Neutral Citation Number: [2019] EWHC 3463 (Pat)

Claim No. HP-2015-000063

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

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
Fetter Lane
London WC4A 1NL

Date: Wednesday, 27 November 2019

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

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Between:

KONINKLIJKE PHILIPS N.V. **Claimant**
(a company incorporated under the laws of the Netherlands)
- and -
(1) ASUSTEK COMPUTER INCORPORATION
(a company incorporated under the laws of Taiwan)
(2) ASUSTEK (UK) LIMITED
(3) ASUS TECHNOLOGY PTE. LTD
(a company incorporated under the laws of Singapore)
(4) HTC CORPORATION
(a company incorporated under the laws of Taiwan)
(5) HTC EUROPE CO. LTD **Defendants**

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MR MEREDITH PICKFORD QC and **MISS LIGIA OSEPCIU** (instructed by **Bristows LLP**) appeared for the **Claimant.**

MR DANIEL ALEXANDER QC (instructed by **Taylor Wessing LLP**) appeared for the **First, Second and Third Defendants**.

MR ANDREW LYKIARDOPOULOS QC (instructed by **Hogan Lovells LLP**) appeared for the **Fifth and Sixth Defendants**.

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Approved Judgment

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MR JUSTICE MARCUS SMITH:

1. Next year, in the Patents Court, there will take place a major trial, currently listed for five weeks, which goes by the short name of "Trial D". The Claimant in Trial D is Koninklijke Philips NV ("Philips"). There are five defendants to this claim. I shall refer to the First, Second and Third Defendants as the "ASUS Defendants", as they all are part of the ASUS group of companies. I shall refer to the Fourth and Fifth Defendants, both part of the HTC group of companies as the "HTC Defendants".

2. This ruling concerns the management of an application recently issued by the ASUS Defendants. By their application, the ASUS Defendants seek to end their participation in Trial D, so that the trial will only involve Philips and the HTC Defendants. This ruling considers whether the ASUS application should be determined swiftly, at a short hearing taking place before the end of this term, or next year at the beginning of Trial D.

3. In the ordinary course, it would be self-evident that this is a matter that ought to be determined as quickly as possible. That would be for three reasons:

    i) First, if the ASUS Defendants can properly extricate themselves from what is, on any view, a substantial trial, then that question ought to be determined as quickly as possible, so as to ensure the maximum saving of time and costs on the part of the ASUS Defendants themselves. If the ASUS Defendants can be spared the costs of trial preparation, without prejudicing anyone else, then that is obviously a benefit.

    ii) Secondly, although all of the parties were understandably coy on the question, it stands to reason that were the ASUS Defendants to be removed from Trial D, there would be some shortening of the hearing length and, therefore, some saving of costs to both Philips and to the HTC Defendants. Not to be overlooked, there would also be a saving of valuable court time. I note that it is not possible to say what sort of saving the absence of the ASUS Defendants would give rise to, but there would, in my judgment, be a material saving of time and cost.

    iii) Thirdly, I must consider the position of the HTC Defendants. The ASUS Defendants and the HTC Defendants are adopting – entirely rightly – a co-operative defence to Philips' claims. The HTC Defendants are entitled to know where they stand in terms of the presence or absence of their co-defendants as soon as possible. It would be unfair to them for the participation of the ASUS Defendants to be unresolved any longer than absolutely necessary.

4. Those are the reasons why anyone coming to this application would be inclined to deal with the matter as quickly as possible.

5. I have indicated in argument with counsel that this court can accommodate an early hearing, if it is appropriate to do so, and I have indicated that the date of 13 December is the date that I would be minded to hear this matter, if early determination of the ASUS Defendants' application is appropriate.

6. Mr Pickford QC, who appeared for Philips, contends that the three reasons that I have articulated in favour of an early determination of ASUS's application are outweighed

by factors going in the other direction. I should say, at the outset, that the ASUS application is by no means straightforward, and (for the reasons articulated by Mr Pickford) the management of the ASUS application is by no means straightforward. Mr Pickford contends that, for reasons that I will go into in a moment, it is more appropriate for the ASUS application to be determined on the first day of Trial D by the trial judge.

7. The first point that I will address – and I stress that this was not Mr Pickford's first point – is that the timing of the ASUS application comes at a particularly unfortunate time for Philips. Trial D is, as I have indicated, a substantial trial taking place next year. What is more, and I do no more than note this because it is relevant to my decision, the timetable to trial is an intense and difficult one involving, on the part of Philips, considerable efforts by their solicitor legal team, their counsel legal team and their experts. Mr Pickford says that hearing the ASUS Defendants' application on 13 December 2019 would prejudice his clients, and that it would (for that reason alone) be appropriate to adjourn the matter off to the first day of Trial D.

8. Related to that point, he says that no good reason has been advanced by the ASUS Defendants as to why this application to extricate themselves from Trial D was not made at an earlier time.

9. Both of these (related) points do, as it seems to me, have some considerable force. However, they cannot, in my judgment, outweigh the three points that I articulated at the beginning, in favour of an early determination of ASUS's application. It seems to me that it would be little short of a case management outrage, were defendants, who wanted out of a substantial trial and had a legal course whereby they could properly extricate themselves from that trial, to be compelled to stay in, incurring legal cost all the while, until the first day of trial. It seems to me that if it is possible to deal properly and fairly with the ASUS application before the commencement of Trial D, the fact of prejudice to Philips and Philips' legal team is something that cannot outweigh the importance of an early determination.

10. It is not the case that Philips cannot deal with the ASUS application: it is that they will have to expand their solicitor team and probably resort to different leading counsel in order to respond effectively to the ASUS application. These are no small matters, but I am clear that they do not, in my judgment, outweigh the enormous prejudice were the ASUS application not determined as swiftly as practically possible.

11. The fact that ASUS could have made this application sooner is not a matter I attach very great importance to. This is not a case where it is self-evident that the application should have been brought sooner. It is, as I shall touch upon, a complex application, and I do not consider that I am in a position to criticise ASUS for the timing of its application.

12. I therefore turn to the crux of the matter, which is whether the early hearing of the ASUS application on 13 December 2019 can properly and justly be accomplished, disregarding for these purposes the prejudice to Philips which I accept exists and which I have considered, but which, as I have found, cannot outweigh on its own the importance of an early determination of the ASUS application. I must tread carefully here because, as it seems to me, I must avoid trespassing into matters relating to the substance of the application to remove the ASUS Defendants from these proceedings.

13. I accept that the issues that will be before me, if I order the matter to be heard on 13 December 2019, are complex. The question of licensing practice and policy and what would be a proper FRAND licence are matters of complexity, which are in fact going to be traversed at the trial itself.

14. Mr Alexander QC, who appeared for the ASUS Defendants, has made clear in his submissions that these are not points that need to be determined for purposes of the ASUS application. He is quite prepared to proceed on the basis that Philips' policy of seeking a global licence to a pool of intellectual property rights, which it requires all of its licensees to obtain irrespective of their actually territorial requirements is a proper commercial policy on the part of the Philips.

15. He is also prepared to proceed on the basis of an assumption that it is, at the very least arguable, and not a matter for determination at an interlocutory hearing, that a FRAND licence can, in this case, properly be a global licence. If one starts from the proposition that this is an arguable point, which cannot be determined as part of the ASUS application, then it seems to me that the second assumption must be framed on the basis that a global FRAND licence would, in this case, be the appropriate licence.

16. Of course, I stress that both of these assumptions are only for the purpose of the ASUS application; they are obviously points that are very likely going to be live in Trial D.

17. Even on the basis of thse two assumptions, Mr Alexander still contends that the application of the ASUS Defendants ought to succeed. In short, even fettered by these assumptions, the ASUS Defendants, according to Mr Alexander, ought to be able to leave Trial D. I say nothing about whether Mr Alexander is right on this or whether he is wrong. That is a matter for determination at whatever point in time the ASUS application is heard and determined.

18. However, it does seem to me that Mr Alexander's willingness to fight the ASUS application on the basis of two assumptions that I have articulated significantly reduces the level of factual and expert complexity that will arise when the application comes to be heard. In essence, the argument reduces to a (complex) point of law. The approach Mr Alexander is willing to take also reduces the element of prejudice to Philips, in that the amount of time and effort that will need to be expended by Philips' legal team will materially be reduced: the evidence that Mr Pickford suggested his clients might have to adduce will not, in fact, have to be adduced.

19. In these circumstances, it is appropriate that the ASUS Defendants be given the opportunity to contend at an early juncture whether they can properly leave these proceedings or not and to have that point determined in short order. I am going to order that a hearing, with a time estimate of one day, take place before me on 13 December 2019, at which the ASUS application can be determined.

20. I want to be clear that the order embodying that direction must articulate the basis upon which the hearing is proceeding: the two assumptions set out at paragraphs 14 and 15 above must be clearly stated in the order, so that no-one is under any misapprehension as to what is, and what is not, open to contention.

21. There was a third area on which Mr Pickford invited me to frame an assumption on which the ASUS application should proceed. That was the question of whether, if the

ASUS Defendants' contention was right, there would be an undermining of the entire ETSI and FRAND system, whereby a party requiring a licence from a patent holder like Philips could play a game of hold-out: extracting itself from litigation by simply paying or offering to pay a territorial and not a global licence fee.

22. I make it clear that I am not prepared to require any kind of factual assumption along these lines. It seems to me that this is a point that goes close to the heart of the arguments that will take place between the ASUS Defendants and Philips on 13 December 2019. It seems to me that it is the flip side of the point that Mr Alexander made, namely that the imposition of a global FRAND licence by licensors such as Philips actually incentivised the litigation of patent disputes in those jurisdictions where the non-licensed party actually had the least business rather than the most. Both of these points, as it seems to me, are matters that are to be argued upon at the hearing of the ASUS application. They are not matters appropriately to be removed from the debate by way of assumptions. It seems to me that these points underlie the territorial arguments that will arise in relation to the ASUS Defendants' application.

23. Having articulated what I expect will form part of the argument before me on 13 December 2019, I say no more: I do want to prejudge what is a complex legal question.

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