



Neutral Citation Number: [2024] EWHC 742 (Pat)

Case No: HP-2019-000032

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, 27th March 2024

Before:

MR. JUSTICE ZACAROLI
Hybrid via MS Teams

Between:

**(1) INTERDIGITAL TECHNOLOGY
CORPORATION**

**(a company incorporated under the laws of the State
of Delaware, USA)**

(2) INTERDIGITAL PATENT HOLDINGS, INC.
**(a company incorporated under the laws of the State
of Delaware, USA)**

(3) INTERDIGITAL, INC.
**(a company incorporated under the laws of the State
of Pennsylvania, USA)**

(4) INTERDIGITAL HOLDINGS, INC.
**(a company incorporated under the laws of the State
of Delaware, USA)**

- and -

(1) LENOVO GROUP LIMITED

**(a company incorporated under the law of Hong
Kong, China)**

(2) LENOVO (UNITED STATES) INC.
**(a company incorporated under the law of the State
of Delaware, USA)**

**(3) LENOVO TECHNOLOGY (UNITED
KINGDOM) LIMITED**

(4) MOTOROLA MOBILITY LLC
**(a company incorporated under the law of the State
of Delaware, USA)**

(5) MOTOROLA MOBILITY UK LIMITED

Claimants

Defendants

MR. DOUGLAS CAMPBELL KC and MS. GEORGINA MESSENGER (instructed by
Gowling WLG (UK) LLP) for the **Claimants**

MR. GEOFFREY PRITCHARD (instructed by **Kirkland & Ellis International LLP**) for the
Defendants

Approved Judgment

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MR. JUSTICE ZACAROLI:

1. This is an application under CPR rule 31.22(1)(b) by the defendants in one set of proceedings, to use confidential documents and information disclosed in those proceedings in a second set of proceedings. Both sets of proceedings are between the same parties: companies in the Lenovo Group (defendants in the first proceedings, and claimants in the second) and companies in the InterDigital Group (claimants in the first proceedings, and defendants in the second). I will refer to them as “Lenovo” and “InterDigital” for convenience.
2. The first proceedings were FRAND proceedings in which the principal issue was the terms of the licence to be granted to Lenovo for the use of InterDigital's patented technology for the period up to 31st December 2023. The issues in the second set of proceedings include the determination of a licence to be granted to Lenovo for use of the same technology going forward, i.e. after 1st January 2024. Additionally, whereas the licence granted in the first proceedings related only to InterDigital's portfolio of standard essential patents (“SEPs”), being those which had been declared essential to the European Telecommunications Standards Institute (“ETSI”), in the second proceedings, Lenovo seeks a licence of the entirety of InterDigital's patent portfolio including within it non-ETSI SEPs and non-essential patents (“NEPs”).
3. InterDigital has issued an application challenging the jurisdiction to bring the second claim in so far as it relates to NEPs, essentially on the basis that a FRAND licence could not realistically extend to them. Without disclosing (in this public judgment) the nature of the confidential information disclosed in the first proceedings which Lenovo wishes to use, Lenovo wishes to rely upon it in order to justify its extended case and thus challenge the thrust of the jurisdiction challenge.
4. In the first proceedings, as is common in order to identify appropriate comparables, various confidential licences between InterDigital and third parties, (“PLAs”), were disclosed to Lenovo. They were disclosed under a strict confidentiality protocol. That protocol was determined with input from the third party counterparties to the PLAs because, in part, it was their confidential information that was being protected. They were also subject to restriction on use otherwise than for the purposes of the first proceedings, contained in CPR 31.22.
5. It is common ground that Lenovo, in the course of preparing the second proceedings and in pleading its case, breached CPR 31.22 and the terms of the confidentiality protocol by making use of three of the PLAs. On the breach being pointed out, Lenovo amended its particulars of claim so as to include only what it regarded as information derived from public sources about those PLAs. InterDigital disputes that they succeeded in doing so. It remains the fact on any view that Lenovo did make use of the confidential information in at least the following respects. First, inclusion of the information in the original pleading. Second, reviewing at least the three PLAs in question for the purpose of reviewing its strategy for the second proceedings. That included passing the draft original particulars (which contained reference to the three PLAs) to four individuals within Lenovo. Those individuals were entitled to see the confidential information as “approved persons” within the confidentiality protocol, but since they saw it for the purposes of considering the second proceedings, that was a breach of the protocol, and of CPR 31.22. All of them, I am told, have now deleted the information received by them. The third manner in which the use of the confidential information was a breach

was including unredacted PLAs and the unredacted FRAND judgment in the disclosure list for the second proceedings. Fourth, a breach of CPR 31.22 was at least arguably committed by disclosing the original particulars of claim to the court in entirely separate proceedings (between InterDigital and an independent party), when making an application seeking disclosure of a document in those proceedings. Lenovo contends that this was done at the request of the judge in those proceeding, although they were unable to locate during the hearing before me the transcript reference to that request having been made. If it was provided at the request of the judge, I do not think that would mean there was no breach but, as it was put by Mr Pritchard (who appeared for Lenovo, at short notice following the illness of Lenovo's retained counsel), it would demonstrate that the breach was not a contumelious one.

6. In addition, the confidentiality protocol was breached in at least the following respects, which did not necessarily amount to use of the information. First, the draft original particulars were passed to two individuals within Lenovo's German lawyers (Freshfields). These persons were outside the confidentiality ring. Lenovo's evidence is that those lawyers were provided with the particulars for the purpose of reviewing that part of them relating to parallel German proceedings and to consider references in them to certain settlement discussions. I am told by Mr. Pritchard, and I have no reason to doubt this, that the German proceedings relate solely to SEPs, such that any reference in the original particulars to NEPs would have been of no interest to them.
7. Additionally, the initial disclosure list and documents contained in it and, indeed, the original particulars, were passed to various lawyers, UK counsel, solicitors firms and a patent agent in Sweden. As far as the latter is concerned, I am told service on them was a mandatory requirement.
8. The only question before me is whether Lenovo should have retrospective permission to make use in the second proceedings of the limited information concerning the PLAs disclosed in the original particulars (and the more limited information in the amended particulars). There is no free-standing application by InterDigital for any relief arising out of Lenovo's past breaches. However, those past breaches are clearly of relevance to the question I need to decide.
9. The parties were agreed on the principles of law to be applied. First, the burden is on Lenovo to be allowed to use the information. Second, the court will generally only grant permission where there are special circumstances which constitute a cogent reason for permitting collateral use, see for example *Tchenguz v SFO* [2014] EWCA Civ 1409. In considering whether to grant permission, it is important to keep in mind the rationale for the rule: imposing mandatory disclosure obligations in proceedings is an invasion of privacy, and compliance with such disclosure obligations is encouraged by restrictions on the use of the disclosed documents, see for example *Tchenguz v SFO* at paragraph 56.
10. Where retrospective permission is sought, the bar is even higher. See, however, the following comments of Rimer J in *Miller v Scorey* [1996] 1 WLR 112:

“If, in principle, I considered it just to allow the plaintiffs to use the discovered documents for the purposes of a separate action raising the same claims as the 1995 action, then, absent any special considerations pointing in a different direction, there

would in my view be much to be said for declining to strike out that action and for giving leave to the plaintiffs to make use of the documents for its further prosecution. Such an order would, no doubt, amount to a de facto validation of what had happened to date, although the court could perhaps reflect its disapproval of that by the making of appropriate costs orders.”

11. In *Schlaimoun v Mining Technologies International LLC* [2012] 1 WLR 1276 Coulson J noted that while retrospective permission would be rarely granted, factors included (a) was any litigant prejudiced? (b) was the breach inadvertent? (c) would the application if made timeously have been granted? and (d) a consideration of the proportionality of debarring the applicant from using the documents at all.
12. I turn to apply those principles to the facts of this case. There has undoubtedly been a breach, indeed multiple breaches, of CPR 31.22 and the confidentiality protocol. I accept that these were inadvertent in the sense that while the use of the material was deliberate, it was inadvertent due to the lack of appreciation that this was a misuse. Ms. Dagg, who signed the statement of truth in the original particulars and provided a witness statement for this application, said this in terms, and I do not have any reason to doubt her evidence.
13. Ms. Dagg's evidence is that Lenovo first considered bringing the new claims within the existing action. The second proceedings, and thus the wish to rely on the confidential information, are reactive to new claims being brought against Lenovo by InterDigital in various jurisdictions. The difficulties of shoe-horning the new claims into the first action were obvious, given the FRAND trial was long over. I infer that this must have been soon appreciated by Lenovo's lawyers. The mistake they then made was that, in deciding to bring the claims by way of a new action, it was not appreciated that use was being made of confidential information disclosed in the first proceedings for which permission was required. Mr Campbell KC (who appeared for InterDigital) object that Ms. Dagg did not speak for others within her legal team who may have committed further breaches in sending the original particulars on to others. I do not find it surprising, however, that those involved in passing on the original particulars to others would not have appreciated the error. The PLAs were themselves public information (having been referred to in the public version of the FRAND judgment). The original particulars contain only minimal reference to confidential aspects of the PLAs. There is no reference, for example, to anything that is of an innately commercially sensitive nature, such as any details of the financial terms. InterDigital itself had the pleading for two months before appreciating that there was a breach of the confidentiality protocol. I also note that the misuse is entirely down to the conduct of Lenovo's lawyers.
14. Moreover, in so far as there has been a breach of the confidentiality protocol, not amounting to non-permitted use, while serious, this is not a case where any commercially sensitive information belonging to InterDigital or any of the third party licensees has been divulged to anyone outside the confidentiality group, aside from the two Freshfields lawyers in Germany. Even in their case, there has been no leak of any information of a kind such as financial details of licences which has real commercial significance and I am assured that all references to the confidential information have been deleted.
15. Nevertheless, any non-permitted use is extremely serious, and that is compounded here by there being multiple breaches of the confidentiality protocol. Those breaches include

Lenovo's failure to inform relevant third parties promptly, or I think at all, that there had been breaches. The Protocol was put together after a great deal of effort and expense involving input, including attendance at hearings, from affected third parties. It has been enshrined in a court order. All of this goes to emphasise its very serious nature. The breaches are also compounded by the fact that the original misuse occurred as long ago as September 2023, while the application for retrospective permission has only been made as late as the end of March 2024.

16. While, once the breaches were pointed out to it on 21 November 2023, Lenovo did not simply ignore them, but sought to engage with InterDigital (producing a revised pleading in attempt to avoid the use of confidential information), the fact remains Lenovo ought to have come to court at a much earlier stage. No apology of any sort was offered until very late in the process, as late as yesterday in Ms. Dagg's second witness statement, and today when Mr. Pritchard has been at pains to provide to the court a very clear apology.
17. One possible reaction is simply to deny Lenovo any relief, to mark the seriousness of the breaches and to encourage compliance by others with the important restrictions contained in CPR 31.22. As against that, however, I balance the following matters.
18. First, I do not see that any substantive prejudice has been or will be caused to InterDigital. They say that they are prejudiced because Lenovo and its lawyers simply cannot be trusted. But to give permission for this further limited use involves no greater risk of the existing confidentiality regime being breached than already exists. If InterDigital were concerned that the confidentiality protocol no longer protects them, because Lenovo has demonstrated that it cannot be trusted, then they would have the option of seeking to vary the existing regime on the basis of a change in circumstances. That is not part of this application.
19. Secondly, no substantial prejudice is caused to third parties whose confidential information is also at stake. Permission is sought for the use of the information for an additional purpose as between Lenovo and InterDigital in what is essentially the same dispute between them, and without the information being disseminated to anyone other than those to whom it could have been disseminated in the first action. (I leave aside the breach in providing the original particulars to Lenovo's German lawyers: any grant of permission for the use of the confidential information for the purposes of the second proceedings would not – and could not – amount to excusing past breaches of that nature.) There is no additional risk to third parties from the use to which the documents may be put as between Lenovo and InterDigital being extended in this way. In short, the level of protection which currently exists for the third parties is unaffected by the relief sought on this application.
20. Third, Lenovo has not itself gained any particular benefit from the past breaches.
21. Most importantly, I do consider it likely that had an application been made timeously it would have been granted. While there are in form two separate sets of proceedings, they are in substance so closely related that the second might be seen as the natural continuation of the first. The parties are the same, the subject-matter, i.e. the terms on which FRAND licences should be granted is, again, broadly the same.
22. Additionally, the relevant documents will inevitably be disclosed in the second proceedings. Whilst that cannot ever be a determinative factor it is of some relevance,

particularly in this case. If use is not permitted now, then the most that InterDigital will achieve is that: first, Lenovo might not now be able to plead its extended case; secondly, it will (as Mr Pritchard submitted, and I accept) inevitably get disclosure of the relevant PLAs in due course in relation to its more limited case in the second proceedings; and third, at that point it could seek to amend the second proceedings by relying on information and documents disclosed to it in the course of those proceedings. It seems to me, on the clear terms of rule 31.22, that that would not be a misuse of the information disclosed in these proceedings, and Mr. Campbell was unable to point to any authority to the contrary.

23. InterDigital say it is nevertheless proportionate to bar Lenovo from using the information because Lenovo have not identified a need to use that information in relation to the jurisdiction challenge. Lenovo submits that they might be able to make good their extended case, which is what they seek permission to do, from public information, but they recognise there is a dispute about that. It is InterDigital's case, as clearly explained to me by Mr. Campbell today, that Lenovo will not be able to make out their extended case from public sources. Where there is information, which is relevant to that question, then I consider it would be contrary to the interests of justice to allow the proceedings to continue on an uninformed basis and potentially a false premise, particularly when, as I have already noted, the most that will be achieved is delay and additional cost.
24. I accept that Mr. Campbell's most powerful points were directed at the lack of full explanation for and justification for the past breaches. He took me in detail through the questions asked of Lenovo very recently and the answers provided in Ms. Dagg's most recent witness statement. He made much of the fact that this information was only forthcoming because InterDigital insisted on it being given. He noted that Lenovo are in continuing breach by having failed to inform the third parties of their past breaches. He reiterated the inexcusable delay for which no real justification has been offered, even now in making this application. The evidence, he said, leaves so many questions unanswered. He submitted that all this leads to only one conclusion: I should refuse this application.
25. As I have said, I agree that there have been serious failings on the part of Lenovo. I do not accept the more serious accusation made by Mr. Campbell that Lenovo must have known they were in breach and simply hoped to get away with it. That is not borne out by the evidence or by the correspondence. In particular, as I already adverted to, the error in the original particulars was not picked up by InterDigital itself for two months, and thereafter Lenovo was at least trying to find a resolution by formulating a pleading based on public information.
26. Taking all the circumstances I have summarised into account, I consider the appropriate course in this case is to allow the application, on two conditions. The first is that it will be limited -- as Mr. Pritchard was in fact content to accept -- to (1) retrospective permission in the use of the information in formulating the claim subsequently pleaded in paragraph 21 of the original particular and then paragraph 19 of the amended particulars, and in actually pleading those matters, and (2) permission to make arguments on the basis of those pleadings in the context of the forthcoming jurisdiction challenge.
27. Secondly, and as a marker that the breaches were serious and were compounded by the various matters I have referred to, and to emphasise the importance of compliance with CPR 31.22, I will order that Lenovo must bear the costs of this exercise. They must bear

their own costs and the costs of InterDigital in relation to this application, the latter to be paid on the indemnity basis.

(For continuation of proceedings: please see separate transcript)

28. Having made a costs order, the court is obliged to consider making an interim payment on account which is what I now do.
29. Mr. Campbell's solicitors have produced a costs schedule. It was produced only this morning, so Mr. Pritchard, and his solicitors, have not had proper time to consider it.
30. Nevertheless, taking into account the circumstances in which I make this order, and the reasons for making it as already explained, I consider it right to order an interim payment on account. Given that the costs are to be assessed on an indemnity basis, and recognising that as it is a payment on account, even if the amount is subsequently reduced it will be repaid, I consider it appropriate to order payment of roughly 80% of the amount claimed. Rounding down, therefore, I will make an order in the sum of £80,000.

(For continuation of proceedings: please see separate transcript)
