



Neutral Citation Number: [2021] EWHC 493 (Pat)

Case No: HP-2019-000014

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

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday 4th March 2021

Before :

THE HON MR JUSTICE MELLOR

Between :

(1) MITSUBISHI ELECTRIC CORPORATION
(2) SISVEL INTERNATIONAL SA

Claimants

- and -

~~(1) ARCHOS SA~~
~~(2) SUN CUPID TECHNOLOGY HK LTD~~
~~(3) NUU MOBILE UK LIMITED~~
(4) ONEPLUS TECHNOLOGY (SHENZHEN)
CO., LTD
(5) OPLUS MOBILETECH UK LIMITED
(6) REFLECTION INVESTMENT B.V.
(7) GUANGDONG OPPO MOBILE
TELECOMMUNICATIONS CORP, LTD
(8) OPPO MOBILE UK LTD

Defendants

(9) XIAOMI COMMUNICATIONS CO LTD
(10) XIAOMI INC
(11) XIAOMI TECHNOLOGY FRANCE SAS
(12) XIAOMI TECHNOLOGY UK LIMITED

Sarah Abram and **Thomas Jones** (instructed by **Bird & Bird LLP**) for the **Claimants**
Daniel Piccinin (instructed by **Taylor Wessing LLP**) for the **Fourth to Eighth Defendants**
Daniel Alexander QC, **Colin West QC** and **William Duncan** (instructed by **Kirkland & Ellis International LLP**) for the **Ninth to Twelfth Defendants**

Hearing date: 2nd March 2021

APPROVED JUDGMENT

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 Thursday 4th March 2021.

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MR JUSTICE MELLOR

Mr Justice Mellor:

1. This is a ruling on one issue which has arisen in the course of this third CMC in an action concerning patents which are alleged to be essential to the 3G and 4G telecommunications standards and infringed by the remaining Defendants who fall into two groups. In common with the parties, I will refer to the fourth to eighth defendants as ‘Oppo’ and to the ninth to twelfth defendants as ‘Xiaomi’. This CMC is concerned with the FRAND aspects of the case.
2. The subject matter of this ruling is a narrow but potentially important point. It arises in the following circumstances.
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.

8. Oppo have helpfully indicated by letter dated 26 February 2021 that they proposed to give a ‘narrative response’ to a considerable number of these requests but also indicated that they will refuse to answer some requests on the basis that they concern expert evidence which will be served in due course. Due to the volume of requests, Oppo indicated they would need until 30th March 2021 to respond. Xiaomi followed a similar course, also on 26 February, indicating they would respond by 16 March 2021.
9. As will be apparent, there was insufficient time before this CMC for either set of Defendants to provide their responses to these recent RFIs. Although at this hearing the Claimants (appearing by Ms Sarah Abram and Mr Thomas Jones) were set to argue for an Order requiring the Defendants to respond to these RFIs, in response to an indication from me, they agreed, subject to two exceptions, to wait for the responses to be served before proceeding further.
10. The two exceptions concern requests 14 and 15. Stripped, I hope, of confidential information, they read, together with the indicated responses given in correspondence, as follows:

“Request 14. By what method have weighted essentiality rates of 18.15% for the MCP pool and 23.5% for the 3G/4G stack been calculated and what data sources have been relied on for this calculation?”

Response: A matter for expert evidence. In any event, as made clear in paragraph 13 the figures were provided by way of illustrative example only and pending further disclosure and expert evidence.

Request 15. On what basis do the Xiaomi Defendants contend that it is appropriate to assume that [two entities] have the same essentiality rate as each other and as the industry as a whole?”

Response: A matter for expert evidence.”

11. The reason why these two requests have a degree of urgency is because the Claimants detect signs that both sets of Defendants either are running or may intend to run a ‘patent counting’ case involving analysis of what proportion of patents in the MCP Pool are truly essential by reference to the patents themselves as opposed to proceeding on assumptions taken from the literature or caselaw. In response to the Claimants’ case, the Defendants would be entirely within their rights to run this type of case, but experience has shown that such cases require careful case management.
12. I refer in particular to the judgment of Arnold J as he then was in *TQ Delta v ZyXEL Communications UK Ltd* [2018] EWHC 3651 where, at the PTR, he was faced with an application by ZyXEL to exclude various aspects of TQ Delta’s evidence on the ground that they fell outside TQ Delta’s pleaded case. One particular part of the evidence to which objection was taken was the presentation in the evidence of Dr Nedev of an analysis and review of some 775 potentially essential patents, carried out by a team of experts headed by himself. Neither the need for nor the methodology of this essentiality review had been foreshadowed in TQ Delta’s pleadings.

13. It was clear that if the evidence of this essentiality review was to be admitted, the case would need to be pleaded, it would be necessary for additional experts to be called and for supplementary evidence identifying the reasons for the stated conclusions. It was also clear that ZyXEL would need an opportunity to respond, something which was impossible in the time left before the planned trial. This was one of the reasons why Arnold J felt compelled to adjourn the forthcoming RAND trial in that case.
14. Turning back to this case, the situation may well be that the two sets of Defendants are waiting to see certain disclosure from the Claimants before committing to running a case based on an extensive essentiality review. Although requests 14 and 15 are not directed to the Oppo Defendants, their Counsel, Mr Piccinin, pointed out that the Claimants had failed to direct equivalent requests to the Oppo Defendants. Nonetheless Mr Piccinin indicated that his clients are currently reserving the right to run this type of case pending disclosure in particular from the Claimants of the essentiality analysis which they rely upon.
15. For their part, the preferred course for the Xiaomi Defendants, as their intended responses indicate, is to leave matters over until expert evidence. Mr Alexander QC points out that there is a period of 8 weeks between service of the first round of expert reports and reply reports which he submits is ample time for the Claimants' experts to analyse and respond to the evidence of Xiaomi's experts.
16. I do not consider that is a satisfactory course. 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.
17. If, by the time of the first round of experts' reports, the methodology employed has changed significantly, it will be a question of degree as to whether a particular statement of case requires amendment to permit the new methodology to be pursued in evidence. In this regard, I note the warning given by Mr Piccinin of the pitfalls of repeated amendments to FRAND statements of case. I am also mindful of the direction already given in the directions order of Mann J that 2 weeks before the PTR, each party must file and serve a position statement summarising their case on the issues to be decided at Trial 3 (including FRAND rates and terms). I also recognise that FRAND cases throw up particular challenges when it comes to identifying that elusive boundary between what must be pleaded and what constitutes evidence. However, I consider it is important, so far as is possible, to ensure that the expert evidence which is served is not like 'ships passing in the night' and the respective experts are addressing the same issues, using the same materials. This ought to reduce costs and reduce the burden on the trial judge.
18. For these reasons I am going to require the Xiaomi Defendants to answer Requests 14 and 15. As discussed in argument, both sets of defendants must provide their answers to the Claimants' RFIs by 10 am on Monday 22nd March 2021. If issues remain over any of the RFIs or any of the answers or lack thereof,

they can be raised at the adjourned hearing of this CMC set, hopefully, for the end of this month.

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.