



Neutral Citation Number: [2021] EWHC 2952 (Pat)

Case No: HP-2021-000022

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: 4 November 2021

Before :

HIS HONOUR JUDGE HACON

Between :

- (1) NOKIA TECHNOLOGIES OY
(2) NOKIA SOLUTIONS AND NETWORKS OY

Claimants

- and -

- (1) ONEPLUS TECHNOLOGY (SHENZHEN)
CO., LTD
(2) UNUMPLUS LIMITED (t/a OnePlus)
(3) GUANGDONG OPPO MOBILE
TELECOMMUNICATIONS CORP, LTD
(4) OPPO MOBILE UK LTD
(5) ASCENSION INTERNATIONAL TRADING
CO., LTD (t/a Realme)
(6) REALME MOBILE
TELECOMMUNICATIONS (SHENZHEN)
CO., LTD
(7) REALME CHONGQING MOBILE
TELECOMMUNICATIONS CORP LTD

Defendants

**Nicholas Saunders QC and Thomas Jones (instructed by Bird & Bird LLP) for the
Claimants**

**Alexander Layton QC, Andrew Lykiaradopoulos QC and Josephine Davies (instructed by
Hogan Lovells International LLP) for the Defendants**

Hearing dates: 27-28 September 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE HACON

Judge Hacon :

Introduction

1. On 26 August 2020 the Supreme Court handed down its judgment in the joined appeals *Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd*, *Conversant Wireless Licensing SÀRL v Huawei Technologies Co Ltd* and *Conversant Wireless Licensing SÀRL v ZTE Corporation* [2020] UKSC 37. The judgment included a ruling that English courts had jurisdiction to settle fair, reasonable and non-discriminatory (FRAND) terms of a patent licence which covered foreign patents even in the absence of the parties' consent to the English court settling global terms.
2. The claimants in the present action ("Nokia") are proprietors of three European Patents in the mobile telecommunications sector which each have a UK designation ("the UK Patents"). The UK Patents have been declared to the standards setting organisation of that sector, the European Telecommunications Standards Institute (ETSI), as essential to certain standards.
3. Nokia seek a declaration that the UK Patents are essential to the relevant standards and that they are valid and infringed by the defendants. The defendants are manufacturers and suppliers of mobile telecommunication devices. Nokia further seek a declaration that the terms of a global licence offered by them to the defendants are FRAND. An injunction and other relief is sought in the event that the defendants fail to take a FRAND licence.
4. The defendants point to two developments which have taken place since the Supreme Court's judgment. The first is that on 19 August 2021 the Supreme People's Court of the People's Republic of China ("the Chinese Supreme Court") handed down its judgment in *Guangdong OPPO Mobile Telecommunications Corp. Ltd v Sharp Corporation* ((2020) Zui Gao Fa Zhi Min Xia Zhong No. 57). The Chinese Supreme Court ruled that courts in the People's Republic of China ("China") have jurisdiction to settle global terms of a FRAND licence even in the absence of agreement between the parties as to the forum in which terms are to be determined. The fact that patent proceedings had already been brought in Japan, Germany and Taiwan made no difference.
5. The second development is that EU law, in particular Council Regulation (EU) No. 1215/2012 ("the Recast Brussels Regulation"), no longer applies in this country.
6. The defendants argue that these have changed the landscape of FRAND litigation in the UK and the jurisdiction of the English courts. They say that this court has no jurisdiction over the first, third, fifth, sixth and seventh defendants, none of which are domiciled in the UK ("the non-UK defendants"). In consequence service against the non-UK defendants should be set aside. The claims against the remaining defendants ("the UK defendants") should be stayed.

7. By way of alternative relief, the defendants seek a stay of the proceedings against all the defendants as a matter of the court's case management or, as a further alternative, a stay of this court's resolution of all FRAND issues.

Background

8. From 1 July 2018 the defendants were licensed under certain of Nokia's standard essential patents (SEPs) and Nokia was granted a cross-licence under patents owned by some of the defendants ("the Original Licence"). The Original Licence expired on 30 June 2021. Nokia and the third defendant acting on behalf of all the defendants attempted to negotiate a renewed licence and cross-licence, expanded to include 5G patents, without success. Nokia submit that the terms of a worldwide licence which they have offered to the defendants are FRAND. The defendants have declined to accept a licence on those terms and deny that they are FRAND, although they have said that they would like to take a global licence provided that the terms are settled by a court in China.
9. Nokia's position is that as matters stand, since the expiry of the Original Licence the defendants have been carrying out acts protected by the UK Patents and have failed to accept a licence under Nokia's FRAND terms, hence the present action for infringement.
10. The claim form was issued immediately after the expiry of the Original Licence, on 1 July 2021. The Particulars of Claim and Particulars of Infringement were dated the same day although there is a dispute as to the date of filing.
11. By an order dated 20 July 2021 Master Pester granted permission to serve the non-UK defendants out of the jurisdiction. Both the UK and non-UK defendants have filed an acknowledgment of service contesting the jurisdiction of the court.
12. On 13 July 2021 the third defendant and related members of the OPPO group of companies filed two actions ("the Chongqing Proceedings") against the first claimant and other members of the Nokia group in the No. 1 Intermediate People's Court of Chongqing Municipality of the People's Republic of China ("the Chongqing Court").
13. In the first, the Chongqing Court has been asked to set the terms of a global FRAND licence of Nokia's SEPs. It was referred to at the hearing as "the Rate Setting Claim". This is a free-standing claim by the third defendant with no concurrent issues of infringement or validity of the SEPs before the court.
14. Nokia has challenged the jurisdiction of the Chongqing Court to settle a global licence but pending the final outcome of that challenge I must assume that the Chongqing Court has jurisdiction in accordance with the Chinese Supreme Court's ruling in *OPPO v Sharp*.
15. The investigation by the Chongqing Court in the Rate Setting Claim will be to settle FRAND terms without reference to a particular offer. Nokia submitted that the judgment would therefore be no more than advisory. It is not necessary for me to resolve whether that is an accurate characterisation. During

submissions before me counsel for the defendants stated that the defendants had undertaken to take a licence from Nokia on the FRAND terms to be settled by the Chongqing Court. I am not sure that is quite right. In a letter dated 21 September 2021 from Hogan Lovells, the solicitors acting for the defendants, to Bird & Bird, the solicitors acting for Nokia, Hogan Lovells stated that the third defendant is prepared to undertake to Nokia that it would enter into a licence on the terms settled by the Chongqing Court. However, should anything turn on the distinction, I would ask the defendants to state unequivocally that an undertaking is given and in this judgment I will assume that the undertaking would follow.

16. Aside from the foregoing, Nokia emphasised two further distinctions between the Rate Setting Claim and the claim before this court. Nokia say that the Chongqing Court has not been asked to determine terms for a cross-licence to Nokia under SEPs owned by the defendants. Also, the terms of a FRAND licence which this court has been invited to settle would cover the branded devices of all the defendants; the Rate Setting Claim is directed only to OPPO-branded devices. The distinctions are not accepted by the defendants and I will return to them.
17. In the second action before the Chongqing Court the third defendant seeks a declaration that Nokia's actions in licensing negotiations were done in a non-FRAND manner and in breach of principles of good faith applicable under Chinese law ("the Non-FRAND Claim").
18. Aside from bringing the present action, Nokia has issued proceedings for infringement of its SEPs in Germany, India, and Indonesia. Proceedings have also been brought by Nokia for infringement of other patents covering inventions alleged to be used by the defendants' products but which have not been declared standard essential and so raise no obligation to offer FRAND terms. These were referred to as "implementation patents". Actions for infringement of Nokia's implementation patents by one or more of the defendants have been filed by Nokia in England, France, Germany, Spain, India and Russia.
19. On 3 August 2021 the UK defendants filed an application notice in this court seeking a stay of the claims in the present action pending final determination of the Rate Setting Claim and the Non-FRAND Claim in Chongqing on the ground that England is not the proper forum for determination of the claims. On 8 September 2021 the non-UK defendants filed an application notice seeking to set aside the Order of Master Pester granting permission to serve out of the jurisdiction, again on the ground that England is not the proper forum for determination of the claims.
20. Both application notices seek alternative relief in the form of a stay of settlement of FRAND terms in this court pending the outcome of the proceedings to settle global terms in the Chongqing Court, as a matter of case management.

The two legal frameworks

21. In relation to the non-UK defendants, the burden rests on Nokia to show that the requirements of CPR 6.36 and 6.37 were met. These were explained by Lord Collins in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7:

“[71] On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements: *Seaconsar Far East Ltd v Bank Markazi Jomhourī Islami Iran* [1994] 1 AC 438, 453-457. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e.g. *Carvill America Inc v Camperdown UK Ltd* [2005] 2 Lloyd’s Rep 457, para 24. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context ‘good arguable case’ connotes that one side has a much better argument than the other: see *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547, 555-557, per Waller LJ affirmed [2002] 1 AC 1; *Bols Distilleries BV v Superior Yacht Services (trading as Bols Royal Distilleries)* [2007] 1 WLR 12, paras 26-28. Third, the claimant must satisfy the court that in all the circumstances the Isle of Man is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.”

22. In the present instance, the defendants accepted, solely in relation to anything to be determined in this application, that the first two requirements set out by Lord Collins are satisfied. The only issue is whether Nokia has shown that in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute.
23. The UK defendants seek a stay of these proceedings against them under CPR Part 11 because another forum is more appropriate, namely the Chongqing Court.
24. In *Spiliada Maritime Corporation v Cansulex Limited* [1987] 1 AC, Lord Templeman summarised the two legal tests (at p.464):

“Where the plaintiff is entitled to commence his action in this country, the court, applying the doctrine of forum non conveniens will only stay the action if the defendant satisfies the court that some other forum is more appropriate. Where the plaintiff can only commence his action with leave, the court, applying the doctrine of forum conveniens will only grant leave if the plaintiff satisfies the court that England is the most appropriate forum to try the action. But whatever reasons may be advanced in favour of a foreign forum, the plaintiff will be allowed to pursue an action which the English court has jurisdiction to entertain if it would be unjust to the plaintiff to confine him to remedies elsewhere.”

25. *Spiliada* was concerned with an application to set aside leave given to serve proceedings against a defendant in Canada. Lord Goff explained in greater detail how the principle of forum conveniens applies to such an application at pp.475-484.
26. During argument in the present application no distinction was drawn by counsel between the issue of forum non conveniens arising in relation to the UK defendants or that of forum conveniens in respect of the non-UK defendants, save for where the burden lies, and no importance was attached to the burden on the facts of this case. There is a single issue to be resolved: whether England is the appropriate forum for the trial of these proceedings.
27. There remains the second and distinct issue of the exercise of the court's case management powers.

The first hurdle: an alternative jurisdiction must be available

28. A similar challenge to the court's jurisdiction arose in the *Conversant* appeals within the joint appeals before the Supreme Court, cited above. In a single judgment the Supreme Court explained that its ruling on the forum conveniens, turned on the absence of evidence that there was another forum in which the dispute could be heard:

“[96] ... But we think, like the judge, that there is a compelling reason why the appellants must fail on this issue which would apply even if the appellants' characterisation had been correct, so that the dispute was in substance about the terms of a global FRAND licence. A challenge to jurisdiction on forum conveniens grounds requires the challenger to identify some other forum which does have jurisdiction to determine the dispute. Even in a case where permission is required to serve out of the jurisdiction, so that the burden then shifts to the claimant to show that England is the more appropriate forum, that still requires there to be another candidate with the requisite jurisdiction. In the present case, China is the only candidate which the appellants have put forward. There may be others, but the court is not required to carry out its own independent search, and such other jurisdictions as might exist in theory may not be remotely convenient.

[97] After hearing extensive expert evidence, the judge found that the Chinese courts do not, at present, have jurisdiction to determine the terms of a global FRAND licence, at least in the absence of agreement by all parties that they should do so. Even in the event of such an agreement, he described the prospect that the Chinese courts would embark on the exercise as no more than speculative. Notwithstanding the admission of fresh evidence on this issue, the Court of Appeal reached the same conclusion. In sharp contrast, we have decided, for the reasons set out above, that the English court does have such a jurisdiction, even in the absence of consent by the parties, and it has of course exercised that jurisdiction in the Unwired case. Directions have been given in the *Conversant* case (subject to the outcome of this appeal) for it to be done again. Furthermore, against the speculative

possibility that the Chinese courts might accept jurisdiction to settle a global FRAND licence by consent, there is the judge's finding that Conversant had acted reasonably in refusing to give its consent, for reasons connected with the conditions which the appellants sought to impose, a conclusion which was not met with any persuasive challenge in this court.

[98] We therefore agree with the judge that the forum conveniens challenge falls at this first hurdle, notwithstanding the fresh evidence introduced in the Court of Appeal.”

29. In the present case that first hurdle has been overcome by the defendants. The Chinese Supreme Court in *OPPO v Sharp* identified five factors which would affect whether the Chinese court of first instance had jurisdiction to settle global terms for licensing SEPs. In summary they are (i) the willingness of the parties to agree a global licence, (ii) the proportion of the SEPs to be licensed having been granted in any one country, in particular China, (iii) the principal place of business of the implementer, (iv) the place where negotiations have been conducted and (v) location of property available for seizure or enforcement of the licence. The Court had earlier set out the relevant facts of the case and having set out the foregoing five factors, continued (in agreed translation):

“It can be seen from the above facts that first, the parties concerned are all willing to reach an agreement on the global licensing conditions for the SEPs in question, and have negotiated with each other about the licensing. The scope of the willingness of the parties concerned to negotiate constitutes a factual basis for determining the global licensing conditions for the SEPs in question. Second, obviously, the SEP licensing dispute in this case is more closely related to China. The close relation specifically lies in that: In this case, most of the SEPs involved in the licensing negotiation of the parties concerned are Chinese patents; China is the main place of implementation, principal place of business or main source of revenue of the implementer of the SEPs in question, the place of patent license negotiation, and also the location of the property available for seizure or enforcement of the applicant for patent license. Making judgment on the global licensing conditions for the SEPs in question by the Chinese court is not only more helpful for ascertaining the implementation of the SEPs in question by OPPO and OPPO Shenzhen, but also can make the adjudication of the case more easier. Last, it should be noted that if the parties concerned can reach an agreement on the adjudication of the global licensing conditions for the SEPs by the court in a country, the court of such country can certainly exercise jurisdiction and adjudication over the global licensing conditions for the SEPs between the parties concerned, but the agreement on jurisdiction is not a necessary condition for a specific court to govern and deal with the global licensing conditions of the SEPs. The Court of First Instance, based on its jurisdiction over this case, properly determined that it is appropriate for it to rule on the global licensing conditions for the SEPs in question if the parties concerned are willing to reach an agreement on global licensing, and the case is

more closely related to the Chinese court.”

30. Accordingly, there is an available forum for settling FRAND terms in the present case in China. As to which forum in China, there is an application by Nokia before the Chongqing Court that if the terms must be settled in a Chinese court, which Nokia opposes, the proceedings should be transferred to Beijing. That is incidental to the issues here.

Brexit

31. The Supreme Court, having concluded that the forum conveniens challenge fell at the first hurdle in *Conversant*, considered what the position would have been if that not been the case:

“[98] ... Had it not done, a number of further issues would have arisen, in particular arising from the application of the *Owusu* principle (*Owusu v Jackson (t/a Villa Holidays Bal-Inn Villas)* (Case C-281/02) EU:C:2005:120, [2005] 2 All ER (Comm) 577, [2005] QB 801 (ECJ)) to the English defendants, set against the possibility that there might be a reflective application of art 24 of the Brussels I Regulation (European Parliament and Council Regulation 1215/2012/EU of 12 December 2012), and the recent decision of this court in *Lungowe v Vedanta Resources plc* [2019] UKSC 20, [2019] 3 All ER 1013, [2019] 2 WLR 1051. But we consider that those issues, which may well arise in future if and when other countries decide to exercise jurisdiction to settle global licences, would best be determined in a context when they might be decisive.”

32. The *Owusu* principle was explained in *Lungowe v Vedanta Resources plc* [2019] UKSC 20:

“[16] Jurisdiction against the anchor defendant derives directly from article 4(1) of the Recast Brussels Regulation, which provides that: ‘Subject to this Regulation, persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state.’ That basic provision is designed not only for the protection of EU domiciliaries, but also to enable a claimant to know, with reasonable certainty, where he may sue. In *Owusu v Jackson* (Case C-281/02) [2005] QB 801 the Court of Justice held, contrary to earlier English jurisprudence, that this conferred a right on any claimant (regardless of their domicile) to sue an English domiciled defendant in England, free from jurisdictional challenge upon forum non conveniens grounds, even where the competing candidates for jurisdiction were England (part of a member state) and some other non-member state such as, here, Zambia. The decision related to article 2 of the earlier Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, which was in identical terms to the present Recast Brussels Regulation.”

33. In *Conversant* the *Owusu* principle required that the UK defendants be sued in England. The exception to the principle raised by the defendants would

apparently have been entertained by the Supreme Court had the defendants not fallen at the first hurdle. But it was emphatically rejected by the Court of Appeal (*Conversant Wireless Licensing SARL v Huawei Technologies Co Ltd* [2019] EWCA Civ 38), where it was described as a reflexive application of art.24(4) of the Recast Brussels Regulation. Floyd LJ, with whom Flaux and Patten LJJ agreed, explained the argument:

“[113] The fact that the two UK defendants are domiciled here means that the court cannot decline jurisdiction as against them unless the case presents an exception to *Owusu*. Huawei and ZTE argue that it does present such an exception, because there is scope for the reflexive application of art.24(4). ...

[114] The argument depends critically on the passage in Dicey at 12-024, cited in [28] above, which states that art.24 should not be applied ‘slavishly’. This is a slim basis for suggesting that the reflexive application of the article should be extended to cases where it would not apply substantively in its direct application. ... It would be absurd if the reflexive application of art.24(4) expanded the exclusive jurisdiction beyond the scope it would have if the patent was that of another member state, where the article would apply directly. Mr Layton’s suggestion that art.24(4) should be applied reflexively in a case which is ‘closely allied’ to a case which would fall under art.24(4), is untenable, and unsupported by any authority.”

34. The Court of Appeal went on to accept the claimants’ argument that since the UK defendant had to be sued in England, there was advantage in not fragmenting the case, which would be avoided by having the claim against the non-UK defendants heard in England too, and that this was a factor to be taken into account in the forum conveniens assessment.
35. The short point is that the *Owusu* principle, any possible exception to it, and any argument against fragmentation of the case which depends on the *Owusu* principle now have no relevance following the end of the transitional period of the Withdrawal Agreement. The defendants described this as leaving the English court free to find the true forum conveniens as explained in *Spiliada*, rather than reaching a result artificially distorted by the Recast Brussels Regulation regime.

Forum conveniens and the nature of the dispute

36. The doctrine of forum conveniens has continued to have application in English law outside the ambit of the Brussels Convention and its successors while they were in force. It was discussed by the Supreme Court in *Conversant* with particular attention being given to the importance of accurately defining the dispute in question before resolving which is the appropriate forum for hearing the dispute:

“[94] Leaving aside questions as to the burden of proof, at common law the forum conveniens doctrine requires the English court to decide whether its jurisdiction or that of the suggested foreign court is the more

suitable as a forum for the determination of the dispute between the parties. The traditional way in which this question has been framed speaks of the ‘forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice’ (per Lord Collins in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2011] 4 All ER 1027, [2012] 1 WLR 1804 (at [88]), adopting the language of Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd, The Spiliada* [1986] 3 All ER 843, [1987] AC 460). The requirement in complex litigation to define, at the outset, what is ‘the case’ to be tried runs the risk that the court will by choosing a particular definition prejudice the outcome of the forum conveniens analysis, as the Court of Appeal decided had occurred at first instance in *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72. Harman J had characterised ‘the case’ as a petition under the English Companies Act for relief for unfair prejudice in the conduct of the affairs of an English registered company, which made it ‘blindingly obvious’ to him that England was the appropriate forum. But the company carried on business entirely in Argentina. The matters complained of all occurred there, where there was a parallel jurisdiction to provide relief under Argentinian legislation. So the Court of Appeal preferred Argentina as the appropriate forum. Like the Court of Appeal in the present case, we therefore prefer for present purposes to identify the dispute between the parties as the matter to be tried, lest reference to ‘the case’ should introduce undue formalism into the analysis of a question of substance.

[95] The question how the dispute should be defined has been the main bone of contention between the parties, both in this court and in the courts below. Is it, as the appellants say, in substance a dispute about the terms of a global FRAND licence, or is it, as the respondent maintains, both in form and in substance about the vindication of the rights inherent in English patents, and therefore about their validity and infringement, with FRAND issues arising only as an aspect of an alleged contractual defence? Thus far the respondent has had the better of that argument, both before the judge and the Court of Appeal. At the heart of the analysis which has thus far prevailed is the recognition that the owner of a portfolio of patents granted by different countries is in principle entitled to decide which patents (and therefore in which country or countries) to seek to enforce, and cannot be compelled to enforce patents in the portfolio granted by other countries merely because a common FRAND defence to the enforcement of any of them raises issues which might more conveniently be determined in another jurisdiction than that which exclusively regulated the enforcement of the chosen patents.

[96] Were it necessary to choose between the rival characterisations of the substance of the dispute, we would have agreed with the choice made by the courts below.”

37. Thus, having agreed with the judge at first instance and the Court of Appeal that the dispute in *Conversant* was better characterised as being in substance about the validity and infringement of the UK patents in suit, the Supreme Court

implied that had its judgment on forum conveniens turned on the correct characterisation of the dispute, it would have found in favour of England being the appropriate forum.

38. Although the Supreme Court gave no reasons of its own, those given below were by implication approved. Floyd LJ, with whom Patten and Flaux LJ agreed, explained the Court of Appeal's reasons:

“[95] Before one can decide whether the English court is the proper forum for the determination of a dispute, a critical initial question is how the dispute is properly to be characterised. The proper characterisation of the dispute has an impact in the subsequent analysis: it may affect whether the foreign court is available to try the dispute and whether it is the appropriate forum. It is of particular importance in the present case.

[96] I accept Mr Layton's submission, supported by Mr Bloch, and not contested by Mr Speck, that in characterising the claim one does not look simply at Conversant's claim: one must look at the overall dispute between the parties. That may involve looking at how the claim is to be answered insofar as that is known: see the passages from *VTB v Nutritek* identified in [32] above. That consideration alone does not assist the appellants, because the dispute characterised as a whole still involves, as Ms Dagg has explained, the questions of essentiality, infringement and validity of the UK patents. Although Ms Dagg does not speak on behalf of ZTE, it is quite unrealistic to suppose that, with the proceedings structured as they are, ZTE would not join in the attacks on validity as well, just as it has done in China.

[97] It is clear that one may get different answers to the forum conveniens questions depending on the level of generality at which one characterises the dispute. It is possible to define the dispute both in a way which is too specific and in a way which is too general. Thus, to define a dispute in a way which focuses on the relief which would be granted in the English court was to define it too specifically: *see re Harrods (Buenos Aires)*. On the other hand, to define the dispute in so general a way that the claimant is left to pursue a claim based on a different property right and different underlying facts in the foreign forum is, in my judgment, likely to define it too broadly.

[98] The way in which claims of the type which Conversant wishes to bring are to be analysed was considered in some depth in *Unwired CA*. The points which emerge from that judgment which are relevant to this appeal are the following:

- (i) At [52] the court pointed out that it was accepted that there was no such thing as a global portfolio right, and that the court in this country will only determine disputes concerning infringement and validity of UK patents or European patents designating the UK. Moreover, if a UK patent is found valid and infringed the relief by way of injunction and damages will relate only to acts of infringement of those patents within that territory.

(ii) At [53] the court contrasted the territorial nature of patent rights with the position in relation to the FRAND undertaking given to ETSI. The undertaking, like the standard to which it relates, was of international effect, applying to all patents which belong to the same family irrespective of the territory in which they subsist. This was necessary in order to protect implementers whose equipment may be sold in a number of different jurisdictions and then used by members of the public who may travel with that equipment from one jurisdiction to another.

(iii) However, just as it was necessary to protect implementers by giving them global protection in this way, it was necessary to protect SEP owners from the need to negotiate patent licences on a country by country basis, and the need to litigate on such a basis. As the court pointed out at [55], Huawei's witness had accepted that the costs of such litigation to the SEP owner would be impossibly high.

(iv) Thus, the court pointed out at [56], in such circumstances it was possible, depending on the facts, that a global licence could be FRAND.

(v) Where a SEP owner brings proceedings for infringement against an implementer in one jurisdiction in respect of the SEPs which it owns there and makes good its case, two outcomes might follow. First, if the evidence establishes that a willing licensor and a willing licensee in the position of the parties would agree a FRAND licence in respect of that jurisdiction but the SEP owner refuses to offer it such a licence then no injunction should be granted. If on the other hand, the implementer refuses to enter into the FRAND licence for that jurisdiction then the SEP owner can properly seek an injunction to restrain further infringement there. Secondly, however, if the evidence establishes that a willing licensor and a willing licensee in the position of the parties would agree a global FRAND licence, that such a licence would conform to industry practice and that it would not be discriminatory but the SEP owner refuses to grant such a licence to the implementer then once again it should be denied an injunction. If on the other hand, the implementer were to refuse to enter into such a licence then the SEP owner should be entitled to an injunction in that jurisdiction to restrain infringement of the particular SEPs in issue in those proceedings: see [57] and [58].

(vi) Were the position otherwise then the SEP owner seeking to recover the FRAND licence monies for all of the SEPs in the same family from an uncooperative implementer who is acting unreasonably would be required to bring proceedings in every jurisdiction in which those rights subsist, which might be prohibitively expensive for it to do. This result would not involve any alteration of the territorially limited characteristics of any SEP; nor would it involve any jurisdictional expansionism. To the

contrary, it would amount to a recognition by the court (i) that the SEP owner has complied with its undertaking to ETSI to offer a licence on FRAND terms; (ii) that the implementer has refused or declined to accept that offer without any reasonable ground for so doing; and (iii) that in these circumstances the SEP owner is entitled to the usual relief available for patent infringement including an injunction to restrain further infringement of the particular SEPs in issue in the proceedings.

[99] Conversant's claim in the present case is closely analogous to the claim advanced in the *Unwired Planet* case. It is (i) that the UK patents are essential to the standard, (ii) that it has complied with its ETSI undertaking, in that the offers which it has made are FRAND, (iii) that Huawei and ZTE have not so complied without any reasonable ground for so doing, and (iv) that it is therefore entitled to enforce its UK SEPs and obtain the usual relief for infringement, including a FRAND injunction and damages. Conversant also seeks a determination as to the terms which are FRAND for the licensing of its portfolio. Huawei's and ZTE's answer is likely to be (i) that Conversant's patents are neither essential nor valid, and (ii) that Conversant has not complied with its FRAND undertaking and so is not entitled to an injunction even if it establishes that its UK patents are valid and essential. The content of Conversant's FRAND undertaking is thus an inseparable part of the dispute about whether Conversant is entitled to relief for infringement of valid UK patents.

[100] I do not accept that this analysis, by referring throughout to the UK patents in Conversant's portfolio, commits the error which the Court of Appeal identified in *re Harrods (Buenos Aires)*. In that case the dispute was about prejudice to the minority shareholders of a company registered in England. By focussing on the place of registration of the company and on the specific remedy of a buyout provided in English law, Harman J. had prejudged the question of appropriate forum, particularly as, through the lens of Argentine law, the company was an Argentine company. If the case were to be tried in Argentina, the relief available would be different, but the underlying dispute would be the same. The facts relied on to establish prejudice would be the same, as would the shareholdings, and the company, about which the parties were fighting. It was possible to say that the appropriate forum for deciding that dispute was Argentina.

[101] In the present case, leaving Conversant to seek a remedy in China would be to compel them to advance a case based on different patents. The Chinese patents are not the UK patents viewed through the lens of Chinese law, but are different property rights applied for and registered in China. They are not even in the same families as the UK patents. They will have different claims. Different prior art will be relevant to their validity. The issue of essentiality of those patents will give rise to wholly different technical issues from the issues which would arise on the essentiality of the UK patents. The acts of infringement relied on will be acts in China, not acts in the UK. I find it impossible to view such a

dispute as being the same dispute as that which would arise in the English court.

[102] I therefore do not accept it is legitimate to generalise out the claim made in the present proceedings and characterise it as a claim for infringement of a ‘local’ patent. That characterisation suggests that it is a matter of indifference to Conversant which national patents they sue on, when that is plainly not the case. It is a way of characterising the dispute so as to make it suitable for determination in any jurisdiction where Conversant has a patent, no matter how different the scope of that patent may be to the scope of the UK patents in suit. Of the two ways in which the parties seek to characterise the dispute, it seems to me that the appellants’ way is the one which offends against the warnings in *Harrods Buenos Aires* against building the answer into the way in which one formulates the question.

[103] It is also not legitimate to characterise the claim as one for enforcement of a global portfolio right. No such right exists, as this court readily accepted in *Unwired CA*. I therefore reject the appellants’ challenge to the way in which the dispute is to be characterised. The question which the judge asked himself was the correct one.”

39. At first instance ([2018] EWHC 808 (Pat)) Henry Carr J characterised Conversant’s claim (at [73]) as:

“... a case which concerns allegations of infringement of UK patents, and for relief in terms of a global FRAND licence.”

40. On appeal Floyd LJ said:

“[104] If one characterises the case in the way in which the judge characterised it, with which I agree, then it seems to me that the forum conveniens question answers itself. The fact that the dispute concerns UK patents is a matter of substance and not of form. Resolution of the dispute will involve determining infringement, essentiality and validity of UK patents. A UK forum is clearly the most appropriate forum, indeed the only possible forum, for this dispute to be tried.”

The correct characterisation of the present dispute

41. The defendants argued that what has changed is the context in which the allegations of infringement of Nokia’s UK patents are brought. The first point made was that in *Conversant* the only forum available on the evidence for the grant of a global licence was England. Infringement was necessarily at the heart of the dispute because without a finding of infringement of a valid UK SEP there would have been no grant of a global licence. By contrast, in the present case the global licence can be and will be settled in Chongqing independently of any proceedings for infringement of a UK patent. Not only that, the Chongqing Proceedings do not involve an investigation into the infringement or validity of any Chinese patent. Such investigation would be procedurally distinct.

42. The defendants' second point was that if all that matters in deciding the appropriate forum is that this is an action for infringement of a UK patent, a UK jurisdiction will always be the appropriate forum for settling FRAND terms. The same would be true of every other jurisdiction in which a claim can be brought for infringement of an SEP. It is at odds with reality to look at the totality of the dispute between Nokia and the defendants as being concerned with infringement of UK SEPs. The only reason for the actions brought in this country and in China, Germany, India and Indonesia was because the parties had failed to agree on what would constitute FRAND terms in a global licence.
43. I do not accept that the change in the factual context of this case, specifically the newly confirmed jurisdiction of Chinese courts to settle global terms of a FRAND licence, alters the correct characterisation of the present proceedings. Floyd LJ's reasoning for the characterisation of the dispute in *Conversant* with one qualification applies equally to the dispute in the present case.
44. The qualification arises from Floyd LJ's paragraph 101. Since the Chongqing Proceedings in which global FRAND terms are to be settled do not involve a determination of the essentiality, infringement or validity of any Chinese patents, it cannot be said that leaving Nokia to seek a remedy in China would be to compel them to advance a case based on different patents. But in this part of Floyd LJ's judgment he was distinguishing the facts of *Conversant* from those in *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72. As I understand the judgment, Floyd LJ was making the point that in *Harrods (Buenos Aires)* the underlying dispute between the parties would be the same whether heard in England or Argentina and that this would not be so in *Conversant*. The same applies in the present case. As in *Conversant* there would be an overlap in the form of the dispute as to what constitute FRAND terms for a licence under Nokia's SEPs. Otherwise the present proceedings have less in common with the Chongqing Proceedings than was the case between the two sets of proceedings hypothesised in *Conversant* since the Chongqing Proceedings do not involve any issues of essentiality, infringement or validity of any patent. There may be other differences, which I consider below.
45. As to the defendants' second point, I do not agree that broadening out the dispute between the parties so that it becomes viewed from a global perspective leads to the result that it can be correctly characterised as a dispute about FRAND terms. That is only possible if the allegations by Nokia of infringement of its SEPs in the various jurisdictions are brushed aside. Alternatively, if they are included with the overall picture of the dispute, those allegations must be characterised as being concerned with the essentiality, infringement and validity of local patents in their various jurisdictions. The fallacy in the latter characterisation was identified by Floyd LJ.
46. The defendants advanced reasons why the "centre of gravity" of the dispute about FRAND terms for the licence under Nokia's SEPs was in China, not England with particular reference to the judgment of Lord Goff in *Spiliada*. Even if that were correct, the issue is not where the centre of gravity of that dispute, taken in isolation, lies.

47. In my judgment, Nokia's claim in the present case is accurately characterised in the same way as was the claim in *Conversant*.

The forum conveniens in the present case

48. In *Conversant* Floyd LJ said that having characterised the dispute, the forum conveniens question answered itself. Since the dispute in the present case is properly characterised in the same way, England is the appropriate forum to hear the dispute so far as the law of forum conveniens is concerned.

Case management

49. The defendants submitted that if there is to be no stay on grounds of forum conveniens, there should be a stay of the proceedings in this jurisdiction pending further order on case management grounds. By way of a further fallback, the defendants said that alternatively there should be a stay of the FRAND proceedings, allowing the claim for infringement of Nokia's SEPs, along with related issues on essentiality and infringement, to go ahead. Argument focussed on the latter.
50. An equivalent to the latter alternative was discussed by the Court of Appeal in *Conversant*. Floyd LJ said:

“[111] I can also see no basis for a case management stay, so as to allow the patent issues to be determined up to but not including the grant of an injunction. Such a stay would only work if there were some proceedings on foot elsewhere which will result in an adjudication on the offers made by the parties and determine the terms of a global FRAND licence, or at least some licence which would extend to the UK. At present the proceedings in China only seek a FRAND determination in respect of the Chinese patents. A FRAND licence under the Chinese patents determined by the Chinese courts would not clear away the obstacles to the enforcement of the UK patents or provide Huawei with an answer to the claim for infringement of the UK SEPs. The age of the *Conversant* Portfolio is also a factor which weighs against the grant of such a stay.”

51. The Supreme Court also considered the matter:

“[99] We therefore turn to case management. The English courts have wide case management powers, and they include the power to impose a temporary stay on proceedings where to do so would serve the Overriding Objective: see CPR 1.2(a) and 3.1(2)(f). For example a temporary stay is frequently imposed (and even more frequently ordered by consent) in order to give the parties breathing space to attempt to settle the proceedings or narrow the issues by mediation or some other form of alternative dispute resolution. A temporary stay may be ordered where there are parallel proceedings in another jurisdiction, raising similar or related issues between the same or related parties, where the earlier resolution of those issues in the foreign proceedings would better serve the interests of justice than by allowing the English proceedings to continue without a temporary stay: see *Reichhold Norway ASA v*

Goldman Sachs International [2000] 2 All ER 679, [2000] 1 WLR 173. But this would be justified only in rare or compelling circumstances: see per Lord Bingham CJ [2000] 2 All ER 679 at 690, [2000] 1 WLR 173 at 185–186, and *Klöckner Holdings GmbH v Klöckner Beteiligungs GmbH* [2005] EWHC 1453 (Comm), [2005] All ER (D) 111 (Jul).

[100] No such application has thus far been made in the *Conversant* case. At first instance the defendants went all-out to obtain the permanent termination of the proceedings, by having service on the Chinese defendants set aside, and by having the proceedings against the English defendants permanently stayed. The whole basis of their application was that the Chinese courts were the appropriate forum to decide the whole dispute, or that the dispute should be split into its Chinese and English parts, leaving only (in England) the question what royalty or compensation for infringement they should pay in relation to the English patents.

[101] At the hearing of case management issues consequential upon Henry Carr J's judgment, the appellants did suggest that the FRAND trial should be stayed to await the outcome of pending proceedings in China. The judge provided some accommodation by directing that the FRAND trial should not take place before November 2019, so that the outcome of the Chinese proceedings, to the extent relevant, could be factored into the determination of a FRAND global licence.

[102] A case management alternative was put forward by Huawei in the Court of Appeal, but still on the basis that the global FRAND issues could and therefore should first be determined in China, before any determination in England of the claim for infringement of UK patents. It was rejected by the Court of Appeal first because the pending proceedings in China sought only to determine the terms of a FRAND licence for *Conversant's* Chinese patents, not a global licence which would extend to the use of its English patents, and secondly because the age of *Conversant's* portfolio militated against allowing further delay.

[103] In this court the case management solution was briefly resurrected during argument, although not as a distinct ground of appeal. Meanwhile the FRAND trial had by then been fixed to start in April 2020 and was no doubt the subject of intensive preparation. It has since then been adjourned due to the Coronavirus pandemic. We think it sufficient to confine ourselves to the issue whether the Court of Appeal was wrong to refuse any case management solution, for the reasons it gave, as summarised above.

[104] In our view the Court of Appeal's reasons cannot be faulted. We have already concluded that the prospect that the Chinese courts might determine a global FRAND licence, even if the parties consented, is no more than speculative. The current proceedings in China relate only to *Conversant's* Chinese patents, and *Conversant* has been held to have acted reasonably in refusing (even if it were possible) to confer a wider global jurisdiction on the Chinese courts. Further the adverse commercial

effect of further delay in the reinforcement of Conversant’s elderly patents is a factor which, in a case management context, the Court of Appeal was plainly entitled to take into account, and to attribute such weight as it thought fit.”

52. The primary reason why the Supreme Court and the Court of Appeal dismissed any prospect of a stay of the FRAND issues has fallen away since the Chongqing Court is prepared to settle a global licence and I have assumed that it has jurisdiction to do so notwithstanding a challenge to that jurisdiction. The secondary reason does not apply because it was common ground that Nokia’s portfolio of SEPs is not old and nearing the end of its life.
53. Nokia submitted that the argument for a stay as a matter of case management should be given short shrift because it is merely way of revisiting the forum conveniens issue by the back door.
54. The question of a case management stay was not dismissed by the Supreme Court in *Conversant* on that ground and it seems to me there was a clear reason for that: once the FRAND issues are isolated from the infringement and validity of the SEPs, different considerations may arise.

The framework of law on a case management stay

55. Section 49(3) of the Senior Courts Act 1981 provides:

“(3) *Nothing in this Act shall affect the power of the Court of Appeal or the High Court to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceedings.*”

56. CPR 1.2(a) states:

“(2) *Dealing with a case justly and at proportional cost includes, so far as is practicable –*

...

(a) *ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;*”

57. CPR 3.1(2)(f) provides:

“(2) *Except where these Rules provide otherwise, the court may –*

...

(f) *stay the whole or part of any proceedings or judgment either generally or until a specified date or event;*”

58. One of the authorities referred to by the Supreme Court in paragraph 99 of its *Conversant* judgment (quoted above) was *Reichhold Norway A.S.A. v Goldman*

Sachs International [2000] 1 WLR 173. In that case the plaintiffs began an action in England for negligent misstatement relating to the sale of a company. The sale agreement was governed by Norwegian law which included warranties as to the accuracy of the company's accounts and its recent business development. Under the agreement disputes were to be resolved by arbitration in Norway. The defendant was the vendor company's agent, thus not a party to the sale agreement. Following the issue by the defendant of a summons to stay the action, the plaintiffs began arbitration proceedings in Norway. Moore-Bick J ruled that taking all relevant factors into account, including the undesirability of concurrent proceedings and that considerations of cost and convenience weighed heavily in favour of a stay, he would stay the English action pending determination of the Norwegian arbitration. The appeal was dismissed. Lord Bingham, with whom Otton and Robert Walker LJ agreed, said (at p.186):

“[Counsel for the respondents suggested] that the court was well able to control its own business, and he accepted that the grant of stays such as this would be a rarity, account always being taken of the legitimate interests of plaintiffs and the requirement that there should be no prejudice to plaintiffs beyond that which the interests of justice were thought to justify. It is plain that in exercising this jurisdiction the court would have to be mindful of the effect of article 6 [of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953)].

I for my part recognise fully the risks to which [counsel for the appellants] draws attention, but I have no doubt that judges (not least commercial judges) will be alive to these risks. It will very soon become clear that stays are only granted in cases of this kind in rare and compelling, circumstances. Should the upholding of the judge's order lead to the making of unmeritorious applications, then I am confident that judges will know how to react.”

59. Thus, a stay of an action which is in no way abusive may be ordered in the interests of justice where there are concurrent proceedings abroad and there are compelling reasons to conclude that there would be a saving in costs and that the stay would afford greater convenience. However, such circumstances will be rare.

The arguments

60. The defendants advanced five reasons why there should be a stay. First, without a stay there will be a trial of 3 to 4 weeks in this court and in parallel a trial in China. It will result in this court spending time on a FRAND trial unnecessarily and a likelihood of irreconcilable judgments.
61. Secondly, if FRAND terms were settled in China a result would be obtained more rapidly than would be the case in this jurisdiction. The rate of progress in China was based on evidence from a partner in a Shanghai law firm who has conduct of the Rate Setting Claim on behalf of OPPO.

62. Thirdly, Nokia could if it wished seek a carve-out from the terms settled in China, with a provision that such terms do not include a licence in the UK. Nokia could then invite this court to continue with a FRAND trial, but only for the UK.
63. Fourthly, the dispute is more closely connected with China. Over 50% of sales of the devices proposed to be licensed are in China, compared to less than 0.5% in the UK.
64. Fifthly, by way of overarching point, the defendants argued that the implication of no stay would be that the owner of an SEP can always choose a jurisdiction in which FRAND terms would be settled, to suit its best interests, by selecting the jurisdiction in which to bring an action for infringement of the SEPs. This inequitably loaded the advantage in favour of SEP owners to the detriment of implementers.
65. Nokia argued first that on the assumption that the Rate Setting Claim goes ahead in Chongqing or Beijing, it will not resolve the FRAND issues before this court because no cross-licence granted by OPPO to Nokia will be settled and also because the royalty rates in the licence granted by Nokia to OPPO will not reflect an appropriate discount for the cross-licence.
66. Secondly, the licence granted by Nokia would not apply to devices other than OPPO-branded devices. For both these first and second reasons there will be a FRAND trial in this jurisdiction in any event.
67. Thirdly, to the extent that a judgment in China and one in England may cover the same issues, they need not be irreconcilable. In the *Unwired Planet* appeal (*Unwired Planet International Ltd v Huawei Technologies Co Ltd* [2018] EWCA Civ 2344) the Court held that more than one set of terms may be FRAND (at [121]).
68. Fourthly, although Nokia would get justice in China in accordance with Chinese law, Nokia would be prejudiced by the likelihood that the royalty rates set in China would be lower than those settled by this court. Put another way, a stay would deprive Nokia of a legitimate juridical advantage. It is right for a party with property rights to be able to choose which of the rights to assert and thereby to select the jurisdiction in which the overall dispute is resolved.
69. Fifthly, by way of a further argument on the loss of a legitimate advantage, FRAND terms must be settled according to French law. Nokia submitted that the Chongqing Court would apply only Chinese law when arriving at appropriate FRAND rates for the licence and that Nokia was entitled to have the rates set by a court applying French law.
70. Sixthly, the evidence indicated that once the Chongqing Court has settled terms it considered to be FRAND, Nokia will be under a compulsion to offer the defendants a licence under those terms on pain of a fine or imprisonment. Nokia should not be required to have the FRAND dispute resolved in a jurisdiction which imposes such sanctions.

71. Seventhly, Nokia presented a different analysis of the likely speed of progression of a FRAND trial, including an appeal in China on the one hand and England on the other. Nokia relied on evidence from a partner in a Beijing based law firm who acts for Nokia in the Rate Setting Claim. On Nokia's analysis, a decision on the merits would be delivered up to two years later in China than would be the case in England. Richard Vary, a partner at Bird & Bird, who has conducted these proceedings on behalf of Nokia, explained in a witness statement that delay in the final result causes prejudice to Nokia and a corresponding benefit to the defendants. He said that this is because delay increases the proportion of royalties which fall to be paid retrospectively and that the argument tends to be raised that a lower rate should be applied to the payment of back royalties. He also said that the longer an implementer need not pay royalties, the longer it has to build up its market share by charging a lower price.
72. Eighthly, the English language is central to the issues that arise in the dispute. The ETSI documents, the negotiations between the parties and comparable licences are all in English. All of Nokia's anticipated witnesses speak English.
73. Ninthly, this court is experienced in determining FRAND disputes and applying French law. The Chongqing Court has never heard a FRAND case.
74. Before assessing the balance of justice in light of these arguments, I will consider some of them individually and in particular their relevance to the balance.

The risk of irreconcilable judgments

75. The submission that the court should grant a stay to avoid irreconcilable judgments was considered by the Supreme Court in *Conversant*. The Court was of the view that the risk of irreconcilable judgments was an inevitable consequence of the way that SSOs (standards setting organisations) have arranged matters to date:

“[90] Finally, Huawei submits that if a national court were prepared to determine that a worldwide licence is FRAND and that entering into such a licence is a precondition of the refusal of an injunction to prohibit infringement of a national patent, there is a risk of forum shopping, conflicting judgments and applications for anti-suit injunctions. In so far as that is so, it is the result of the policies of the SSOs which various industries have established, which limit the national rights of a SEP owner if an implementer agrees to take a FRAND licence. Those policies, which either expressly or by implication provide for the possibility of FRAND worldwide licences when a SEP owner has a sufficiently large and geographically diverse portfolio and the implementer is active globally, do not provide for any international tribunal or forum to determine the terms of such licences. Absent such a tribunal it falls to national courts, before which the infringement of a national patent is asserted, to determine the terms of a FRAND licence.
...”

76. Nokia made the point that courts may differ as to FRAND terms without their judgments being irreconcilable.

Timing

77. Looking at the rival timetables for the progression of actions in China and in this court, I think there are too many uncertainties for me to reach any reliable conclusion as to which forum would provide an earlier result. During the hearing the defendants produced a table setting out the parties' rival contentions on the time to reach a final result on the assumption that this would include one appeal in China and England. The table suggested that there would not be much in it and my best guess is that this is correct.

Whether the Chongqing Court will settle the cross-licence

78. It was common ground that the Rate Setting Claim as pleaded makes no mention of a cross-licence to Nokia. It was also common ground that the Non-FRAND Claim will be heard at the same time as the Rate Setting Claim. Nokia argued that on the pleaded case in the Rate Setting Claim the Chongqing Court will neither settle the terms of a FRAND cross-licence sought by Nokia from the defendants, nor settle the royalty rate of a FRAND licence under Nokia's SEPs with an appropriate deduction to take into account royalties under the cross-licence. Accordingly there is bound to be a FRAND determination of the cross-licence in this jurisdiction and it makes no sense to separate the assessment of the two licences.

79. Tingting Liao is partner at Fangda Partners, a law firm in Shanghai. She has conduct of the Rate Setting Claim and the Non-FRAND claim on behalf of OPPO in the Chongqing Court. Ms Liao provided two witness statements. The first included this:

“30. As explained above, I understand that the intention of the plaintiffs in the Chongqing Proceedings is that the Chongqing Court will set FRAND licensing conditions for a global licence. I also note that it would also be open to the Nokia defendants to seek a global cross-licence to OPPO's patents portfolio by way of a counterclaim in the Chongqing proceedings. I note that it would also be possible for OPPO to amend its claim to make this point expressly should they consider it necessary to do so.”

80. The final sentence gives no commitment on the part of OPPO to bring the cross-licence into the Rate Setting Claim. But if the previous sentence is correct, adding the cross-licence into the proceedings is a matter within Nokia's control should the Rate Setting Claim go ahead. There is a challenge to the jurisdiction of the Chinese courts so assuming that Chinese law is similar to English law in this respect, it may be that Nokia would not attempt to introduce the cross-licence until the challenge is done. If the challenge is successful, Nokia's ability to plead the cross-licence becomes irrelevant. If unsuccessful, Nokia may plead a counterclaim and can choose to seek a cross-licence.

81. The defendants attitude at the hearing towards what Nokia clearly took to be an important point was odd. My attention was neither drawn to paragraph 30 of Ms Liao’s witness statement nor to the absence of any evidential challenge to that paragraph. I only noticed its significance when re-reading the evidence in the course of writing this judgment.
82. Instead Mr Lykiardopoulos QC, one of the defendants’ leading counsel, took me to the pleading of the Non-Frand Claim. As in the Rate Setting Claim the plaintiffs are three OPPO companies including the present third defendant. The defendants are three Nokia companies including the present first claimant. The first stated claim in the Non-FRAND Claim summarises the plaintiffs’ case:
- “1. Judgment is sought to affirm that the Defendants’ behaviours in the licensing negotiations violated the fair, reasonable and non-discriminatory obligation, or principle of good faith;”
83. The pleading goes on to give detail of the alleged conduct on the part of the Nokia companies said to have been non-FRAND and in breach of good faith. In the course of setting out their case the OPPO companies plead:
- “In addition, since the negotiations also involved cross-licensing, the reasonable value of [OPPO’s] standard essential patents should be equally considered and reflected in the cross-licensing. However, throughout the negotiation process, [Nokia’s] offer to [OPPO] did not reflect their reasonable recognition of the value of [OPPO’s] standard essential patents.”
84. In the second witness statement of Richard Vary, who is a partner at Bird & Bird with conduct of these proceedings on behalf of Nokia, Mr Vary discussed the action taken by Nokia after the Original Licence expired:
- “28. This has involved making numerous offers of a FRAND licence to Nokia’s portfolio of SEPs, Importantly, each of Nokia’s offers have been for a worldwide cross-licence between Nokia and all of the Defendant groups (which are, as above, under common ownership). Under the ETSI IPR Policy, Nokia is entitled to insist upon reciprocity of licensing as part of the FRAND terms to its SEPs, and the notification form contains a tickbox to this effect.”
85. As Mr Vary said, the ETSI pro-forma IPR Information Statement and Licensing Declaration completed by Nokia – Nokia’s formal declaration to ETSI of the essentiality of its SEPs in issue – contains a tickbox marked “This irrevocable undertaking is made subject to the condition that those who seek licences agree to reciprocate (*check box if applicable*)”. The box has been checked.
86. The defendants argued that it was entirely unrealistic to suggest that when the Chongqing Court determines the two claims before it the cross-licence will not be taken into account. It would not be in accordance with the ETSI declaration given.

87. On the current pleadings, I disagree. The OPPO plaintiffs in the Rate Setting Claim chose how to plead their case and apparently decided not to ask the Chongqing Court to set a rate with a cross-licence in mind even though they were aware from Nokia's ETSI declaration form that Nokia seeks a cross-licence. This is unlikely to have been an oversight.
88. I doubt that the pleading as it is in the Non-FRAND claim would result in the Chongqing Court setting a FRAND rate taking the cross-licence into account. The pleading alleges that during negotiations Nokia failed to recognise the value of OPPO's SEPs and that this was a component of their non-FRAND behaviour. It does not invite the Chongqing Court to do anything in relation to the value of OPPO's SEPs, never mind give Nokia the benefit of a cross-licence.
89. There was apparently a last minute decision by the defendants to argue this aspect of their case by reference to the Non-FRAND Claim. Until shortly before the hearing OPPO's pleading in that claim had been left untranslated, presumably because it was regarded as peripheral by both sides. During the weekend before the first day of the hearing (a Monday) a translation into English was served on Nokia. It seems that Nokia were not told of the significance that the defendants attached to the pleading until the oral submissions of Mr Lykiardopoulos on the first day.
90. In the course of reply submissions by Mr Layton QC, also leading counsel for the defendants, he said that there was no need for any reference to the settlement of a cross-licence in the Rate Setting Claim pleading because that degree of particularity has not yet been entered into.
91. Again, I was not referred to Ms Liao's paragraph 30 and Mr Layton's suggestion as to particularity to which the OPPO plaintiffs were required to plead their case at this stage was not even based on what Ms Liao had said. Nokia's counsel, perhaps understandably, said nothing about Ms Liao's paragraph 30.
92. I am left with the impression that neither side wished to place any emphasis on what Ms Liao had said. On the other hand, that paragraph is undisputed evidence and I do not find the notion that Nokia could raise the cross-licence in a pleaded counterclaim at all surprising. I accept the evidence. I think it is likely that if the claims of the OPPO plaintiffs go forward in Chongqing, it is within Nokia's control to ensure that the Chongqing Court will consider the cross-licence and its effect on net royalties payable by the defendants.

A licence for devices other than OPPO-branded devices

93. Another issue arose from the pleading in the Rate Setting Claim. The pleading refers only to the OPPO plaintiffs' seeking a licence for OPPO-branded devices. The defendants' response to this was in marked contrast. Ms Liao's first witness statement included this:

“28. I understand that the intention of the plaintiffs in the Chongqing Proceedings is that the Chongqing Court will set FRAND licensing conditions for a global licence of Nokia's patents for all Licensed OPPO Products (as defined in the 2018 Licence) but with 5G added as a

Licensed Standard. OPPO has not limited its claim to OPPO branded devices. However if it were considered that the current formulation of the Chongqing Proceedings did not for any reason cover all Licensed OPPO Products, then OPPO has confirmed to me that the plaintiffs would take such steps as were necessary to change this.”

94. I accept that evidence and will assume that a FRAND licence to be settled by the Chongqing Court would include devices other than OPPO-branded devices.

Whether the Chongqing Court would settle lower royalty rates

95. The defendants referred to the judgment of Henry Carr J in *Conversant* at first instance (*Conversant Wireless Licensing S.A.R.L. v Huawei Technologies Co Ltd* [2018] EWHC 808 (Pat)):

“[63] ... FRAND royalty rates for Chinese patents have been lower than in other parts of the world, no doubt because China considers this to be in accordance with the current needs of its population. This is not a question of an inability to obtain justice in accordance with the laws of a different jurisdiction. However, the significantly lower royalty rates explain why *Conversant* will not agree to the Defendants’ ‘concessions’. No owner of a global portfolio would voluntarily submit to determination of a FRAND licence for the entirety of its portfolio where the rates applied would be lower than in the rest of the world.”

96. Although this is a little ambiguous, the final sentence seems to imply that the lower rates set by Chinese courts in relation to Chinese patents might be applied as a flat rate to patents granted in all countries.
97. That may have been a concern of the SEP owner in *Conversant* and is a concern of Nokia in the present application, but I cannot assume that a Chinese court is bound to impose a flat rate consistent only with what is appropriate for sales in China. Ms Liao gave evidence about this at paragraph 21(a) of her first witness statement:

“(a) Chinese courts have recognised that different royalty rates may apply to China compared to developed countries. In *Huawei v Conversant*, the Nanjing Intermediate People’s Court accepted expert evidence that ‘*the Chinese handset market is different from that of foreign countries in terms of market landscape, competitive dynamics, and the new product development speed, etc. Therefore it is inappropriate to apply the aggregate royalty rate of developed countries to China directly*’”

98. The principal point is that, as both Nokia and the defendants agreed, the Chongqing Court, if and when it rules on royalty rates, will do so justly. I fully endorse that agreement. The rates will therefore be FRAND. The authors of *Dicey, Morris and Collins on The Conflict of Laws*, 15th ed., set out at 12-030 seven propositions which may derived from the speech of Lord Goff in *Spiliada*. Although Lord Goff was speaking in a different context, it seems to me that his

seventh proposition, as distilled in Dicey, applies equally to the question of a stay as a matter of case management:

“Seventhly, a stay will not be refused simply because the claimant will thereby be deprived of ‘a legitimate personal or juridical advantage’, provided that the court is satisfied that substantial justice will be done in the available appropriate forum.”

The relevance of French law

99. Once an SEP owner has made a declaration to ETSI in relation to specified SEPs, it is under an obligation to offer to grant a licence to implementers on FRAND terms. That obligation is governed by French law. In *Conversant* the Supreme Court said:

“[8] The ETSI IPR Policy (‘the IPR Policy’) is a contractual document, governed by French law. It binds the members of ETSI and their affiliates. It speaks (clause 15(6)) of patents which are inevitably infringed by the sale, lease, use, operation etc of components which comply with a standard as ‘Essential IPR’. By requiring an IPR holder whose invention appears to be an Essential IPR to give an irrevocable undertaking to grant a licence of the IPR on FRAND terms, it creates a ‘stipulation pour autrui’, in other words an obligation which a third-party implementer can enforce against the IPR holder. The IPR Policy falls to be construed, like other contracts in French law, by reference to the language used in the relevant contractual clauses of the contract and also by having regard to the context. In this case, that context is both the external context and the internal context of the IPR Policy document itself, such as the policy objectives declared in the document.”

100. It was common ground that the existence and nature of the obligation on an SEP owner created by a declaration to ETSI is governed by French law.
101. In a later passage of the judgment the Court considered the difference between what had been defined as “hard-edged” and “general” discrimination in the context of the undertaking to offer a licence on FRAND terms:

“[106] Huawei's case is that the non-discrimination limb of the undertaking must be given its ordinary and unadorned meaning, which is that like situations must be treated alike and different situations differently. The non-discrimination limb of the undertaking means that the SEP owner must grant the same or similar terms to all similarly situated licensees, unless it can be shown that there are objective grounds for treating them differently. Huawei says that this corresponds with the usual meaning given to obligations not to discriminate in other contexts. Birss J used the term ‘hard-edged’ in relation to the non-discrimination obligation to describe the interpretation contended for by Huawei. The practical effect of Huawei's submission is that the non-discrimination obligation means that a SEP owner is required to grant licence terms equivalent to the most favourable licence terms to all similarly situated licensees.

...

[107] ... “[Unwired Planet] said that the non-discrimination element in the FRAND undertaking did not involve a distinct ‘hard-edged’ discrimination obligation as submitted by Huawei. Instead, Unwired said that the non- discrimination element is to be read as part of a single, unitary obligation to license on terms which are ‘fair, reasonable and non-discriminatory’. To comply with that obligation, a licensor has to offer a royalty rate set by reference to the true value of the SEPs being licensed; that is, a standard fair market royalty rate available to market participants for use of the SEPs. A rate set in this way, which is available to all licensees without discriminating between them by reference to their individual characteristics, does not cease to be FRAND because the SEP owner has previously granted a licence on more favourable terms. The judge referred to the obligation interpreted in this way as a ‘general’ non-discrimination obligation.

...

[112] This court upholds the judgment of Birss J and the Court of Appeal on the second of Unwired’s arguments. They were right to find that the non-discrimination element in the FRAND undertaking is ‘general’ and not ‘hard-edged’ and that there had been no breach of it. Accordingly, the third argument does not arise.

[113] The choice between regarding the non-discrimination obligation as ‘general’ or ‘hard-edged’ is a matter of interpretation of the FRAND undertaking in clause 6.1 of the IPR Policy. The obligation set out in that provision is that licences should be available ‘on fair, reasonable and non-discriminatory ... terms and conditions’. In our view, the undertaking imports a single unitary obligation. Licence terms should be made available which are ‘fair, reasonable and non-discriminatory’, reading that phrase as a composite whole. There are not two distinct obligations, that the licence terms should be fair and reasonable and also, separately, that they should be non-discriminatory. Still less are there three distinct obligations, that the licence terms should be fair and, separately, reasonable and, separately, non-discriminatory.

[114] The text of clause 6.1 lends itself naturally to being read in this unitary way. The ‘non-discriminatory’ part of the relevant phrase gives colour to the whole and provides significant guidance as to its meaning. It provides focus and narrows down the scope for argument about what might count as ‘fair’ or ‘reasonable’ for these purposes in a given context. It indicates that the terms and conditions on offer should be such as are generally available as a fair market price for any market participant, to reflect the true value of the SEPs to which the licence relates and without adjustment depending on the individual characteristics of a particular market participant. Put another way, there is to be a single royalty price list available to all.”

102. Nokia drew from this that the unitary approach – so that the non-discrimination obligation is ‘general’ – was derived by the Supreme Court from an analysis of clause 6.1 of the ETSI IPR Policy document. This is a document to be construed according to French law. Nokia submitted that the unitary approach is part and parcel of identifying the nature of the obligation to offer FRAND terms imposed on an SEP owner. In other words, both the obligation itself and the assessment of FRAND terms that must be offered under that obligation, including FRAND royalty rates, are governed by French law.
103. In *Unwired Planet* Birss J did not refer to French law when carrying out the assessment of the commercial, financial and related matters which led him to settle royalty rates and consider non-discrimination. It seems that no evidence on French law was filed. That was not remarked upon in the Court of Appeal or the Supreme Court.
104. The concept of FRAND terms, sometimes referred to as reasonable and non-discriminatory or RAND terms (there is no difference), originated in the United States and was used, possibly for the first time, by a federal court in 1942, see *A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust Through a Historical Lens*, Jorge L. Contreras, 80 *Antitrust Law Journal* 39 (2015). It has since become a more widely used concept, recognised by the Court of Justice of the European Union among other courts, see *Huawei Technologies Co Ltd v ZTE Corp.* (Case C-170/13) EU:C:2015:477.
105. The obligation created by a declaration to ETSI is governed by French law but it does not necessarily follow that the terms offered by the declarant must be recognised as FRAND according to French law as opposed to any other law. That, presumably, is of itself a matter of French law, which was not explored before me. It may be imagined that the French law on terms which qualify as FRAND must be consistent with EU law. That was not explored either.
106. Although the Chongqing Court will very likely assess FRAND terms including royalties pursuant to Chinese law, it was not shown in the expert evidence that this will involve a concept of FRAND different from that adopted in other jurisdictions. Even if that is the case, it was not explained to me why any difference matters.
107. It take the view that this point ultimately goes nowhere.

Sanctions imposed under Chinese law

108. During the preparation for this hearing the defendants apparently became concerned by the suggestion from Nokia that a ruling by the Chongqing Court would only be advisory. Shortly before the hearing a second witness statement by Ms Liao was filed. Ms Liao said:

“7. To clarify, the position is as follows:

- (a) It is correct that the current practice before the Chinese courts is that a rate-setting claim can be brought independently from any patent infringement action. Under

the amended *Provisions on the Causes of Action for Civil Cases*, which took effective on 1 January 2021, it is possible to bring a dispute over royalty rates for SEPs as an independent cause of action in the PRC.

- (b) However, the determination in such a dispute is not advisory, and can be enforced if it is not complied with by the parties. The process is that, firstly, the royalty rates and other conditions decided by the court decision shall be followed and incorporated into the license agreement reached following negotiation after the decision, unless both parties mutually agree on other rates and conditions to replace the decision.
- (c) If either party refuses to obey the decision of the Chinese court, then the other party may file a petition to the court. The court has full discretion as to whether or not to impose a penalty, which can include a monetary fine or up to 15 days judicial detainment of responsible management (such as legal representative, executive director or general manager), on the breaching party. Further, a refusal to enforce an effective court decision may also constitute a criminal offence under Chinese law. This is confirmed by Article 111 of *Civil Procedure Law of PRC*, which states:

“If any litigant or any other person in the proceedings commits any of the following acts, the people’s court shall, according to the seriousness of the act, impose a fine or detention on him; if the act constitute a crime, the offender shall be investigated for criminal responsibility according to the law: ... (6) refusing to comply with legally effective judgments or orders rendered by the people’s court.

If a unit commits any of the acts specified above, the people’s court may impose a fine or detention on its principal head or the person who is held responsible for the act; if the act constitutes a crime, the offender shall be investigated for criminal responsibility according to the law.”

and by Article 115 of *Civil Procedure Law of PRC*, which states:

“A fine on an individual shall be up to than RMB 100,000; a fine on a unit shall be between RMB 50,000 and RMB 1,000,000. The period of detention shall not be longer than 15 days.”

- (d) To date, no such penalty has been imposed by a Chinese court with respect to failure to comply with a FRAND rate-

setting decision. This is because, as I understand it, all such cases were finally settled by the parties. However, there are precedents of such penalties being imposed in other cases.

- (e) It is also very likely that the Chinese courts will deem the breaching party to be a bad faith party in any subsequent legal proceeding between the parties. For example, the Chinese court may refuse to grant an injunction to a patentee refusing to comply with the effective rate setting decision in further infringement cases filed against the other party. The court may refuse to acknowledge and enforce a foreign court's decision which is in conflict with the effective decision in the PRC.

- 8. Therefore, if following the effective decision of the Chongqing Court, Nokia does not offer to license OPPO on the global FRAND conditions set by the Chongqing Court, it will be open to the Chongqing Court to impose a penalty, including a monetary fine or detainment of responsible management.”

- 109. Nokia interpreted this to mean that if and when the Chongqing Court settles terms for a licence between Nokia and the defendants, Nokia will be compelled to offer a licence on those terms on pain of a fine or possible imprisonment of Nokia management. Nokia submitted that it should not be required to submit to the possibility of such a sanction.
- 110. I accept Ms Liao's last minute evidence as to the theoretical sanctions available to the Chongqing Court. It does not follow that a fine, far less a prison sentence, are realistic possibilities in the event that Nokia did not like the terms settled by that Court and refuses to offer a licence on those terms. I would need more considered evidence from both sides before reaching that conclusion. It may be that in practice, following the settlement of terms in Chongqing, the way forward would be similar to that following the settlement of terms in this court. I would also expect that if the parties were to enter into a licence it would become an enforceable contract.

Ease of enforcing a FRAND licence

- 111. There is a factor of potential significance that was given very brief mention in the evidence but which was not referred to by counsel on either side. This is the ease of enforcing a FRAND licence once granted.
- 112. Enforcement is more likely to be pursued by an SEP owner than the implementer, typically to obtain appropriate royalties due. The third defendant is domiciled in China and has assets there. Paul Brown, who is a partner at Hogan Lovells International LLP with conduct of these proceeding on behalf of the defendants, in his third witness statement provided a list of factors which in his view were ties between China and this dispute. Towards the end of the list he noted that the third defendant has assets and a presence in China for the purpose of enforcement proceedings.

113. This does not establish that enforcement would be easier if the FRAND terms were settled in Chongqing. Neither side provided evidence as to the law which would govern a licence settled by the Chongqing Court, or which court would have jurisdiction over any dispute arising from the licence. Nor, more generally, was there evidence about how enforcement proceedings work in China in alternative contexts. Nothing was said about the parties' preference as to which courts should be awarded jurisdiction over disputes if the licence were settled in England.
114. In other words, for their own reasons the parties did not file evidence from which I can conclude that if FRAND terms are settled in Chongqing enforcement would be more straightforward than if they were to be settled in this court. Counsel on neither side pursued the matter.

Discussion

115. I begin with the defendants' central argument: SEP owners should not be allowed to select the jurisdiction for the settlement of FRAND terms that suits them best.
116. The current unevolved framework for the settlement of a global licence between owners of SEPs and implementers is plainly not satisfactory. It is not a recipe for commercial chaos as the defendants would have it, but it does encourage expensive parallel litigation in several jurisdictions and more uncertainty than is necessary. I doubt that it can be sustained in the long term. As the Supreme Court indicated, one potential solution would be the establishment of an internationally recognised tribunal to which patentees and implementers must refer their disputes. But until that or an alternative mechanism for settling global licences is internationally agreed, national courts must deal with circumstances as they are.
117. The defendants rightly said that if SEP owners have unfettered freedom to select the jurisdiction in which to bring an action for infringement, it means that potentially they get to select the jurisdiction likely to settle FRAND terms most favourable to them. The logic of Nokia's position on this is that should it become known that the courts of State X settle FRAND terms particularly favourable to SEP owners, SEP owners must be free to select the courts of State X for the settlement of terms – until such time as the courts of State Y offer the prospect of even better FRAND terms. A race to the top would not be an attractive prospect for the telecommunications industry as a whole, or for any other industry.
118. This cuts both ways. If implementers have unfettered freedom to bring a claim in any jurisdiction for the settlement of FRAND terms, they will select the country most favourable to them. A race to the bottom is no more attractive than a race to the top.
119. The issues relevant to the grant of a stay on case management grounds in English law may differ from those relevant to assessing the forum conveniens. Part of the forum conveniens analysis requires the court to consider the factors which point in the direction of one forum or another, being the forum with which the

issues in the action have the most real and substantial connection. This could include factors such as the place in which the larger proportion of sales of the licensed products are made or the place where the larger proportion of SEPs to be licensed were granted. There may be a policy element to this. See also the judgment of the Chinese Supreme Court in *OPPO v Sharp*.

120. By contrast, when considering a stay as part of case management an English court must reach a conclusion on the balance of justice, with particular reference to the saving of costs and the convenience of the parties (see *Reichhold Norway* and the Supreme Court's judgment in *Conversant* above). The balance of justice will largely or entirely turn on the balance of prejudice to the parties likely to be caused by, respectively, a stay or no stay on the facts of this case, that is to say balance of factors which are of practical relevance to the parties.
121. A further matter to be taken into account when considering a stay is the overriding objective of CPR 1 observed in English courts. Dealing briefly with that, the only aspect of the overriding objective raised in this application was the saving of the court's time if there were a stay. Self-evidently, this court's time would be saved, but the logic of such an approach would be that just the existence of another available forum would always point in favour of the English court granting a stay.
122. The disadvantages inherent in a multiplicity of proceedings provide a very strong argument in favour of FRAND terms being settled in one tribunal, but they do not help in resolving which tribunal that should be.
123. The defendants say that Nokia could ask the Chongqing Court not to settle FRAND terms for the UK, leaving that to be determined by this court. It is not obvious to me why the Chongqing Court would agree to do that. Both sides have said that they would like a global licence. If the UK were carved out, why not Germany, India and Indonesia or any other territory that Nokia may wish to list? It would make a nonsense of the preferred solution of a global licence.
124. I am not persuaded by Nokia's argument that use of the English language is relevant. Just as the English courts regularly deal with documents translated from another language and hear evidence from witnesses interpreted into English, I have no doubt that that Chongqing Court would have no difficulty in dealing with documents in English or witnesses giving evidence in English. Probably less difficulty than would be the case for many other languages foreign to that court.
125. Nor am I persuaded by Nokia's argument that this court has more experience in dealing with FRAND cases than does the Chongqing Court. So far there has been only one FRAND trial in this jurisdiction. It cannot be said that the outcome was less reliable because it was the first.
126. In my judgment none of the factors raised by the parties tips the balance of justice as between the parties in favour of a stay or no stay.
127. That being so, I do not take the view that the circumstances of the present case are of the rare and compelling nature contemplated by the Court of Appeal in

Reichhold Norway such that the balance of justice favours a stay of the FRAND issues before this court. No stay will be granted.

The filing of the UK defendants' acknowledgment of service

128. Nokia contended that the acknowledgment of service filed on behalf of the UK defendants was out of time.

129. CPR 11(1) states that a defendant may apply to the court for an order declaring that it has no jurisdiction or should not exercise any jurisdiction which it may have. CPR 11(2) provides:

“(2) *A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.*”

130. CPR 11(4) provides:

“(4) *An application under this rule must –*

(a) be made within 14 days after filing an acknowledgment of service; and

(b) be supported by evidence.”

131. The claim form and the Particulars of Claim were served on the UK defendants by courier on 2 July 2021 and service was deemed to have occurred on 6 July 2021. CPR 10.3(1) provides:

“(1) *The general rule is that the period for filing an acknowledgment of service is –*

(a) where the defendant is served with a claim form which states that particulars of claim are to follow, 14 days after service of the particulars of claim; and

(b) in any other case, 14 days after service of the claim form.”

132. The claim form in the present case stated that Particulars of Claim would follow, although in fact Particulars of Claim were served together with the claim form. On the face of matters, the UK defendants were required to file an acknowledgment of service by 20 July 2021. The UK defendants filed their acknowledgment of service on 29 July 2021. On 3 August 2021, the UK defendants applied to challenge jurisdiction.

133. The UK defendants advanced four arguments. First, the Particulars of Claim served on 6 July 2021 were incomplete in that they made reference to a confidential schedule which was not included among the documents served. CPR 16.4(1)(a) requires a claimant to include in its Particulars of Claim “a concise statement of the facts on which the claimant relies”. Nokia knew that the Particulars of Claim were materially incomplete because the claim form stated that Particulars were to follow. The confidential schedule, not served until 3 August 2021, is referred to four times in the Particulars of Claim and is

critical to the FRAND issues set out in the Particulars. It follows that the time for serving the acknowledgment of service started from 3 August 2021, although in fact it had already been filed 5 days earlier.

134. Secondly, filing an acknowledgment of service late does not preclude a challenge to the jurisdiction under CPR 11.
135. Thirdly, if the defendants were out of time, there should be an order giving retrospective permission to serve the acknowledgment of service late and relief from sanctions.
136. Finally, the defendants' argument on case management has nothing to do with CPR 11 and so remains unaffected by late filing of the acknowledgment of service, even if that is what happened.
137. The defendants developed these arguments, the second in some detail. I see no need to resolve all the issues raised. I will assume, without finding, that the acknowledgment of service was filed 9 days out of time and that I must apply the usual criteria set out in *Denton v TH White Ltd* [2014] EWCA Civ 906.
138. The first stage requires me to consider the seriousness and significance of the defendants' filing 9 days late. Nokia argued that the rules on timing should be applied strictly and that a delay in proceedings had been prejudicial to them. I fail to see how any such prejudice is possible. If the defendants had filed the acknowledgment of service on 20 July 2021, rule 11(4) would have allowed the defendants until 3 August 2021 to challenge jurisdiction under rule 11. The defendants filed their challenge on that day: 3 August 2021. The breach of the rules which I have assumed was not serious and was of no practical significance.
139. Where there is no serious or significant breach, as directed in *Denton* the court is unlikely to need to spend much time on the second and third stages. With regard to the second, Mr Brown's evidence was that the breach, if there was one, was due to an honest mistake. I accept that evidence.
140. Moving to the third *Denton* stage, I have no doubt that in all the circumstances of the case the UK defendants are entitled to relief from sanctions. I give them retrospective permission to the UK defendants to file their acknowledgment of service by 29 July 2021.

Conclusion

141. The applications of the defendants are dismissed. The UK defendants have retrospective permission to file their acknowledgment of service by 29 July 2021.