FRAND licence would result from the FRAND trial.

22. I am therefore going to adjourn determination of the question of when the FRAND trial should be until next week. There are a couple of other matters to mention, however. The first one is that I have heard argument about whether or not the FRAND trial can feasibly be made ready for Michaelmas term next year and I conclude that it can be. That is still a year away. Panasonic ought to have thought about this carefully already. I suspect they have and I suspect they already have in mind, in a reasonable degree of detail, how they will seek to justify the rates that they seek and if they have not thought about it among the intense preparations that must have gone on to prepare the launch of 13, I think it is, sets of proceedings, then they should have done and, if they have not, then they must blame themselves.

23. In any event, a year is a long time to get a matter such as this ready and I do not accept the submissions by Ms. Jamal that one can read across from other quite different cases to this one. I am certainly not prepared to advantage Panasonic, if I am otherwise persuaded to expedite the FRAND trial, which remains to be seen, I am not prepared to advantage Panasonic by assuming that the trial will take significantly more than a year to get ready, just because of some uncertainty as to its shape.

24. I do recognise that there is uncertainty about how the trial will shake down and it is challenging in a case management sense to make decisions in that context. I can exercise a degree of caution, of course, but it is not a reason not to go forward, in my view. I will take the argument forward next week on the basis that it is possible to have the FRAND trial in Michaelmas term next year. Of course, that does not mean that it necessarily should be so. There is still the question of whether expedition is needed and the effect on the court diary and so forth, although I qualify that by making clear, as I did during the hearing, that it would be possible, if I were persuaded to expedite the FRAND trial, for it to be heard in Michaelmas 2024 by a judge designated to hear patent matters without the need to eject anybody else from the list.

25. The second thing I want to say is that if the parties are able to put in place a regime to ensure that a FRAND licence results from the FRAND trial, then I will want to consider carefully the contents of that FRAND trial. In addition to rate setting, which is certainly the most important issue and which Mr. Segan, for Xiaomi, says is the fundamental issue in the whole litigation, with which I agree, in addition to that, there are also competition issues pleaded and issues concerning the past conduct of the parties.

26. I suspect that those matters are relatively peripheral and while they may have a life of their own, the key reason for their inclusion is for Xiaomi to seek to obtain findings at the UK FRAND trial which might improve its chances of fending off injunctions in Europe, and in the scenario where Panasonic's undertaking referred to earlier has been put in place, their importance seems to me to dwindle very greatly. So, if a regime is put in place, then I will want persuading by Xiaomi that it is right to include abuse of dominance and past conduct of the parties in the FRAND trial, rather than just limit it to rate setting, which I think is what really matters, and probably stay competition law and past conduct. That is not a concluded view, but I think it will help the parties think through the next steps.

27. Finally, I have touched on this already, I really do encourage the parties, and in this context I really mean Xiaomi and Panasonic, through their representatives, to act in a collaborative way over the next few days, to work out a regime. I hope they do not feel limited to firing off solicitors' letters and I encourage them to discuss matters without prejudice, if they want, by telephone or in person, to find a way forward. I say that partly because the nature of the hearing today was partly a, sort of court-moderated negotiation and partly because experience in these sorts of cases teaches one ever more that the parties do achieve quite a lot when they discuss directly and step away from limiting themselves only to the solicitor correspondence to communicate.

28. Finally, but also on the same note, I will be taking into account the reasonableness of both sides' positions on what I have called the "regime" when I come to make my decision next week, and I mean their reasonableness objectively assessed. I certainly do not mean that I will be getting into the details of the discussions that have taken place, if they do, which obviously the parties should feel free to conduct without feeling that I am looking over their shoulders.

29. So my conclusion is that I endorse the ordering of the FRAND and technical trials and adjourn to either next Tuesday or Wednesday the question of timing of the FRAND trial, whether to expedite it and its duration. I will also, so far as possible, be willing to give appropriate directions, if not all the way to trial, then certainly to keep the matter moving forward productively until a further CMC, which I am sure will be necessary before too long.

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