Nokia Corporation v Interdigital Technology Corporation [2005] ADR.L.R. 08/26

JUDGMENT : MR. JUSTICE PUMFREY: Chancery Division. Patents Court. 26th August 2005

1. This is an application on the part of InterDigital Technology Corporation, who are the defendants to action number HC05CO2026 and are also the defendants to action number HC04C01952, in which the claimants, Nokia Corporation, the well-known manufacturers of cell phones, seek revocation of in total a substantial number of InterDigital's patents. The patents are, as I recall, both UK patents and European patents in the UK. These disputes form part of a much wider dispute between InterDigital Technology Corporation, who own a very substantial number of patents relating both to second and third generation mobile telephony on the one part, and one of the leading manufacturers of apparatus for use in such systems on the other.

2. The application before me is for an order that the parties be ordered to participate in mediation at a time and place to be agreed by the parties and that the parties be represented by persons including an executive or senior vice president at the mediation.

3. The reasons for such a mediation are, of course, good ones. The mediation, if successful, saves costs and substantially reduces court time. I should say that the first of the two actions to which I have referred which concerns three patents only is set down for trial for a period, to all intents and purposes, including reading time, of a month later on this year, and the new action covers 31 patents. On a like for like basis, I suppose there is a risk that the trial of the new action will take 10 months but I hope that by suitable steps in case management it too can be reduced to a month or so, or possibly even less.

4. Not only is the reduction of costs and court time satisfactory but a mediation is of course, in principle, capable of resolving disputes of a much wider and more commercially valuable basis than is the resolution of the comparatively narrow issues which arise in inter partes litigation. A court ordered mediation affords parties the opportunities to put into the pot everything that is worrying them about the other side with a hope that the issues can be satisfactorily resolved. That is what one hopes for.

5. As Mr. Watson said, between companies of this description there are so many deals that can be struck it seems ridiculous not to mediate, but it is precisely on this point that the parties differ. Nokia, for their part, refuse only to participate in a mediation which concerns the UK actions alone. They take the view that this is a worldwide dispute involving many patents between two transnational interests, that of the patentees who own the patents throughout the world, and those of Nokia who sell telephones and associated equipment throughout the world. Therefore, they say, and one can see why they would wish to say it, this is a dispute which is to be decided on a worldwide basis. InterDigital, on the other hand, are unwilling, as I understand the material before me, to extend the scope of any mediation for which they seek an order to encompass all the issues in which Nokia wish to be concerned worldwide. If that is the position, then I cannot order mediation since there is a flat refusal by the parties to have their disputes mediated upon a common basis.

6. The point is perhaps most clearly made in a letter from InterDigital to Nokia of 17th August 2005, where Mr. Bernstein, who is general patent counsel of InterDigital, talks about a proposed meeting which is now taking place albeit in New York on 1st September. He says: *"Second, I understand from Bill [who was his predecessor in office] that in a private meeting between you and Bill near the end of the evidentiary hearing [this is a reference to an arbitration which has taken place] bill outlined the framework of a proposal for settling both the 2G and 3G issues. While InterDigital is always open to alternative structures for settling our disputes, the value range that Bill discussed remains the range in which InterDigital is willing to settle these matters. [*That I understand to be negotiation language for, 'This is how much we want.'*] Accordingly, before we take time from everyone' schedule for a meeting, we need to have an understanding with Nokia that it is willing to negotiate within the range previously discussed. If Nokia believes it is still far off from agreeing to these terms, then please let us know, in which case we believe that both parties would be better served by a structured ADR of one or both of the current UK actions. Concerning those actions, while we understand your position concerning mediation, our plan is to still request that the UK court appoint a mediator for one or both of the actions. Nokia should not take this as a sign that InterDigital is not interested in discussing a global settlement or resolving this matter in the informal manner your proposed. Rather, we believe it beneficial for both parties that we continue with a structured settlement mechanism, such as mediation, of one or both of the*

current UK actions in an effort to exhaust as many avenues as possible for settlement. We hope that you understand our position and share our views on this. Hopefully, our meeting in the UK will enable us to come to a mutually agreeable business solution to all of our open issues."

7. There are a number of what I suspect are misunderstandings about the function that an English judge will fulfil in these circumstances. It is a familiar feature of litigation that American judges will participate actively in an attempt to settle litigation. That we cannot do. The difference between us and American judges is American judges preside over fact-finding tribunals which consist of juries. Accordingly, they are in a far better position to take the parties and knock their heads together than we can be who have to decide not only the issues of law but all the issues of fact which exist in the proceedings.

8. The result is that we cannot actively participate in settlement negotiations. At the same time also, we cannot, as I understand the authorities, direct mediation where one of the parties refuses to mediate upon the ground that is proposed. Where the parties cannot agree upon the proper substrate for the mediation negotiations, then the court will not direct a mediation. The court does have a sanction against the parties in those circumstances in that if it considers their conduct unreasonable, then that fact will ultimately be reflected in the order as to costs, but that is not a reason for supposing that the court can direct a mediation where the parties cannot agree.

9. This question has been the subject of a very lively debate both on legal principle and on wider principles of policy, which finds its most recent and comprehensive discussion in the decision of the Court of Appeal in two conjoined appeals, ***Halsey v Milton Keynes General NHS Trust*** and ***Steel v Joy and Hallida***y, a judgment of Ward LJ, Laws LJ, and Dyson LJ [2004] EWCA Civ 576, delivered on 11th May 2004. In paragraph 9, the Court of Appeal said: *"We heard argument on the question whether the court has power to order parties to submit their disputes to mediation against their will. It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. The court in Strasbourg has said in relation to article 6 of the European Convention on Human Rights that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to* ***'particularly careful review'*** *to ensure that the claimant is not subject to 'constraint': see* ***Deweer v Belgium*** *(1980) 2 EHRR 439, para 49. if that is the approach of the ECtHR to an agreement to arbitrate, it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6. Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it. We would adopt what the editors of Volume 1 of the White book (2203) say at para 1.4.11:* ***'The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are nonbinding. Consequently the court cannot direct that such methods be used but may merely encourage and facilitate.'***

   If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it."

10. The range of steps open to a court to bring the parties to mediation is wider than one would suppose. If one is satisfied at an early stage that one party is captiously opposing a suggestion that the case should be mediated, then it is possible not only to warn that party in the strongest terms but also to stay the proceedings for a suitable period of time to enable that party to come to its senses. This is, of course, a technique which is perhaps of more use in disputes between individuals than it may be in disputes between multinational companies where many hundreds of millions of dollars are at stake.

11. The court can warn the parties that an unreasonable refusal to pursue any mediation may have adverse costs consequences, even if they are ultimately successful. The court can in a suitable case take steps to refer the individual parties to an ADR organisation. All these matters are appropriate to their own class of litigation. Here I have very heavy litigation of the greatest commercial importance to the parties. I understand that an award of compensation has already resulted in a very substantial payment of about a quarter of a billion dollars in connection with the dispute subsisting between the litigants before me.

12. Where, therefore, the serious litigants cannot be satisfied that their best commercial interests are served by mediation of the sort proposed by the other, then I do not think it is for the court to second-guess that commercial decision. The court protects its own position and that of other litigants before it by the ultimate sanctions of costs in the event that the refusal was unreasonable. That is all it can do.

13. On the authorities, therefore, it seems to me that I am obliged to refuse the application to direct mediation in this case. I have thought whether I should stay the proceedings for a period but if I say I am proposing to stay the proceedings for a month to enable Nokia to consider whether or not they should mediate the English proceedings, the existence of the letter from InterDigital which I have read demonstrates, if demonstration were needed, how pointless that operation would be. These are matters which are under active consideration, the parties are themselves trying to feel a way towards a settlement on a global basis, and to order mediation in those circumstances seems to me to be absolutely unnecessary.

14. In those circumstances, therefore, this application must be refused.

MR. MICHAEL SILVERLEAF, QC (instructed by **Bird & Bird, EC4**) for the Claimant.
MR. ANTONY WATSON, QC and **MR. GEOFFREY PRITCHARD** (instructed **Milbank, Tweed, Hadley & McCloy**) for the Defendant.