

Adjourning complex FRAND trials in the current health crisis—(Conversant Wireless Licensing v Huawei Technologies)

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Dispute Resolution analysis: This case involved the application of Huawei to adjourn a trial in a FRAND case. Conversant instead sought that the trial was conducted, for the most part, on the papers. The judge outlined the relevant case law and current guidance from the Lord Chancellor. Crucially, the Civil Procedure Rules had not been amended such that it was appropriate for the conduct of a FRAND trial to go forward on the papers. While the judge accepted that it may well be that the FRAND trial, while not straightforward, could be in danger of becoming unnecessarily complex, there were bound to be issues, a significant number of them, which would require cross-examination in the usual way. Accordingly, the trial was adjourned. Written by Georgia Whiting, barrister, 4 King's Bench Walk.

Conversant Wireless Licensing SARL (a company incorporated under the laws of Luxembourg) v Huawei Technologies Co. Ltd (a company incorporated under the laws of the People's Republic of China) and other companies [\[2020\] EWHC 741 \(Pat\)](#)

What are the practical implications of this case?

This case provides useful guidance in respect of the present health crisis and, in particular, the current guidance in terms of the adjournment of trial as a result of the same. While some interim applications may be appropriately dealt with on the papers in order to avoid attendance of parties (even remotely) it was not appropriate, at this stage, in respect of a complex FRAND trial to deal with the majority of the matter on the papers. There were bound to be a number of issues in the instant case which would require cross-examination in the usual way. There was an additional factor in terms of a linked Supreme Court judgment, which also meant that it was appropriate to adjourn the matter in this instance.

Parties should be alive to the numerous changes and adaptations which will need to be considered in the current health crisis, and applications should be made accordingly. However, in a trial in which there will be doubtless issues which must be explored by way of cross-examination, it will not (as the guidance currently stands) be appropriate to conduct a trial for the most part on the papers. The guidance may well change in due course, but parties should seek to agree adjournments in such cases as appropriate. Where a trial can be conducted remotely, including cross-examination, this should also be considered, but lengthy adjournments are unfortunately the reality for parties in complex cases for the time being.

What was the background?

This case concerned an application by the defendants, Huawei and ZTE, to adjourn a trial in a FRAND matter. The claimant, Conversant, while objecting to the proposed adjournment, accepted that it was not practical to conduct the trial in the usual way in light of the global Coronavirus (COVID-19) pandemic. In broad terms, Conversant sought that the trial should be conducted, in large, on paper. It was suggested that focused hearings on particular issues could be held remotely, and there would be full written submissions, and any cross-examination allowed by the court would be focused and time limited.

Counsel for Huawei raised several objections to this proposal. First, it was pointed out that nowhere in the recent guidance from the Lord Chancellor issued in response to the current health crisis was there any mention of trials being conducted on paper (as opposed to interim hearings being decided on paper). It was submitted that there was good reason for this absence of guidance, referring to the judgment of the Supreme Court in *Al Rawi v Security Service* [\(2011\) UKSC 34](#), in which Lord Dyson said:

'There are certain features of a common law trial which are fundamental to our system of justice (both criminal and civil). First, subject to certain established and limited exceptions, trials should be conducted and judgments given in public'.

It was argued that the points made by Lord Dyson in *Al Rawi* held good now as they did when the judgment was given, notwithstanding the public health crisis.

Counsel on behalf of Conversant submitted that adjourning the trial for an indefinite period of time would severely prejudice them, as other potential licencees were unwilling to agree a licence pending settlement of the terms under the relevant patents to be settled by the court. In addition, there was a risk that owners of patent portfolios, such as Conversant, could have their financial resources drained while the resolution of licences remained pending.

What did the court decide?

The judge held that there were formidable barriers in the way of Conversant's proposal to deal with the trial, for the most part, on paper. Since the start of the health crisis developments in the guidance given to courts in respect of the conduct of trials and hearings had been rapid. However, so far, these had not included any change in the Civil Procedure Rules which would make it appropriate for the conduct of a FRAND trial to go forward largely on paper. It may well be that the approved means of conducting trials would continue to change, but neither the Civil Procedure Rules nor the guidance of the Lord Chief Justice permitted a trial with the characteristics of a substantial FRAND trial to be conducted largely on paper.

It may well be that, as counsel for Conversant suggested, less cross-examination would be required than suggested by the defendants, and that it may well be that the FRAND trial, while not straightforward, could be in danger of becoming unnecessarily complex. However, there were bound to be issues, a significant number of them, which would require cross-examination in the usual way.

Given that there was also a linked pending appeal in the Supreme Court, a good deal of time and costs may well be wasted if the trial proceeded in the ignorance of the same. The judge accordingly vacated the trial date but gave the parties permission to re-apply after judgment from the Supreme Court. If any further application was to be made, it would be dealt with in-line with the guidance in force at that stage.

Case details

- Court: Patents Court
- Judge: Judge Hacon (sitting as a High Court judge)
- Date of judgment: 25 March 2020

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