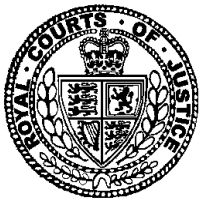

Neutral Citation Number: [2024] EWHC 1922 (Pat)

Case No: HP-2023-000031

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24/07/2024

Before :

MR JUSTICE ZACAROLI

- -

Between :

(1) LENOVO GROUP LIMITED **(a company incorporated under the laws of Hong Kong, China)** **(2) LENOVO (UNITED STATES) INC.** **(a company incorporated under the laws of Delaware, USA)** **(3) LENOVO TECHNOLOGY (UNITED KINGDOM) LIMITED** **(4) MOTOROLA MOBILITY LLC** **(a company incorporated under the laws of Delaware, USA)** **(5) MOTOROLA MOBILITY UK LIMITED**	**Claimants**
- and –	
(1) INTERDIGITAL TECHNOLOGY CORPORATION **(a company incorporated under the laws of Delaware, USA)** **(2) INTERDIGITAL PATENT HOLDINGS, INC.** **(a company incorporated under the laws of**	**Defendant**

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

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David Cavender KC and Femi Adekoya (instructed by **Kirkland & Ellis International LLP**) for the **Claimants**
Douglas Campbell KC and Edmund Eustace (instructed by **Bird & Bird LLP**) for the **Defendants**

Hearing date: 17 July 2024
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JUDGMENT

Mr Justice Zacaroli :

1. The claimants, companies in the Lenovo group ("Lenovo"), apply for expedition of a trial in which they seek declarations as to their entitlement to, and the terms of, a FRAND licence to use a portfolio of patents owned by companies in the InterDigital group ("InterDigital").

2. The background to these proceedings has been set out in numerous judgments dealing with earlier phases of this litigation: see, for example, the judgments of HHJ Hacon [2023] EWHC 3212 (Pat) and of Richards J [2024] EWHC 596 (Ch).

3. Lenovo seek an expedited trial in June/July 2025. InterDigital object to that, and contend that a trial in October/November 2025 is preferable.

4. This application was heard on 17 July 2024. It so happened that I was due to hear, two days later, an application, in a case between companies in the Nokia and Amazon groups involving very similar issues, for an expedited trial in July 2025. The Chancery listing office indicated that the court could accommodate one trial for 20 days, in a window commencing either 23 June or 1 July 2025, but not two such trials. In those circumstances, and having regard in particular to the second and third of the *Gore* questions I outline below, I delayed making a decision in this case until after I had heard the Nokia/Amazon case.

5. I was provided with extensive evidence and arguments both in writing and orally. This judgment focuses on the matters I consider to be most relevant to the two principal issues that remained in dispute by the end of the hearing: expedition and length of trial.

6. The test to be applied is that set out in *WL Gore & Associates GMBH v Geox SpA* [2008] EWCA 6322, §25, per Lord Neuberger, and involves answering the following four questions:

   (1) Is there good reason for expedition?

   (2) Will expedition interfere with the good administration of justice – including taking into account the interests of other litigants?

   (3) Will expedition cause prejudice to the other party?

   (4) Are there any other special factors?

<u>Is there good reason for expedition?</u>

7. InterDigital first make the point that it is premature to order expedition, because the shape of the trial is too uncertain. Mr Campbell KC, who appeared with Mr Eustace for InterDigital, pointed to numerous parts of the pleading which he said remained too vague for any reasonable conclusion to be reached either as to the length of the trial or its expedition. The crux of his argument was that Lenovo is yet to identify in its pleading what they say the terms of a FRAND licence would be, and that the prayer for relief identifies four different possibilities as to what a FRAND licence would look like.

8. As Mr Cavender KC, who appeared with Mr Adekoya for Lenovo, submitted, however, Lenovo is not yet able to plead the terms of a FRAND licence because it has yet to see the comparables (i.e. licences granted to others by InterDigital) on which it says the licence to it should be based. Moreover, the prayer sets out a "cascade" of options, Lenovo's primary case being the type of licence first mentioned, with the other three being fall-back options.

9. The parties have agreed that InterDigital will very soon provide early disclosure of some 22 licences, and that Lenovo will then plead its full statement of case. By 20 September 2024, therefore, InterDigital will, or should, have clarity as to the nature of Lenovo's FRAND case.

10. I accept that the lack of precision in Lenovo's case at this stage makes it difficult to estimate with any certainty the length of the trial. On any view, however, with well-resourced parties such as these there should be ample time between 20 September and June or July next year for the case to be adequately prepared for trial. I consider that it is, at the very least, important to fix a date now for trial. If the parties wait until the autumn to do so, then the likelihood is that the trial could not occur – without an even greater degree of expedition – until 2026. In the context of proceedings commenced in late 2023, that is an unattractive proposition. Moreover, setting a date now incentivises the parties to focus on narrowing the issues for trial as soon as possible.

11. Mr Cavender refers to the fact that there is as yet no mechanism devised by the courts for holding the ring pending determination of a FRAND licence. A patentee such as InterDigital is therefore free to take action in other jurisdictions to try and prevent an implementer from selling its products, with the aim or at least consequence of encouraging it to enter into licences at rates demanded by the patentee – which the implementer contends are "supra" FRAND rates.

12. He submitted that while the UK Courts – which have taken on the task of setting global FRAND terms – have not so far identified an effective way of holding the ring pending trial, what they can do is to minimise the period during which an implementer is suffering damage, by expediting the trial.

13. He further submitted that InterDigital is participating in classic "hold-up" behaviour: it has already obtained an injunction in Germany precluding Lenovo from selling its products there, and is pursuing proceedings in the USA which, if successful, are likely to have the effect of excluding Lenovo from using five of its patents there, from about July 2025. This is a case, accordingly, where Lenovo can point to actual as well as threatened harm as a result of the delay between now and obtaining judgment in the FRAND trial.

14. Mr Campbell disputes that Lenovo is suffering, or is likely to suffer, serious harm. He submitted that it could be inferred no serious damage was being suffered, because Lenovo, having originally asked for expedition to December 2024, was now not even pressing for a trial in March 2025, but only for July 2025. I reject that submission: Lenovo have clearly tailored their submissions to be realistic as to what is possible. That says nothing about their perception of damage in the meantime.

15. There is no detail, beyond broad statements, as the extent of the damage actually being suffered by Lenovo. There is as yet no evidence of any actual drop in sales figures in Germany. InterDigital point out that Lenovo products can still be sold into Germany, indirectly. Germany is, however, a significant market for Lenovo, and I would find it surprising if Lenovo did not sell directly into one its biggest marketplaces, and that it would suffer if unable to do so.

16. The very fact that InterDigital is insistent on maintaining its injunction, and refuses to stay enforcement pending trial, is compelling support for the conclusion that damage is caused by it. InterDigital accepts that it has sought the injunction because of a perceived benefit to it in doing so. That is likely to be, it seems to me, because the injunction causes harm to Lenovo.

17. A similar point arises in relation to the action being taken by InterDigital in the US. InterDigital has brought the proceedings, I must assume, because it perceives there to be a benefit to it, and thus likely concomitant harm, to Lenovo. InterDigital says that the US proceedings concern just five patents, and Lenovo could remove the offending items from its products. There is little evidence on this, but I am prepared to accept on the basis of the evidence I have seen, that Lenovo would be likely to suffer significant harm if unable to use the US patents, if only because they are necessary for it to remain competitive in that market.

18. Mr Campbell made much of the fact that if this court sets FRAND terms, InterDigital are not obliged to enter into the licence as set by the court: they have not undertaken to do so, and could choose to offer a licence on other terms. They cite the terms offered pursuant to the "Orange Book" procedure in Germany, which the German court considered FRAND-compliant. Even if this court declares particular terms to be FRAND, therefore, there is no guarantee that it would have any impact on any other court's decision whether to injunct (or to continue to injunct) Lenovo.

19. This is a particularly bleak view, however. I think it right to work on the assumption that, the parties having engaged in this hugely expensive process, and the court having reached a view about what is FRAND, the parties will in the real world act on it. That is indeed the outcome of the proceedings before Mellor J (at least following the recent decision of the Court of Appeal).

20. In other cases, the court has ordered expedition on the basis that a patentee is exerting commercial pressure on an implementer: *Panasonic v Xiaomi* [2024] EWHC 1733 (Pat) and *Lenovo v Ericsson* [2024] EWHC 1734 (Pat).

21. Each case is different, and little is to be gained from comparing outcomes in case management decisions in other cases. I note that Panasonic involved particularly egregious conduct on the part of Panasonic, which was a contributing factor. On the other hand, the *risk* of an injunction (as compared to the actuality of a foreign injunction here) was relied on in granting expedition. In *Lenovo v Ericsson* there appears to have been strong evidence of foreign injunctions having had a serious effect on business in the meantime.

22. Mr Campbell also contended that Lenovo's application is an attack on comity, and that the court would be implicitly criticising the German court in ordering expedition. I do not accept that. This court would not be trying to influence the decision of any foreign court. This case is about reaching a resolution of an issue (whether and if so on what terms Lenovo is entitled to a FRAND licence). If a licence is entered into, that would remove any continuing infringement and remove the rationale for enforcement action elsewhere. Even if no licence is entered into, Lenovo would be entitled to present this court's conclusion to any foreign court. Whether that would have an impact on the foreign court's decision to injunct or to continue to injunct Lenovo is a matter for it. I do not see how ordering expedition of the resolution of the issue could reasonably be characterised as an attempt to influence a foreign court.

23. Taking into account the above, I am satisfied that Lenovo can demonstrate that there is good reason for a measure of expedition. I consider the extent of expedition after considering the remaining *Gore* questions.

(2) Administration of Justice and (3) prejudice to the other party.

24. This question is concerned in part with the rights of the parties to this dispute to have the case determined fairly and in the interests of justice. The strongest point in Lenovo's favour is that the early determination of the FRAND licence is the most likely route to resolving the dispute between these parties, including the litigation in this jurisdiction and elsewhere.

25. That needs to be balanced against the prejudice to InterDigital. Mr Campbell did not suggest that, if the court ordered it, InterDigital would be unable to prepare for a fair trial by July 2025. His submission, essentially, was that it would be better to have more time. These parties are well-resourced. InterDigital can hardly complain at having to devote additional resources in this jurisdiction, to the extent that is needed as a result of expedition. It is its choice to devote resources to proceedings in other jurisdictions. If it agreed not to proceed elsewhere, the need for urgency here (and thus expedition) would go away.

26. I am not therefore persuaded that InterDigital would be prejudiced by having to prepare for a substantive trial in 12 months' time. I bear in mind in particular that, with the imminent disclosure of potentially comparable licences, Lenovo will have served its detailed statement of case by mid-September. The scope of the case can hopefully be refined, therefore, with ample time before an expedited trial in July 2025.

27. Also important under this element is the impact on other litigants. As I have noted above, Chancery listing has indicated that the court could accommodate a 20-day trial starting at the end of June or the beginning of July 2025, but only one.

28. Since the hearing of this application, I have heard and determined the expedition application in the Nokia/Amazon case. That case is to be listed for October 2025. It follows that this case can be accommodated in June/July 2025 without another litigant being prejudiced by having its case taken out of the list. As I

explain in my judgment in the Nokia/Amazon case, the decision has inevitably involved a degree of comparison between the two cases. I bear in mind: that in this case the expedition application was issued in November 2023; that issues as to the scope and shape of this trial are likely to be narrowed sooner as a result of the imminent disclosure of potentially comparable licences; and, in view of that, there is a stronger prospect that a trial in June/July 2025 can be achieved without prejudicing either party.

29. That does not mean that expedition will not impact at all on other litigants, merely that so far as other litigants whose cases are currently due to be heard in 2025 are concerned, their cases will not be taken out of the lists. FRAND proceedings need to be closely case managed, and can involve multiple interlocutory applications. Once an expedited trial date is set, the court will be under pressure to list such interlocutory applications on an urgent basis. That, too, can adversely impact on other litigants. Nevertheless, I do not think this concern outweighs the need for urgency in this case.

(4) Special factors

30. I do not think there are any special factors pointing either way. Lenovo points to the absence of any interim remedy (unlike in a domestic injunction case, where the court can impose terms such as a cross-undertaking in damages pending trial). I have already taken account of this in answering the first of the *Gore* questions as to the need for urgency.

31. InterDigital suggest that the fact that Lenovo has refused a licence, which the German court considered to be FRAND, in the context of the German proceedings is a special factor pointing against expedition. Whether that licence was FRAND, however, is hotly disputed by Lenovo.

32. Both parties accuse the other of causing delay in these proceedings by making applications which failed (for example, Lenovo's failed application for an interim licence, and InterDigital's failed challenge to this court's jurisdiction). I discount these points entirely: none of the applications was improperly made.

Conclusion on expedition

33. In considering the need for expedition, I bear in mind that – even on Lenovo's timetable – a judgment is unlikely to be handed down following the trial before October 2025. If there is no expedition, then that date is likely to be pushed back to the end of 2025 or early 2026. In the context of the damage being suffered in the meantime by the German injunction, the difference, therefore, is between another 15 months, or another 18 months, of lost sales in Germany. The degree of harm likely to be suffered as a direct consequence of expedition being refused is therefore less significant. On the other hand, in the context of the US proceedings the time period is of greater significance, given that an exclusion order would likely be made in about 12 months' time.

34. Having regard to all the factors I have considered above, I conclude that expedition is warranted in this case, and that it is appropriate to order an expedited trial in June/July 2025.

Length of trial

35. The parties dispute how long the trial in this case is likely to be. Lenovo says that 10-15 days should be sufficient. InterDigital says it would be significantly longer.

36. Mr Campbell pointed to the length of other FRAND trials, in at least one of which the judge had commented that the time available was too short. Those had not involved the additional point advanced by Lenovo, that the FRAND licence must include non-essential patents and patents declared essential to other standard setting organisations than ETSI.

37. Mr Cavender submitted that InterDigital's portfolio had recently been the subject of scrutiny, and a valuation exercise, in two FRAND trials – the first trial between these two parties before Mellor J and in another case involving InterDigital before Joanna Smith J earlier this year. The make-up of the portfolio, licences involved and the timescales are, however, different. He also pointed out that numerous expert witnesses had been called in the earlier case in front of Mellor J, and that some of that evidence addressed a "top-down" valuation approach which it was likely would not be repeated. Mr Campbell was unable to agree – certainly at this stage – that a top-down approach would not form part of the trial.

38. While I would expect the parties to have learned a great deal about how a FRAND trial might be conducted more efficiently as a result of their past experiences, there is no guarantee that will translate into a more streamlined process in this case.

39. While I reject some of Mr Campbell's more unlikely claims – for example that expert evidence of US and German law may be required simply because Lenovo had pleaded what had happened in those jurisdictions (Mr Campbell was unable to point to the issue of foreign law to which those pleadings gave rise), I accept that the possibility of quite extensive expert evidence cannot be ruled out at this stage. Indeed, until the number of contenders for comparable licences that will have to be considered at trial is known, estimation of the length of trial is to a large extent guesswork.

40. Doing the best I can on far from perfect information at this stage, I consider that a trial period of twenty days, including judicial pre-reading, is appropriate. While FRAND trials can be complex, it is the duty of the parties to narrow issues as much as possible so that a manageable trial can take place. They will need to do so in this case so as to ensure that the trial can be accommodated in that period. Ideally, the trial should be listed in a window commencing on 23 June 2025.

41. There was a further minor dispute between the parties as to whether the trial would require a Category 4 Judge. Mr Campbell maintained that it might do, because unless Lenovo was prepared to accept that it *needed* a licence to the non-essential patents within the portfolio of patents, the issue of whether those patents were necessary (which raised technical issues) would need to be resolved.

42. Mr Cavender accepted that Lenovo would not run the argument that no licence was required (which I understood to mean that it would not be arguing that it did not need a licence to the non-essential patents within the portfolio). On that basis, it is highly unlikely that technical issues of the sort Mr Campbell suggested would need to be resolved at trial. Accordingly, the case does not require a category 4 judge. If it subsequently turns out, once the nature of Lenovo's case is clearer following the pleading of its statement of case on FRAND, that it does intend to run an argument that would give rise to the need for a category 4 judge, it will need to take its chances as to the availability of such a judge for the expedited trial, or tailor its case accordingly.