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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: Wednesday, 8th November 2023

Before:

MR. JUSTICE MEADE

Between:

PANASONIC HOLDINGS CORPORATION
(a company incorporated under the laws of Japan
- and -

Claimant

(1) XIAOMI TECHNOLOGY LIMITED
(2) XIAOMI INC.

Defendants

(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

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)**

Approved Judgment

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

1. This is the resumption of a hearing of a number of applications which began last week and, at the end of the hearing last Friday, 3rd November, I gave an oral judgment recording the decisions I had made and where matters had reached and I adjourned the matter to come back this week; as it turns out, today. I will not repeat what I said in that judgment, but I take it as read for the purposes of this judgment.
2. I have not yet approved the transcript of my judgment from last week. I will approve it, along with the transcript of this judgment, but I record that I gave the parties permission to use the unapproved transcript for the hearing today and for their skeletons for this hearing, which they have done.
3. The central point that has led to the argument today is that following the short adjournment last Friday, it appeared that a regime could be put in place whereby Panasonic would give an undertaking not to enforce injunctions obtained in the UPC or in Germany pending the FRAND trial here. The matter was presented to me by Ms. Jamal, who appeared for Panasonic then, as she does today, on the basis that the wording needed to be tidied up, which I understood, but as I explained in paragraphs 21 and following of my judgment, I did not want to make an important case management decision about the timing of the FRAND trial only to find that I was doing so on the wrong basis and that is the reason why I made the adjournment until today.
4. In some dimensions, significant progress has been made and it is therefore important to record that matters have been put in place so that, as Xiaomi record in their skeleton for today, at paragraph 10, Xiaomi and Panasonic have agreed to give reciprocal undertakings to enter into a FRAND licence, that that will deal with the position that the licence might be adjusted on appeal and that the technical trials should be stayed.
5. Xiaomi also confirmed that, provided that the FRAND trial was expedited, the FRAND trial need not include issues of Panasonic's past conduct or breach of competition law and Xiaomi, Panasonic and, indeed, Oppo, are close on the time that will be needed for the stripped-down FRAND trial of that kind, which is to say between ten and 15 days in court.
6. The matter, therefore, was adjourned on that basis and the parties went away to think about their positions. Progress in the respects that I have indicated was made and set out in correspondence but, crucially for today's hearing, having thought the matter over, Panasonic decided that it would not, in fact, be willing to give an undertaking not to enforce injunctions obtained in the UPC or Germany pending the FRAND trial here, even if Xiaomi were completely bound to enter into a licence on the terms decided here.
7. That is characterised by Panasonic in its skeleton for today as matters having "moved on". I do not regard it as matters moving on; I regard it as a very substantial and important change of position by Panasonic. It might be going slightly too far to say that Panasonic resiled from what it said last week, but only very slightly too far. Panasonic has rowed back very considerably.

8. The reason for this change in position is explained in paragraphs 3(a) and 16(b) of Panasonic's skeleton as follows:

“3(a) Panasonic’s primary position was (and remains) that it is a matter for the UPC and the German Court to determine whether to grant and permit enforcement of any injunctive relief. If Xiaomi contends that it has a right to resist the grant or enforcement of such relief, the only appropriate forum in which to advance that contention is the UPC or Germany as the case may be, and that those Courts were capable of doing justice to the parties in light of all the relevant circumstances⁴. This is all the more so given that Xiaomi has not applied (and indeed could not realistically apply) for an anti-enforcement injunction in these proceedings.

...

16(b) Having had time to reflect, including with the benefit of advice from Panasonic’s German and UPC counsel (which was not possible during the hearing on 3 November), Panasonic has concluded that it would be inappropriate and disproportionate for it unilaterally to tie its hands on the question of enforcement of substantive relief for infringement of its foreign patent rights that *ex hypothesi* the Germany or UPC Courts have concluded it is entitled to.”

9. Panasonic, therefore, wants to preserve its option to obtain and enforce an injunction against Xiaomi, despite the fact that Xiaomi is committed to take a FRAND licence on terms decided by this court, as Panasonic sought by the very bringing of these proceedings and, furthermore, Panasonic wants to preserve its option to do that, even in the last few months before the FRAND trial, were that to be listed, for example, in October next year, because although last week Ms. Jamal made timing submissions on the basis that enforcement normally takes place following the appellate stage in Germany (and it may turn out as well, maybe, in due course, who knows, in the UPC), today she makes clear that Panasonic wishes to preserve the right to seek to enforce a first instance injunction, which could come next summer.
10. In paragraph 16(b), which I have quoted, it says that Panasonic has concluded it would be “inappropriate and disproportionate” for it to tie its hands on the question of enforcement of substantive relief, on the hypothesis that the German or UPC courts have concluded that it is entitled to do that.
11. Mr. Segan, KC, who again appears for Xiaomi, explains that Xiaomi's concern is that what Panasonic is reserving the right to do (and possibly intends to do) is to get the quickest possible injunction in Germany or in the UPC and then try to use it as leverage to get *supra*-FRAND royalties from Xiaomi, just barely in advance of a FRAND trial here in the UK, to whose result both sides are committed.

12. Ms. Jamal repeats what Panasonic said last week: that it cannot envisage a situation where it would want to do that. However, to put it in a nutshell, she submits that Panasonic, as a matter of principle, is unwilling to bind its hands.
13. I should make clear, if I have not already, that none of this puts a limit on what Panasonic is entitled to seek from the courts of Germany or the UPC; it only limits its ability to enforce and, in particular, in Germany, as I understand it, and this has not been contradicted, it is at the election of the successful party whether they do enforce an injunction or not.
14. I struggle most severely to understand Panasonic's position in this respect. I do not understand why it is that having obtained Xiaomi's now unavoidable commitment to take the FRAND licence determined by this court – which, at the risk of repeating myself, I have already pointed out is what Panasonic sought by these proceedings – why, in that scenario, it wants to persist with actions on 13 standard essential patents in Europe or, indeed, to enforce any injunctions that it can obtain.
15. Ms. Jamal says that I have to proceed on the hypothesis that the courts of Germany and the UPC will proceed justly, and I do proceed on that hypothesis, but she also says that I must proceed on the hypothesis that there is some scenario where Panasonic might theoretically be able to present an argument that there is a need for an enforceable injunction. She candidly accepts that she is unable to put forward today a rational argument that could be presented to such a court why an injunction that can be enforced ought to be granted and, indeed, enforced by either of those courts in the scenario where the imposition of FRAND terms, in the sense of a decision by this court of FRAND terms which the parties have bound themselves to accept, is only a matter of weeks or months away.
16. None of this, to my mind, makes objective sense and although Ms. Jamal submits that Panasonic is entitled to get a decision about infringement and validity and therefore essentiality of SEPs in those European proceedings, I struggle to understand that too because once a licence is in place, I cannot see why Xiaomi would want to continue to argue about that.
17. Ms. Jamal also says that it would be important for Panasonic to get declarations about the past conduct of Xiaomi. But, again, I cannot see the utility of that or why, indeed, Xiaomi would want to contest it.
18. In any event, at least Ms. Jamal does accept on behalf of her client that once a licence is in place, as a result of the proceedings in this court, then Panasonic can no longer enforce injunctions in Europe. So, what we are focusing on is the time before this situation arises.
19. Before I come on to decide concretely what I should do, I feel compelled to make the following general observation. FRAND proceedings in this country remain long, complex and costly. They require close and frequent case management and that exercise needs to take place in an atmosphere of candour and trust between the parties and the court. I regret to say that Panasonic's approach in carrying out such a striking and, I would say, aggressive U-turn

since the hearing last week and its approach in putting forward an explanation for its position which, in my view, lacks coherence and credibility, undermines that sort of candour and trust and will, I am afraid to say, make it difficult to manage the case going forwards.

20. I should also note that none of the explanations that I have been given today have been supported in evidence. I am disappointed that I have not had a better explanation. I think I must make my case management decisions on the basis that Panasonic's real intention is, or at least, includes the possibility of seeking a swift injunction just ahead of a trial here, if I expedite the trial to the autumn of next year.
21. Mr. Segan says that Xiaomi may have to, in those scenarios, think of interim measures, such as seeking a declaration that Panasonic is not a willing licensor or seeking a declaration of an interim licence to cover the position until the full FRAND trial. I express no opinion about the prospects of success of either of those routes, but I do understand Xiaomi's concerns in those regards. I also accept and endorse Mr. Segan's contention that Xiaomi has done what it is that the UK court has expressed that an implementer in its position ought to do, which is commit to FRAND terms and move efficiently towards their determination.
22. Panasonic has agreed – not that it had much choice – to abide by my decision that a trial in Michaelmas next year is feasible, but it says that a trial in July is not. It has, in that respect, the support on this procedural point of Oppo – whose position I must not overlook, despite the fact they have had a modest participation in this hearing, through Mr. Lykiardopoulos KC, making brief submissions – Panasonic has the support of Oppo, who also say that a trial in July is not practical.
23. In addition to the feasibility of the steps that would be required before July next year, Mr. Lykiardopoulos draws attention to the fact that Oppo is already involved in a FRAND trial with InterDigital, in the spring of next year, to which I referred in my judgment last week and I think that is a relevant factor.
24. Since there is agreement between the parties that expedition to at least the Michaelmas term is feasible and not opposed, I will deal rather briefly with the *WL Gore* criteria for expedition. Is there a good reason? Yes, there is because at least some measure of expedition will reduce the injunction risk which Xiaomi, to my mind, rightly is concerned about, even if it is a low one. Further, and in general terms, the sooner a licence is decided and entered into in the UK, the sooner it may be possible to bring to a close the, in my view, wasteful infringement and other related litigation which Panasonic is currently conducting in other jurisdictions around the world.
25. Second, interference with the good interests of justice: I have already indicated last week that if it was essential, a trial in Michaelmas term next year could be achieved without anybody else having to lose their place in the list. That does not hold with anything like the same degree of confidence for July, but I will say that expedition to the Michaelmas term will involve extra work on the court and the court staff in arranging the diary to make sure that it can happen.

26. Third, would expedition be prejudicial to Panasonic? Panasonic, as I say, perhaps not with the greatest of grace, has accepted my decision that October can be accommodated but says that July cannot, and that is the main head of prejudice. Mr. Segan has put the following timetable: statements of case at the beginning of March; fact evidence on 8th March; reply, 2nd April; experts, 12th April; reply experts, 17th May; PTR in mid-June; and a trial in early July.
27. In an absolutely extreme case, I can conceive that a FRAND trial could be brought on with this sort of haste, but it is very, very compressed indeed and, as Mr. Lykiardopoulos points out, it allows very little time, indeed almost no time, for getting through what, if I can put it this way, is the thorny thicket of third party confidentiality and the provision of comparables.
28. I conclude that whilst it is not impossible to have a trial in that sort of timeframe, it would prejudice the quality of the preparation, it would prejudice other court users almost certainly, and significantly more than Michaelmas, and it would, I fear, make Oppo's life very, very difficult because of the FRAND InterDigital trial in the spring. That is prejudice to Panasonic and, of course, in the sense I have just covered, Oppo.
29. Fourth, special factors: what is relied on here is, first, Panasonic's conduct, which I have covered that already and, second, the need, Mr. Segan says, to protect this court's procedure moving towards a FRAND trial, under which head I think it is right to note that the court will have to find time, if Xiaomi feels it is necessary, to hear applications of the kind I indicated earlier, and that will be disruptive. As I have said already, I express no opinion about the success or failure, likely success or failure, of those applications, but if Xiaomi is put in a position by Oppo's conduct where it feels that it has to make the applications, then I think it will be only fair for the court, at least, to find time to hear them, whether or not they succeed or fail and that does involve a degree of disruption for the court.
30. I have a lot of sympathy for Xiaomi's position. I have no sympathy at all for Panasonic's position, which I think is extremely regrettable for all the reasons that I have set out earlier in this judgment. But it would be folly, I think, to try to cram the FRAND trial into a slot in July and I think it would be unfair on Oppo to do that.
31. The scenario where Panasonic seeks an injunction from an UPC or a German court will have to be dealt with by Xiaomi's submissions there that it is inappropriate and/or by the sort of applications I have indicated already can be made (without, as I said and at the risk of repeating myself, making any indication myself about whether those would succeed or fail).
32. I do formally record – and I imagine that my Continental colleagues would want to know this – that by reason of the procedural steps that have been put in place by both sides, that is to say Panasonic and Xiaomi, I am operating on the assumption, which I am sure is justified, that a FRAND licence between those parties will definitely result from the FRAND trial, which I will direct to take place next autumn, for the reasons I have indicated.

33. The reason I give that very specific statement in this judgment is that if Panasonic does feel that, for reasons as yet undisclosed, it is right and necessary to make an application to get a first instance injunction and to try to enforce it, I would want my colleagues in the UPC or in the German infringement courts to take a decision about what to do without any doubt or equivocation at all as to what is forthcoming in the UK.
34. So, for those practical reasons, I am going to expedite the FRAND trial here to the October term. I am going to give case management directions to do that which, I think, need to be crafted to make absolutely certain that the trial can be kept on track and, in particular, at this stage, that means making sure that the pleadings and the exercise of getting to provision of comparables is done very swiftly.

(For continuation of proceedings: please see separate transcript)

35. I have to deal with costs of the hearing last week and today and of the various applications. It is a complicated picture because Oppo and Xiaomi stand in different positions. So far as Oppo is concerned, I think there is a much greater element of case management to what has happened than there is with Xiaomi because Xiaomi had concrete specific positions that needed deciding and that were the subject of its applications for expedition, which was resisted in totality, and for the giving by Panasonic of an unconditional undertaking to grant a FRAND licence.
36. On expedition, I have ordered expedition and it is fair to say that Panasonic, prior to this morning's hearing, but subsequent to last week's, has agreed that expedition could take place. It is fair to say that Xiaomi has not been wholly successful today at least, because it was pressing for more expedition, to July. But I do regard those applications as touching on specific matters that concretely and separately needed deciding and, overall, I think it is right to say that Xiaomi is the successful party.
37. I take on board Ms. Jamal's submissions that the success has not been unqualified so, for example, I have not directed the early trial of specific issues that Xiaomi sought by one of its applications because those have not been necessary in the way that things have unfolded and were not pressed. But I still consider that Xiaomi is the victorious party in concrete separable aspects of what I have been dealing with over the two days.
38. It is right, also, to say that there has been a substantial degree of case management and it would be wrong to award the costs of that to Xiaomi. That ought to be costs in the case in the usual way and it was built into Mr. Segan's submissions to accept that to a significant degree.
39. I also should take into account Panasonic's conduct as dealt with in my judgment earlier this morning, which I would characterise as not only unreasonable, but wasteful of time and costs.
40. Taking those things as a whole, I will order Panasonic, as between it and Xiaomi, to pay two-thirds of the costs of what has taken place over the two days

that I have been sitting (not two whole days, but the time in the two whole days during which I have been sitting) and the other one-third will be costs in the case to reflect the case management that I have done.

41. So far as Oppo is concerned, I think that had Panasonic behaved more reasonably, the matter would have concluded last week and it would not have been necessary to come back today. I will therefore award Oppo half of its costs of attendance today and that is to reflect the fact that there has been necessary case management time and that it would be excessive to award it all of its costs of attendance today.
