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## UK Supreme Court Case Tracker: *Unwired Planet v Huawei; Conversant v Huawei and ZTE* — Day 3 of 4

24 October 2019

During the third day of the landmark *UK Supreme Court Unwired Planet/Conversant* appeals, the respondents continued their submissions and sought to rebut a number of the opening arguments made by the appellants. The respondents continued to dispute what they contend is the appellants' case that the ETSI undertaking requires the licensing on FRAND terms of SEPs only when held to be valid and infringed, and further sought to emphasise that in setting a global licence, the English Court would not be enforcing foreign patents, but rather would be setting the terms of a licence to which the appellants must agree as a condition of participating in the ETSI scheme for the implementation of standards. The appellants were said to have adopted a strategy of taking the benefit of the SEPs underlying the relevant portfolios, while trying to avoid the grant of injunctive relief and also avoid or delay the payment of royalties for the use of those SEPs. The respondents' submissions will continue into the start of Day 4, before the appeals conclude with the appellants' responsive submissions.

### Respondents' Submissions — Continued

Some of the key submissions the respondents made were as follows:

- The contractual limitations imposed by ETSI undertakings, which are international in nature, must be distinguished from the underlying patent rights, which are territorial in nature. Patent licences are commonly international in their operation (including contractual undertakings imposed by SSO/SDOs other than ETSI (such as IEEE)) such that the the logical consequence of the appellants' case would be an inability to enforce similar contracts.

- There is an important distinction to be made between royalties payable under a licence, and relief payable in respect of infringement of a particular patent. The payment of a royalty is not payment of damages for each patent in a given portfolio, nor is it predicated on the assumption that each patent in the portfolio, if litigated, would turn out to be valid and infringed. If it were possible to litigate all relevant patents upon entry into a contract, then some proportion of these would turn out to be invalid. This reality is in fact priced into the real-world royalty rates for licensed portfolios, and further, similar adjustments can also be made to account for the possibility of over-declaration. As such, the determination of a royalty does not involve the adjudication of the patents in a given portfolio, even in the case of a global licence.
- The validity of the UK patents-in-suit is connected to the availability of injunctive relief limited to the UK, whereas the valuation of the portfolio relates to the terms of the FRAND licence. It is necessary for courts consider **both** of these limbs when FRAND relief is sought, because implementers must ultimately make a choice as to whether or not they wish to participate in the ETSI regime.
- Through their submissions, the appellants would appear to be contending that they should not be required to license disputed patents (e.g., in terms of their validity and essentiality) until disputes relating to such patents are determined in each relevant jurisdiction. The practical consequence of this stance is that implementers will never have to pay royalties in respect of the vast majority of such patents, which will never be litigated. The approach adopted by the appellants was characterised as one where they seek to take the benefit of the licensed patents, while avoiding an injunction and simultaneously seeking to avoid or delay the payment of FRAND royalties under the bargain created by the ETSI regime. It was further said that the appellants' focus on the licensing of individual patents would not translate to the common industry context of cross-licensing, which necessitates reciprocity.
- The appellants' contention that the effect of the decisions under appeal serves to turn national rights into global rights is incorrect. As they have previously noted, the FRAND injunction is in respect of a UK right and is limited in operation to the UK, and further, the fact that a contract may have international effects (as many such contracts do) does not turn the underlying rights into global rights.
- The logical consequence of the suggestion that it may in certain circumstances not be FRAND to seek a licence in a particular jurisdiction that covers foreign patents (e.g., seeking a FRAND licence to Chinese patents in the UK) would likely serve to limit the jurisdiction of enforcement to the jurisdictions in which they are registered, or only in the jurisdictions chosen by implementers.

On the afternoon of Day 3, the respondents undertook a close reading of a number of decisions of foreign courts (in particular, from the US and Germany) in support of their

contention that, contrary to the appellants' case(s), foreign courts in certain instances have been of the view that a FRAND licence may be global in scope, and have also granted injunctions in circumstances where a (F)RAND offer has been refused (see, e.g., *Apple v Motorola* (US), *Microsoft v Motorola* (US), *InterDigital v Nokia, ZTE* (US), *Pioneer v Acer* (DE)). In focusing on these authorities, the respondents sought to demonstrate that the decisions of the English Court under appeal are far less unorthodox and unprecedented than the appellants have contended.

## Comments from the Bench

**Lord Reed:** At the start of the day, he asked a number of questions about the potential mechanisms for royalty adjustments for a portfolio to account for changes in royalty rates in particular jurisdictions, including as a result of validity challenges. He also showed a strong interest in the textual interpretation of the ETSI IPR policy in view of the practicalities of SEP licensing. For instance, he commented that a standard will generally not have been set at the time a patentee makes a declaration, such that the patentee may not know which patent(s) will prove to be essential to the ultimate standard.

**Lady Black:** She showed an interest in the practical operation of licensing pursuant to the ETSI IPR Policy, and in particular the licensing of particular acts relating to, for example, the use or manufacture of a device rather than just the licensing of individual or specific patents.

**Lord Briggs:** He asked a number of questions in relation to the foreign decisions cited by the respondents and the principles that can be derived from them.

## What's Due to Happen Next

On the fourth and final day, the respondents will conclude their submissions before the appellants commence their reply submissions. It is expected that the respondents will continue to advance their contentions concerning the nature of the ETSI undertaking and the principles that can be derived from the foreign decisions to which they have referred. In their rebuttal, the appellants are expected to respond to the respondents' submissions about the broad, collective nature of SEP portfolio licensing pursuant to the ETSI IPR policy, which they say is not focused on individual patents, and to challenge the respondents' characterisation of their case as requiring each SEP in a portfolio to be litigated in each jurisdiction before that SEP can be licensed. Further,

the appellants are likely to seek to distinguish or contextualise the US and German decisions relied upon by the respondents.

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