



Neutral Citation Number: [2021] EWHC 2746 (Pat)

Case No: HP-2021-000023

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, 13th October 2021

Before:

MR. JUSTICE MELLOR
(Hybrid hearing)

Between:

NOKIA TECHNOLOGIES OY
(a company incorporated under the laws of Finland)
- and -
(1) **ONEPLUS TECHNOLOGY (SHENZHEN) CO., LTD**

Claimant

(a company incorporated under the laws of the
People's Republic of China)
(2) **UNUMPLUS LIMITED (t/a OnePlus)**
(3) **GUANGDONG OPPO MOBILE
TELECOMMUNICATIONS CORP, LTD**
(a company incorporated under the laws of the
People's Republic of China)
(4) **OPPO MOBILE UK LTD**

Defendants

MR. NICHOLAS SAUNDERS QC and MR. EDWARD CRONAN (instructed by **Bird & Bird LLP**) for the **Claimant**

MR. IAIN PURVIS QC (instructed by **Hogan Lovells International LLP**) for the **2nd and 4th Defendants**

Approved Judgment
(on Listing Application)

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

1. This is an application to list a patent trial. This listing application has been brought now with a view to getting a trial listing in advance of the CMC, which is estimated for a day and has been listed for 13th-15th December 2021. The Patents Judges are aware that CMCs lasting half a day or a day do take quite some time to come on. In a recent Patents Court Users' Committee Meeting, Meade J indicated that the Patents Judges are willing to hear these listing applications provided they are kept short. Today's listing was estimated for an hour and, with this judgment will last slightly longer, but the expectation is that this type of listing application should take no more than 30 minutes. Provided those sorts of estimates are adhered to, we will be prepared to have these short hearings, perhaps in advance of the court day at 9.30 or 9.45.
2. The purpose of taking these short listing applications is to adhere, so far as we can, to the desire stated in the 2015 Practice Statement to bring patent trials on for trial within 12 months of issue where possible. Mr. Purvis QC, who appears for the second and fourth defendants, the UK companies, has pointed out that the Patents Court, at the moment, is extremely busy and mostly fails to bring on cases for trial within 12 months. But that remains the aim and, subject to availability, it is an aim that we will seek to uphold.
3. Before I turn to the specifics of this case, it may be helpful for me to address some of the debate which has arisen out of observations I made as to listing of trials in the CMC in *Sandoz v Bristol-Myers-Squibb* and then in *Teva v Janssen* on 17th August 2021. It is clear that observations specific to particular circumstances in a case are capable of being taken out of context or misinterpreted. As I pointed out in a short judgment in *Teva v Janssen*, there is a conflict between the way trial estimates are described in the 2015 Practice Statement (in that they exclude pre-reading and time for preparing closing submissions) and the way in which Chancery Listing now requires deals with trial estimates (such that they must include pre-reading and time off for preparing closing submissions). As I understand it, that disparity is going to be addressed in a revised Practice Statement which will be issued shortly, once it has been approved.
4. It may be helpful to emphasise that these parties, like all litigants, have the following options in terms of obtaining a trial listing.
 - i) First of all, (a) if the parties are able to agree both the subject-matter of a trial, i.e. which patents are in issue and (b) the listing estimate, including pre-reading, court days and time off for preparing closing submissions, the Patents Court is likely to approve the obtaining of a trial listing even in advance of the full CMC and potentially that can be done on paper, or simply by approaching Listing.
 - ii) Second, if, for example, there remains a relatively confined dispute over the listing estimate which can be dealt with by the court in a short hearing of, as I have indicated, 30 minutes at 9.30 a.m., the parties can approach the listing officer for a short hearing to determine such short disputes, again prior to the full CMC. In this regard, I adhere to an observation I made in my judgment in *Teva v Janssen*, to the effect that the Court will give a trial listing provided it has a proper appreciation of the scope of the trial.
 - iii) Third, if the action for example and by contrast involves a number of patents and disputes over which patents should be considered in which trials and/or in which

order, or the dispute is complex in some other way such as the effect of disputed directions on trial length, the trial listings may have to be determined at the CMC.

5. I emphasise all litigants are under a duty to provide realistic time estimates for the necessary pre-reading and hearing times and if we sense parties are abusing the advantage of short hearings, the ability to secure them may become more difficult.
6. The patents judges are aware that the Patents Court lists are congested for many months into the future, but as I have said, the aims as stated in the 2015 Practice Statement remain valid.
7. In this action, the Claimant (Nokia) sues four defendants in the Oneplus/Oppo group on a single patent, EP 3 716 560 (the Patent). Only the Second and Fourth Defendants (for whom Mr Purvis QC appears) have been served. They are both UK companies. The First and Third Defendants are companies incorporated in China and, at the moment, as is their right, they are insisting on service through the usual channels and if that continues to be the position, service is estimated to take place against them in China in March of next year.
8. Mr Saunders QC, for Nokia, points out that in a parallel action, which I believe was started at the same time, which involves allegations of infringement of three Standard Essential Patents, the First and Third Defendants accepted service just before the hearing of a jurisdiction challenge which was heard by His Honour Judge Hacon at the end of September this year. Mr Saunders drew attention to evidence which indicates that the Third Defendant is giving instructions as to the conduct of the two actions on behalf of the UK defendants, the point being that when the First and Third Defendants are served or accept service, they will not be learning of this action for the first time or the steps by then taken in it.
9. Turning to the present application, the parties focussed on the remark I made in *Teva v Janssen*, mentioned above. The argument centred on whether the Court had a proper appreciation of the scope of the trial, what the appropriate trial estimate was and when the trial should be listed.
10. In the present case the battle lines are that Nokia wants the trial of this non-SEP single patent case to occur in either September 2022 (14 months after issue) or, failing that, in the autumn term of 2022, whereas the defendants are keen to push the trial into January 2023 (18 months after issue).
11. Mr. Purvis, for the second and fourth defendants, has made various submissions by which he seeks to persuade me that I cannot yet have a proper appreciation of the scope of the trial and, therefore, he urges me to put off listing this trial until the CMC occurs in December.
12. Mr. Purvis draws attention first of all to what he says is the obscurity of the infringement case. He says that they have not yet seen the first witness statement of Mr. Vary which was used to obtain permission to serve out on the first and third defendants, and which must explain the basis of the infringement case. In the course of argument I questioned why that witness statement had not yet been provided to these defendants and I was told it will now be provided. As I mentioned in argument, I obtained a copy of that witness statement (from CE-file) and noted that Nokia claim privilege in some experiments conducted to satisfy themselves that they had an infringement case.

13. In his skeleton argument, Mr Purvis identified a number of applications his clients intended to bring. One was characterised as a strike out, but was in fact an application for an unless order requiring service of Nokia's basis for alleging infringement. Another is an application to stay this action pending the outcome of an opposition to this Patent at the EPO, which as I understand it has not yet been filed. All of those applications can be dealt with at the CMC or some other occasion, on their own merits.
14. Mr Purvis also points to the fact that Nokia has already launched an application under 28 USC 1782 in the US to obtain relevant information from Qualcomm, the makers of the chipsets in issue which are used in the defendants' phones. The outcome of that 1782 application is expected, I understand, before the CMC is heard in December. Mr. Purvis also reminds me that the claimants might well rely on further or different experiments to those referred to in the first witness statement of Mr. Vary and/or a PPD provided by the defendants. He reminds me that there may be, because this is an implementation case, design-arounds with possible declarations for non-infringement to be brought into the action in due course.
15. I understand all those uncertainties, but in this case, I have read the Patent. It is apparent the patent does require some understanding of the technology underlying 4G or LTE systems and, therefore, it is very likely to be a Category 4 case. Mr. Purvis urges me to think of it as a category 5 case, but having read the patent, the concept in it is relatively simple. It is the introduction of a low pass filter in the amplitude path to regulate the power in the amplification of the outgoing signal from the mobile phone. The purpose is to suppress spurious signal components to improve the quality of uplink communications and in the capacity of the mobile phone. The low pass filter is regulated according to the number of transmission resource blocks allocated to the phone. On my, perhaps uneducated, reading of the patent, it does not appear to be unduly complex.
16. In terms of the grounds of invalidity already pleaded, they rely on obviousness over a single piece of prior art, a European patent application, which is discussed in the patent-in-suit, so that does not appear to raise too many difficulties.
17. Of course I do not rule out the possibility of the need for cross-examination of a Qualcomm witness at trial and I do not rule out various procedural wrangling which may take place as this case proceeds to trial. However, experience informs us that generally a single patent of this nature is usually well-capable of being tried, in terms of both infringement and validity, in a week. In this case, Nokia put forward an estimate of five days of court time which, in a sense, is perhaps on the generous side. Their estimate of five days of court time, of course, is likely to require seven days of judge time, in the sense of perhaps one day pre-reading, four days in court, one day preparing closings and one day of closing submissions. Mr. Purvis says I should approach the estimate very cautiously and he says the estimate clearly falls within the 6-10 day range.
18. The parties remain under a continuing obligation to keep the trial estimate under review and to inform the court if the estimate changes. However, based on the current material I feel I have a sufficient, but by no means complete, appreciation of the likely length of trial, barring unexpected developments. So I would propose to list this trial on the basis of 1-2 days' pre-reading, 3 days of opening and evidence, one day off for preparing closings and one day of closing submissions. I draw the parties' attention to paragraph 4 of the existing Practice Statement, which states:

"The Court will use its case management powers in a more active manner than hitherto, with a view to dealing with cases justly and at proportionate cost in accordance with CPR rule 1.1. This may have the effect of setting limits on hearing times that enable cases to be listed promptly. For example, the Court may direct that a case estimated at 6 days will be heard in 5 days, and may allocate time between the parties in a manner which enables that to be achieved."

19. In these circumstances, and bearing in mind what I have said about my somewhat incomplete but, in my view, sufficient understanding of the scope of this action, I asked Meade J whether he is willing to sit in late September 2022 to take this trial and he has agreed to do so.
20. Mr. Purvis reminds me that the Practice Direction suggests that trials will only be listed in September if they are urgent. Although I accept this trial is not particularly urgent, if a listing in September allows the Patents Court to achieve its aim of listing trials within 12 months or as close as possible to 12 months, then it seems to me that is a sufficient justification for a listing in September, provided there is a Judge available and willing to take the trial.
21. Although the parties must keep the trial estimate that I have indicated under review and notify the court if there is reason to make a significant change to that estimate, in fact, this listing in September is perhaps a little bit more flexible than normal, because Meade J will take the case. I am going to list it in the second half of September and the parties will have to negotiate with the Listing Officer as to precisely when it will be heard in that time.

(For further proceedings: please see separate transcript)
