



Neutral Citation Number: [2022] EWHC 1703 (Pat)

Case No: HP-2022-000010

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Friday, 1st July 2022

Before:

MR. JUSTICE MEADE

Between:

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| KONINKLIJKE PHILIPS N.V. (a company incorporated in the Netherlands) | <u>Claimant/ Applicant</u> |
| - and - | |
| (1) GUANGDONG OPPO MOBILE TELECOMMUNICATIONS CORP, LTD (a company incorporated under the laws of the People's Republic of China) | <u>Defendants/ Respondents</u> |
| (2) OPPO MOBILE UK LTD | |
| (3) ONEPLUS TECHNOLOGY (SHENZHEN) CO., LTD (a company incorporated under the laws of the People's Republic of China) | |
| (4) UNUMPLUS LIMITED (t/a OnePlus) | |
| (5) OPLUS MOBILETECH UK LIMITED | |
| (6) REFLECTION INVESTMENT B.V. (a company incorporated under the laws of the Netherlands) | |
| (7) REALME MOBILE TELECOMMUNICATIONS (SHENZHEN) CO., LTD (a company incorporated under the laws of the People's Republic of China) | |
| (8) REALME CHONGQING MOBILE TELECOMMUNICATIONS CORP LTD (a company incorporated under the laws of the People's Republic of China) | |
| (9) ASCENSION INTERNATIONAL TRADING CO., LIMITED (t/a realme) (a company incorporated under the laws of the Hong Kong Special Administrative Region of the People's Republic of China) | |

MR. ALAN MACLEAN QC (instructed by **Bristows LLP**) for the **Claimant/Applicant**

MR. LAWRENCE AKKA QC and MS JOSEPHINE DAVIES (instructed by **Hogan Lovells International LLP**) for the **Defendants/Respondents**

Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MR. JUSTICE MEADE:

1. On 4th May 2022, Mellor J granted an *ex parte* and without notice anti-suit injunction in these proceedings, and he made an order for service out. In substance, the injunctive order he made was what is sometimes referred to as an "anti-anti-suit injunction", but I am just going to refer to "anti-suit" injunction generally in this judgment. The order made by Mellor J was continued until the determination of the application that I am hearing by the order of Falk J of 17th May 2022. On 28th June, this week, I heard argument about continuation of the anti-suit injunction and this is my judgment in respect of that.
2. The basic background is set out in paragraphs 1-4 of the judgment of Mellor J as follows:
 - "1. There are two applications before the Court by Philips, as claimant and patentee, in this action against three sets of defendants: The Oppo defendants (which are defendants 1 and 2), the OnePlus defendants (defendants 3-6), and the RealMe defendants (defendants 7-9).
 2. The action is in familiar form, in the sense that Philips asserts three patents (EP(UK) 1,623,511; 1,999,874 and 3,020,043) which are said to be, and have been declared, essential to one or more of the 3G or 4G standards and therefore infringed by various mobile devices conforming to those standards sold by or at the behest of each set of defendants in the UK, as detailed in the Particulars of Infringement.
 3. The relief which Philips seeks is fairly standard for this type of SEP FRAND action. It is to be expected that the defences to these claims for infringement of the patents will involve claims that one or more of the patents is invalid, and obviously counterclaims for invalidity have to be heard by this court.
 4. It is now conventional in this type of SEP FRAND case for the Court to manage the action into one or more technical trials, followed by a FRAND trial to determine the terms on which the patentee's SEP portfolio should be licensed."
3. At the hearing before me this week, Mr. Maclean QC appeared for Philips, and Mr. Akka QC and Ms Davies appeared for the defendants. I am grateful to all Counsel for their helpful and concise submissions.
4. In terms of evidence, I considered the first witness statement of Mr. Boon, of Bristows (Philips' solicitors), which was the primary evidence before Mellor J. A second witness statement of Mr. Boon that was before Mellor J was also referred to before me; it was primarily concerned with the service out application and, as it transpired, was not very important to the arguments before me. I considered a short third witness statement by Mr. Boon concerning some points raised by Hogan Lovells, the defendants' solicitors, in correspondence. The main evidence for the defendants in opposition to the continuation of the order was the first witness statement of Mr. Brown, of

Hogan Lovells. Finally, there was a witness statement, his first and only one so far, from Mr. Pinckney of Bristows, responding to certain points made by Mr. Brown.

5. I note that the defendants have said that they intend to challenge jurisdiction in these proceedings. They oppose continuation of the anti-suit injunction on grounds that I will come to, but they have offered a contractual undertaking in correspondence, by letter of 30th May 2022, from Hogan Lovells, which is in the following terms:

"Until the end of the Action HP-2022-000010 (including any appeals) the Respondents undertake to give the Applicant 7 days' notice before they, whether by their directors, officers, partners, employees or agents, or in any other way, seek any relief from the PRC" -- that is People's Republic of China -- "courts that would restrain, prevent, require the withdrawal of, or seek to penalise the Applicant for pursuing the Action in the UK. For the avoidance of doubt, this undertaking does not extend to requiring the Respondents to notify the Applicant in advance of initiating a rate-setting action in the PRC Courts to determine the FRAND rates of a licence between them."

6. The precise form of the order made by Mellor J is of particular significance to the argument I heard, and paragraph 5 of his order was as follows:

"Until after the return date or further order of the Court, the Respondent, whether by its directors, officers, partners, employees or agents, or in any other way, must not seek any relief from a foreign court or tribunal that would interfere with, restrain, prevent, require the withdrawal of, or seek to penalise the Applicant for pursuing the Claim herein, or taking any step in relation to the Claim, including, without limitation, pursuing the Applications or any application to be made at the return date."

7. Also of significance is the SEP FRAND landscape internationally, which was described as follows, in paragraphs 3 and 4 of the defendants' skeleton:

"3. Since *Unwired Planet* [2020] UKSC 37 it has been clear that the English court is prepared to set FRAND terms for a global SEP portfolio, not just for a SEP holder's UK portfolio. The English court is not the only jurisdiction which will do this. The courts of the People's Republic of China ('PRC') will also set global terms (see *Sharp v OPPO*). There is a potential for inconsistent determinations therefore and questions as to the correct approach to managing such potential parallel litigation are before the Court of Appeal this week (*Nokia v OPPO* on appeal from [2021] EWHC 2952 (Pat) with the Judge's permission).

4. Actual or potential concurrent proceedings on the same or similar subject matter in England and abroad may be undesirable

from a costs perspective but are not of themselves regarded as an attack on the English court and the overseas proceedings may not be restrained by injunction. In the present context in particular, the risk of there being conflicting judgments from different courts is acknowledged to be an unfortunate consequence of the industry's decision to establish international standard setting organisations such as ETSI (*Unwired Planet* (above) [90]; *Nokia v OPPO* (above) [116])."

8. I should note that footnote 1 to those paragraphs says: "It is understood that (at least) the courts of the Netherlands, France and USA will do so as well." "Do so" refers to global rate-setting. I should make it clear that there is quite a lot of complexity and nuance to the position in those courts and I, by taking in those paragraphs, do not purport to endorse footnote 1. But the general description of the position following *Unwired Planet* and the position in the PRC is important and, in my view, correctly set out in those paragraphs
9. The *Sharp v OPPO* litigation referred to there also included, as well as rate-setting, an anti-suit injunction obtained by OPPO in the PRC. That is described in paragraph 11 of the judgment of Mellor J.
10. In other somewhat similar disputes, however, OPPO has not sought antisuit relief in China, and I will come to that in more detail in this judgment.
11. The defendants oppose the continuation of the relief granted by Mellor J on a number of grounds, which are set out in paragraph 15 of their skeleton for this hearing as follows:

"As a result of Philip's current position, the outline of OPPO's opposition to the Injunction is as follows:

(1) The Injunction should be set aside *ab initio* because of material lack of full and frank disclosure at the without notice hearing.

(a) The Injunction was sought *quia timet* but Mellor J was not referred to the relevant legal threshold requirements.

(b) Mellor J was not referred to significant material demonstrating that OPPO had no intention to apply for anti-suit relief in PRC or elsewhere.

(c) The fact that the Injunction was intended to apply worldwide was not drawn to Mellor J's attention. There was neither evidence nor submission on the point.

(d) The meaning of the words "interfere with" (which Philips now asserts preclude the enforcement in PRC of a PRC judgment (or even, e.g., a French judgment in France)), was not addressed in evidence or submissions. Indeed it was not even put before

the Court until Philips' Reply evidence for the current application.

(e) Further, there was no basis for an order of this sort (i.e. to bar enforcement of a judgment in proceedings which had not even been begun to have been sought) on an urgent, without notice, basis. But neither point was addressed.

(2) The Injunction, having been set aside *ab initio*, should not be re-granted.

(3) The Injunction should not be continued because now that OPPO have had the opportunity to file their own evidence it is beyond doubt that they have no intention of applying for anti-suit relief. Further, OPPO have offered an unequivocal undertaking not to do so without notice (which Philips has refused to accept).

(4) Alternatively, the Injunction sought should not be continued in the terms sought.

(a) The words 'interfere with' should be removed because: (i) they would (on Philips' case) impose an illegitimate restraint on legitimate parallel proceedings; (ii) there is no evidence that OPPO would (or could at any proximate date) seek to enforce a hypothetical future PRC judgment PRC proceedings have not even been started; and (iii) if they are not the restraint for which Philips contends they are confusing surplusage.

(b) There was and is no basis for the Injunction to apply worldwide."

12. I will, first of all, identify the legal principles applicable to my determination, in relation to which there was in fact relatively little disagreement. Mellor J set out the basic position at paragraph 9 of his judgment, by reference to *Glencore v Metro Trading International Inc (No 3)* [2002] 2 All ER (Comm) 1, per Rix LJ, at paragraph 42. Mr. Akka, for the defendants, did not submit that that was wrong.

13. In paragraph 18 of the defendants' skeleton, emphasis was placed on the decision of the House of Lords in *Airbus v Patel* [1999] 1 AC 119, where Lord Goff elaborated on what "vexatious" or "oppressive" meant. I accept that principle. In paragraph 19 of their skeleton, the defendants emphasised that "parallel proceedings are not objectionable *per se*" by reference to the case of *OT Africa v Magic Sportswear* [2005] EWCA Civ 719 at paragraph 31, where Longmore LJ said:

"... the mere fact that the English court refused a stay of English proceedings on the ground of forum non conveniens did not itself justify the grant of an injunction to restrain foreign proceedings. The doctrine of comity requires restraint since (a) another jurisdiction may take the view that the courts of that jurisdiction are an equally (or even more) appropriate forum than the English

court and (b) any anti-suit injunction can be perceived as an, at least indirect, interference with such foreign court."

14. Then, in paragraph 20 of their skeleton, the defendants drew attention to what Lord Brandon said in *South Carolina v Assurantie NV* [1986] 1 AC 26 25 at 41D:

"It is difficult, and would probably be unwise, to seek to define the expression 'unconscionable conduct' in anything like an exhaustive manner. In my opinion, however, it includes, at any rate, conduct which is oppressive or vexatious or which interferes with the due process of the court."

15. It is primarily in this sense (interference with the due process of the court), as I understand it, that the claimant argues that an anti-suit injunction in China would be unconscionable.
16. It is not in dispute between the parties that parallel proceedings can and do sometimes happen and that while this gives rise to the risk of inconsistent decisions, that is also something which can and does happen. It bears emphasis that an anti-suit injunction to restrain *enforcement* of a foreign decision in the context I have just identified of the possibility of parallel proceedings is something that the English court will be very slow to do and be very cautious about. The defendants identified that principle in their skeleton at paragraphs 23-24, by reference primarily to *ED & F Man v Haryanto (No. 2)* [1991] 1 Lloyd's Rep. 161. As I understand it, Mr. Maclean accepted this principle.
17. Anti-suit injunctions in relation to SEP FRAND cases, in the form of anti-anti-suit injunctions, have been granted in previous cases by the English courts. Mr. Maclean, in his skeleton, identified certain specific instances at paragraphs 45-47, in particular litigation in *IPCom v Lenovo* and a decision of Mann J in *Philips v Xiaomi*. The fact that those orders have been made in the past should not be thought to make anti-suit injunctions the default or the rule. Quite clearly, they have to be justified on the facts of every individual case.
18. I move on to the principles applicable to *quia timet* relief, which is quite plainly the form of relief sought by the claimant on this application. Again, there is very little dispute about the principles. For present purposes, I think I can take them from the decision of Marcus Smith J in *Vastint v. Persons Unknown* [2018] EWHC 2456 (Ch). I refer, in particular, to paragraphs 29-31 as follows:

"29. *Gee, Commercial Injunctions*, 6th ed (2016), para 2-035 similarly, suggests that the circumstances in which a *quia timet* injunction will be granted are relatively flexible:

'There is no fixed or "absolute" standard for measuring the degree of apprehension of a wrong which must be shown in order to justify *quia timet* relief. The graver the likely consequences, the more the court will be reluctant to consider the application as "premature". But there must be at least some real risk of an actionable wrong.'

30. However, in *Islington London Borough Council v Elliott* [2012] EWCA Civ 56; [2012] 7 EG 90, Patten LJ, with whom Longmore and Rafferty LJJ agreed, formulated an altogether more stringent test, at paras 29–31:

'29. The court has an undoubted jurisdiction to grant injunctive relief on a quia timet basis when that is necessary in order to prevent a threatened or apprehended act of nuisance. But because this kind of relief ordinarily involves an interference with the rights and property of the defendant and may (as in this case) take a mandatory form requiring positive action and expenditure, the practice of the court has necessarily been to proceed with caution and to require to be satisfied that the risk of actual damage occurring is both imminent and real. That is particularly so when, as in this case, the injunction sought is a permanent injunction at trial rather than an interlocutory order granted on *American Cyanamid* principles having regard to the balance of convenience. A permanent injunction can only be granted if the claimant has proved at the trial that there will be an actual infringement of his rights unless the injunction is granted.

'30. A much-quoted formulation of this principle is set out in the judgment of Pearson J in *Fletcher v Bealey* (1884) 28 Ch D 688 at 698 where he first quotes from Mellish LJ in *Salvin v North Brancepeth Coal Company* (1874) LR 9 Ch App 705 and then adds his own comments that: "It is not correct to say, as a strict proposition of law, that, if the plaintiff has not sustained, or cannot prove that he has sustained, substantial damage, this court will give no relief; because, of course, if it could be proved that the plaintiff was certainly about to sustain very substantial damage by what the defendant was doing, and there was no doubt about it, this court would at once stop the defendant, and would not wait until the substantial damage had been sustained. But in nuisance of this particular kind, it is known by experience that unless substantial damage has actually been sustained, it is impossible to be certain that substantial damage ever will be sustained, and, therefore, with reference to this particular description of nuisance, it becomes practically correct to lay down the principle, that, unless substantial damage is proved to have been sustained, this court will not interfere. I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a quia timet action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shewn that, if the damage does occur at any time, it will come

in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a quia timet action.’

31. More recently in *Lloyd v Symonds* [1998] EWCA Civ 511 (a case involving nuisance caused by noise) Chadwick LJ said: "On the basis of the judge’s finding that the previous nuisance had ceased at the end of May 1996 the injunction which he granted on 7 January 1997 was quia timet. It was an injunction granted, not to restrain anything that the defendants were doing (then or at the commencement of the proceedings on 20 June 1996), but to restrain something which (as the plaintiff alleged) they were threatening or intending to do. Such an injunction should not, ordinarily, be granted unless the plaintiff can show a strong probability that, unless restrained, the defendant will do something which will cause the plaintiff irreparable harm — that is to say, harm which, if it occurs, cannot be reversed or restrained by an immediate interlocutory injunction and cannot be adequately compensated by an award for damages. There will be cases in which the court can be satisfied that, if the defendant does what he is threatening to do, there is so strong a probability of an actionable nuisance that it is proper to restrain the act in advance rather than leave the plaintiff to seek an immediate injunction once the nuisance has commenced. 'Preventing justice excelleth punishing justice' — see *Graigola Merthyr Co Ltd v Swansea Corpn* [1928] Ch 235, 242. But, short of that, the court ought not to interfere to restrain a threatened action in circumstances in which it is satisfied that it can do complete justice by appropriate orders made if and when the threat of nuisance materialises into actual nuisance (see *Attorney-General v Nottingham Corpn* [1904] 1 Ch 673, 677). ... In the present case, therefore, I am persuaded that the judge approached the question whether or not to grant a permanent injunction on the wrong basis. He should have asked himself whether there was a strong probability that, unless restrained by injunction, the defendants would act in breach of the Abatement Notice served on 22 April 1996. That notice itself prohibited the causing of a nuisance. Further he should have asked himself whether, if the defendants did act in contravention of that notice, the damage suffered by the plaintiff would be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at that stage) to restrain further occurrence of the acts complained of, a remedy in damages would be inadequate. Had the judge approached the question on that basis, I am satisfied that he could not have reached the conclusion that the grant of a permanent injunction quia timet was appropriate in the circumstances of this case."

31. From this, I derive the following propositions:

(1) A distinction is drawn between final *mandatory* and final *prohibitory* quia timet injunctions. Because the former oblige the defendant to do something, whilst the latter merely oblige the defendant not to interfere with the claimant's rights, it is harder to persuade a court to grant a mandatory than a prohibitory injunction. That said, the approach to the granting of a quia timet injunction, whether mandatory or prohibitory, is essentially the same.

(2) Quia timet injunctions are granted where the breach of a claimant's rights is threatened, but where (for some reason) the claimant's cause of action is not complete. This may be for a number of reasons. The threatened wrong may, as here, be entirely anticipatory. On the other hand, as in *Hooper v Rogers*, the cause of action may be substantially complete. In *Hooper v Rogers*, an act constituting nuisance or an unlawful interference with the claimant's land had been committed, but damage not yet sustained by the claimant but was only in prospect for the future.

(3) When considering whether to grant a quia timet injunction, the court follows a two-stage test: (a) First, is there a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights? (b) Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of *actual* infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?

(4) There will be multiple factors relevant to an assessment of each of these two stages, and there is some overlap between what is material to each. Beginning with the first stage – the strong possibility that there will be an infringement of the claimant's rights – and without seeking to be comprehensive, the following factors are relevant: (a) If the anticipated infringement of the claimant's rights is entirely anticipatory — as here — it will be relevant to ask what other steps the claimant might take to ensure that the infringement does not occur. Here, for example, Vastint has taken considerable steps to prevent trespass; and yet, still, the threat exists. (b) The attitude of the defendant or anticipated defendant in the case of an anticipated infringement is significant. As *Spry, Equitable Remedies*, 9th ed (2013) notes at p 393: 'One of the most important indications of the defendant's intentions is ordinarily found in his own statements and actions'. (c) Of course, where acts that may lead to an infringement have *already* been committed, it may be that the defendant's intentions are less significant than the natural and probable consequences of his or her act. (d) The time-frame between the application for relief and the threatened infringement may be

relevant. The courts often use the language of imminence, meaning that the remedy sought must not be premature. (*Hooper v Rogers* [1975] Ch 43, 50).

(5) Turning to the second stage, it is necessary to ask the counterfactual question: assuming no *quia timet* injunction, but an infringement of the claimant's rights, how effective will a more-or-less immediate interim injunction plus damages in due course be as a remedy for that infringement? Essentially, the question is how easily the harm of the infringement can be undone by an *ex post* rather than an *ex ante* intervention, but the following other factors are material: (a) The gravity of the anticipated harm. It seems to me that if some of the consequences of an infringement are potentially very serious and incapable of *ex post* remedy, albeit only one of many types of harm capable of occurring, the seriousness of these irremediable harms is a factor that must be borne in mind. (b) The distinction between mandatory and prohibitory injunctions."

Those paragraphs begin with a citation from Mr. Gee's book on commercial injunctions. There has been a further edition since, but that does not affect the position, which suggests that the circumstances in which a *quia timet* injunction will be granted are flexible.

19. I agree with this. It is clear from the decision of Marcus Smith J and the earlier cases that he cites, including *Islington Council v Elliot* and *Lloyd v Symonds* that assessment of the appropriateness of *quia timet* relief is a multifactorial test. The court is not just to assess as a percentage the likelihood of the defendant doing the act which is sought to be restrained, but must have regard to the other matters identified in those paragraphs.
20. That is of relevance here, because Philips relies on the facts, as it asserts them to be, that if the defendants had obtained an anti-suit injunction in China that would have been irreversible and terminal for these proceedings. I accept those submissions. None the less, whilst the likelihood of the defendant doing that which is sought to be restrained is not the only factor, it is clearly always going to be a very significant one and perhaps the most significant one in many cases. A central argument by the defendants on this application is that there is no likelihood of anti-suit relief being sought in the PRC.
21. Next, it is said by the defendants that when the court decides whether or not to grant anti-suit relief, it is not proceeding on the basis of *American Cyanamid*, because the decision it makes is a permanent one, or at least a final one. I accept that and I did not understand Mr. Maclean to dispute it, but an important nuance is that Mr. Maclean submits that what Mellor J was doing when he granted the *ex parte* order was dictated, or at least guided by *American Cyanamid*, because the decision that he was making was how to hold the ring until an *inter partes* return date, i.e. this hearing. I accept that submission on behalf of the claimant.
22. The last aspect of the legal principles that I have to consider is the obligation of full and frank disclosure on an *ex parte* application. There was no real dispute about this either. I consider that I can adequately get the applicable principles from the decision in *CEF*

Holdings v Munday [2012] EWHC 1524 at paragraphs 34 to 35 summarising many other well-known decisions.

23. On the basis of those principles, I would say that a material breach of the obligation of full and frank disclosure usually leads to discharging a without notice order. The jurisdiction is a penal one, as Mr. Maclean accepted in the course of argument when I put it to him.
24. Mr. Maclean's skeleton contained the argument that the obligation is one of disclosure and not of full argument. If that had been meant to convey that there was no duty on an applicant to identify arguments that the respondent might make in due course, I would have rejected the submission on the basis of *Memory Corporation v Sudhu (No.2)* [2000] 1 WLR 1443 at 1454-5 in the judgment of Robert Walker LJ (as he then was), citing *Tate Access v Boswell* [1991] Ch. 512, but I do not think that was the real gist of Mr. Maclean's submissions in any event. What he was really saying was that there is an emphasis on the need to identify the crucial points and not every point.
25. Having identified the principles, I turn to consider the circumstances of the present case, and central to the arguments, and because of that centrality, the first point that I will consider, is whether there was and is a real threat by the defendants to seek anti-suit relief in the Chinese courts. A central part of the picture, quite plainly, in my view, is the *Sharp v Oppo* litigation, where in a similar situation to the present, as I have mentioned already, Oppo sought and obtained an anti-suit injunction in the PRC which completely ended German infringement proceedings as a result, to put it in a nutshell, of Sharp giving in under the pressure exerted by the Chinese order.
26. Following the end of that litigation, Oppo made some public statements about it. I heard very detailed arguments about what Oppo said. These turned on the translation of a press release, on some words not appearing in the original version of the press release and so on. I do not think I need to go into those arguments in the greatest detail. It is fair to say that there is some ambiguity, but my clear impression and my finding is that by what it said, Oppo was claiming a major litigation win based, in large measure, on the availability of global rate-setting in the People's Republic of China, but also, to a significant extent, on the obtaining of anti-suit relief. Certainly, there was nothing, in my view, adequate to restrict its statements to its having obtained the ability to have global rate-setting done in China.
27. Taken in isolation, the *Sharp v Oppo* history would, in my view, found a good inference that Oppo would be willing to do the same again if it was strategically advantageous to it in litigation and it might very well be strategically advantageous to it in the present case. Coupled with the irreversibility and the seriousness of obtaining anti-suit relief in China, that would found an adequate, imminent threat.
28. However, matters do not end there and *Sharp v Oppo* cannot be seen in isolation, in my view. There are two major other matters which have to be considered and which the defendants relied on heavily. The first was the existence of proceedings where Oppo did not seek anti-suit injunctive relief in China and, secondly, statements that have been made in evidence for the purposes of this application.
29. I first of all consider other proceedings where Oppo, and/or other of the defendants, it does not matter precisely, were involved. Situations prior to the decision in *Sharp v*

Oppo that the PRC courts could undertake global rate-setting are, in my view, of much less relevance, because it was evidently less likely that anti-suit relief would be sought or obtained to allow the PRC courts to go ahead with global rate-setting. This is not an entirely clear picture, because in fact anti-suit relief was granted in some proceedings concerning Huawei in August 2020, but none the less, I think proceedings prior to the decision in *Sharp v Oppo* are of extremely limited relevance.

30. However, there are two other bits of Oppo litigation since, which are potentially more important, one involving Nokia, which started, as I understand it, in July 2021, and litigation involving InterDigital started in December 2021.
31. In Nokia, on the evidence before me, the German court did grant an anti-anti-suit injunction, but I do not have any great detail about it. In the UK proceedings, there was a full jurisdiction hearing and there was no indication in the course of that of any likelihood of an anti-suit injunction being sought by Oppo. I note, in passing, that the decision of His Honour Judge Hacon, who sat as a High Court judge in that hearing, is before the Court of Appeal this week.
32. I know, also, rather little about the InterDigital proceedings. I will need to refer further to this in relation to the arguments on full and frank disclosure, because the defendants say that Mellor J should have been told more than he was.
33. That is the situation with other litigation and I turn to the evidence of the defendants to which I have referred and the key evidence is paragraphs 15 and 16 of the witness statement of Mr. Brown, of Hogan Lovells who stated as follows:

"15. I am informed by Jack Peng, that, although the First Respondent did seek an anti-suit injunction against Sharp, it has not sought anti-suit relief in any court since and neither it nor any associated company has any intention to do so again; i.e. they have no intention to apply to the courts for anti-suit style relief so as to preclude parallel patent infringement lawsuits linked to FRAND of the sort being pursued by Philips in this case (or, indeed, other claimants such as Nokia and InterDigital in England - see further below). My firm drew this lack of intention to the attention of Philips in a letter of 30 May 2022 (pages 1-2 of Exhibit PJB-1).

16. Again, Mr Peng informs me that since the Sharp case if the First Respondent (or associated companies) considers that the more appropriate forum to hear proceedings initially commenced in another jurisdiction is the PRC courts (where its business is predominantly based), its practice is to approach that issue by challenging the jurisdiction of any non-PRC court using the processes and procedures of that non-PRC court. This is evident from the Mitsubishi, Nokia and InterDigital claims which have been issued against some of the Respondents in this jurisdiction more recently (on 23 April 2019, 1 July 2021 and 20 December 2021 respectively)."

34. My assessment of this evidence is that it is very carefully worded and somewhat conclusory. It leaves room for the defendants to change their mind and to seek anti-suit relief, especially if its favoured approach, as described in paragraph 16, of challenging jurisdiction in these courts, is unsuccessful. It does not say that the defendants have concluded that the type of relief sought in *Sharp v Oppo* is inappropriate or that it never ought to be sought and it could be simply that that sort of relief was thought by the defendants to be less appropriate in the particular circumstances of the previous litigation to which I have referred, but might, in due course, be regarded by the defendants as a useful thing to do in this litigation.
35. A more minor part of the picture is that the undertaking offered allows the defendants to act on seven days' notice. Apart from the fact that that is obviously a period that is impractically short, it leaves the question: why is that reservation made? What is it that the defendants are reserving the right to do specifically? In the course of correspondence, which has been, I have to say, a little bit testy on both sides, the defendants have not clarified this.
36. Overall, I consider that despite the submissions of the defendants, there is a sufficiently imminent – and I use the word "imminent" in the sense of the authorities to which I have already referred – risk that the defendants would seek anti-suit relief in the courts of the People's Republic of China.
37. The second extremely significant aspect of the argument before me has related to the use of the word "interfere" in Mellor J's order. The defendants object to it on the basis that it is generally unclear, would or might hinder the commencement or prosecution of a parallel rate-setting case in the courts of the PRC and would or might hinder enforcement of a judgment from those courts, in due course, resulting from such a parallel action.
38. The last of these, in my view, is the most serious, by which I mean hindering enforcement of a Chinese final judgment setting a rate. Until the hearing before me, Philips was maintaining that the injunctive relief sought should restrict the defendants' ability to enforce a final Chinese judgment, even in China, and that appears from Bristows' letter of 8th June 2022. This is no longer maintained. At the hearing before me, Mr. Maclean accepted, as I understood it, that enforcement of a Chinese judgment ought not to be restrained by any order I make. I have already referred to the principles applicable above in relation to anti-enforcement injunctions, which I think really made the concession made by the claimant at the hearing before me inevitable.
39. Furthermore, I accept Mr. Akka's submission on behalf of the defendants that enforcement of a final Chinese judgment setting a rate is in no sense imminent. It is far off in the future. By "imminent" there, I mean close in time.
40. The procedural impact of Chinese parallel proceedings also has to be considered. It is possible that case management decisions quite properly made by the Chinese court could have a negative knock-on effect on proceedings here, not on the ability of the High Court to proceed at all, but just at a practical level. That can be case-managed by the courts here, if it occurs, but I think there is a risk that the word "interfere" would or could penalise the defendants taking procedural arguments in China and for that reason, too, the word "interfere" is not an appropriate one to include in any order that I make.

41. These are specific contextual reasons why "interfere" is not appropriate to include in any order I make, but apart from these context-specific points, I would not have concluded that "interfere" was inherently ambiguous to an extent which made it inappropriate to include in the injunction. I rather suspect that it is used in injunctions in other fields of the law and it is certainly used to characterise wrongful conduct, as in the context, perhaps, of interfering with the quiet enjoyment of property. To that extent I would agree with the observation of Falk J in argument when the injunction granted by Mellor J was continued.
42. I note, for completeness, that "interfere" was also included in an anti-suit injunction granted by Mann J in *Philips v Xiaomi*, but as I understand it, he was not considering the arguments that I have been, so although his decision perhaps stands for the proposition or at least supports it, there is nothing wrong with the verb in general, in the present context, because of the two points that I have mentioned, "interfere" ought not to be included in any order that I make.
43. I next consider the undertakings offered by the defendants. These are contractual undertakings, as I have mentioned above, and the reason given in correspondence for giving contractual undertakings as opposed to undertakings to the court was a concern on the part of the defendants, which they have been scrupulous in stressing on many occasions, that they do not wish to risk submitting to the court's jurisdiction or to prejudice their application to set aside service out.
44. I do not accept that is an adequate reason for limiting undertakings offered to the contractual form and, in my view, if they were otherwise appropriate, I could direct or decide that the offering of undertakings to the court would not prejudice the defendants' position on jurisdiction.
45. The contractual undertakings offered would also have the problem that if there was a need to enforce them, the claimant would have to bring proceedings in contract with the procedural friction and potentially delay that that would involve. I am not of the view that the offering of contractual undertakings is appropriate.
46. There is a presentational reason, which I acknowledge, for preferring undertakings to an injunction, since no commercial organisation likes it to be said that it has been enjoined. Since the defendants have engaged, albeit in my view imperfectly, with the situation that has arisen by offering undertakings, I would, in principle, if I decided to make an order or grant relief, to accept undertakings to the court from the defendants instead of an injunction. On that point specifically, as I understood it, Mr. Maclean did not really disagree. His concern was much more that any undertaking given should not be merely a contractual one.
47. I acknowledge that sometimes the court does accept contractual undertakings and, in Mr. Akka's skeleton at footnote 13, reference was made to the case of *Caterpillar* as follows:

"A contractual undertaking was considered to be satisfactory in *Caterpillar Logistics Services (UK) Ltd v de Crean* [2012] EWCA Civ 156, [2012] 3 All ER 129 (Stanley Burnton LJ), [67]."

I appreciate that is sometimes done, but that was a very different situation and it is by no means a general rule

48. The next substantive aspect of the argument before me concerns the fact that the relief granted by Mellor J on the claimant's application was worldwide. It is said by the defendants that nowhere else but the courts of the PRC makes available both global rate-setting and anti-suit injunctions of the kind made in *Sharp v Oppo* to restrain infringement proceedings in other jurisdictions.
49. I am not sure that is absolutely true, since my understanding is that the courts of the United States have done both, where the parties agreed to global rate-setting, but that is not this case and the general proposition put forward by the defendants, in my view, is correct and that would lead me to conclude that there is no threat sufficient to found *quia timet* relief in relation to anywhere other than the PRC.
50. I turn, against that background, to consider full and frank disclosure. I have done it in this order because it seemed to me that the central arguments were those I have touched on already and they give me a context to explain the full and frank disclosure arguments, but I also appreciate that in a logical sense, one might well put full and frank disclosure first, since if the applicant had been in breach of that obligation, there is a leaning by the court to set the order aside altogether and not renew it. My reasons for dealing with it last are simply that doing so allows me to provide the factual context, rather than because I think it is unimportant. On the contrary, it is very important, as the authorities that I have cited explain.
51. I have already said that the aspects where it said that full and frank disclosure was not made were identified in paragraph 15 of Mr. Akka's skeleton. The first is that the injunction was sought *quia timet*, but that Mellor J was not referred to the relevant legal threshold requirements. In my view, there is nothing to this point. What was being sought before Mellor J was an order to hold the ring until the return date and the judge was clearly aware of this and it is spelled out in paragraphs 23 and 41 of the skeleton that Mr. Maclean put in for the purpose of the application to Mellor J.
52. Second, it is said that there was a lack of full and frank disclosure in relation to what is said by the defendants to be significant material demonstrating that Oppo had no intention to apply for anti-suit relief in the PRC or elsewhere. Obviously, the statements in Mr. Brown's evidence were not before the judge. What was before him was details of the previous cases to which I have referred.
53. I ought to mention, at this stage, that the claimant's evidence before Mellor J referred to situations where companies other than defendants had obtained anti-suit injunctions in the PRC. The defendants submit that that is irrelevant. I do not agree and I think it is of some relevance. A relatively common remedy might more readily be sought than a truly rare one, but I do agree with the defendants that it is not central to what was up for consideration before Mellor J. On the other hand, nor was it presented as such.
54. The real gist of the complaint is that there was limited, and the defendants say inadequate, reference in the evidence before Mellor J and in the argument to the cases where the defendants had not sought anti-suit relief in China.

55. Mr. Boon's first witness statement covered litigation involving, as the counterparties to the defendants, Mitsubishi, Philips in India and the Nokia UK proceedings, and made the point about circumstances changing when the courts of the PRC became willing and able to do global rate-setting.
56. Mr. Boon's evidence did not, however, mention the proceedings involving InterDigital. The defendants focus on this, among other things, and on the fact that there was no explicit reference in Mr. Boon's first witness statement to the November 2021 hearing before His Honour Judge Hacon in the Nokia proceedings, which I have already mentioned.
57. Dealing with the second point first, I do not see why Mr. Boon needed to deal with all the stages in *Nokia v Oppo*. There was a perfectly adequate basis for Mellor J to appreciate that they were typical set FRAND proceedings and that there had been no application for an anti-suit injunction in China. Mr. Boon recognised, but did not overplay, in my view, the German anti-suit injunction in *Nokia v Oppo*.
58. In relation to the InterDigital proceedings, Mr. Boon does not, in his third witness statement, say that he was not aware of it. I am satisfied that he probably could have found out the proceedings existed, if he did not already know, but the question then arises: What is the importance of that? All he would have said was that there was a lack of detail available to him.
59. In my view, the "crucial" point, to use the word from the authorities that I referred to earlier on, was that while Oppo had sought anti-suit injunctive relief on one occasion, a very important one in a parallel situation, it had not done so on a variety of other occasions. Mr. Boon, in my view, made this more than adequately clear, and the criticisms made, if I accepted them, would, I think, impose a standard of perfection on a party in the claimant's position which is beyond what the law requires on the authorities I have touched on.
60. Relatedly, it is said that Mr. Boon overstated Oppo's press release at the end of the Sharp litigation. I do not think he did. I have dealt with this earlier and I have concluded that Oppo's position was that it had obtained a strategic litigation triumph, including, in part, the anti-suit relief.
61. Next, it is said that it was not drawn to Mellor J's attention that the injunction was intended to apply worldwide. I find (and accept) the defendants' submission that this was not drawn to Mellor J's attention explicitly. That much is obvious. I have to say that I think it was a little bit sloppy of Philips to seek worldwide relief without explicitly seeking to support it. However, the complaint and that point makes the whole issue sound a lot more important than it practically is. The whole issue is (and was before Mellor J) about China, and Mellor J was aware of that. I do not think he was remotely misled that there might be some other territory that might realistically grant an anti-suit injunction. Although it would clearly have been better if this point had been addressed, I do not think it is consequential in any way and, to be fair, Mr. Akka did not press this point very hard at all.
62. The next issue is the meaning of the word "interfere". I have already rejected the inclusion of any such language in any order I was to make, but that does not mean that there was a lack of full and frank disclosure. The defendants argue that Philips has

either (1) sought, since Mellor J's order to expand the relief sought, to make it anti-enforcement relief as well as anti-suit relief, or (2) failed to make full and frank disclosure because they did not tell Mellor J he was granting anti-enforcement relief. In other words, the allegation of lack of full and frank disclosure is a contingent one. I have held that former is the case and, therefore, the full and frank disclosure point does not arise in this respect.

63. For completeness, I should say that I was referred to the evidence of a Ms. Liao of the defendants' Chinese lawyers, which was put in before His Honour Judge Hacon in the Nokia litigation. Her evidence described the sanctions the Chinese court can impose on a party which disobeys one of its orders. In my view it is clear that Ms. Liao was speaking in the context of a final rate-setting order and not an anti-suit order directed at the initiation of foreign proceedings. However, the sanctions she described are general and could be applied in the latter context as well.
64. His Honour Judge Hacon considered the evidence in the Nokia case in his judgment and concluded that such sanctions were theoretically available, but that that did not mean that they would, in practice, be used or were likely to be used. I do not think I need to revisit that. All I draw from Ms. Liao's evidence is that a Chinese court has powers to compel obedience to its orders, as does this court, and I think that although I have covered it because the parties argued it, the evidence of Ms. Liao is neither here nor there on the issues for me.
65. My conclusion is that there was no material lack of full and frank disclosure.
66. I conclude, for reasons that I have given already, that there is a sufficient and sufficiently imminent threat for the grant of *quia timet* relief. The seeking of an anti-suit injunction in China would, in my view, be vexatious and oppressive and unconscionable in the sense identified above, given that it would prevent a UK court from determining infringement of a UK patent, i.e. for essentially the same reasons as Mellor J gave.
67. I record that I do not think, in truth, the defendants contended that that was not so. Their central point, which I have dealt with and rejected on the facts, was that there was absolutely no threat of doing it. In principle, and subject to the limitations that I have indicated, I am willing to grant relief.
68. I should say that I have also considered and reflected on the requirements of comity. The relief I propose to grant does not restrict, even indirectly via the defendants, the courts of the PRC from conducting global rate-setting if the defendants initiate proceedings and if the courts of the PRC consider it appropriate. The relief I have granted simply defends the English court's proceedings in relation to infringement of a national patent, as was explained in the *Unwired Planet* decision of the Supreme Court to be the nature of these SEP/FRAND cases.
69. It is out of a deference to the requirements of comity, in part, that I have restricted the relief sought to avoid the limitation on any Chinese rate-setting proceedings that do take place by removing the word "interfere" and also to make clear that enforcement of a Chinese judgment rate-setting, if one eventually emerges, is not affected.

70. I will therefore grant relief as sought, but with the removal of the word "interfere" and with an appropriate change to delete "foreign" and insert "in the People's Republic of China". I repeat what I have already said, that although that is the scope of relief that I think is appropriate, in the circumstances of the case, I am willing to accept undertakings to the court from the defendants instead of granting an injunction, making clear that this does not prejudice their position on jurisdiction, if the defendants still prefer that course.
71. I will say that I do not consider that it is necessary to include in any relief a specific express permission for a rate-setting claim in the People's Republic of China, if the defendants bring one. I think attempting to word the carve-out would only cause confusion. For reasons I have explained, it is my view that the words used, once "interfere" is deleted, do not prevent or restrict the bringing of such an action and my judgment spells this out as well.
72. Those are my conclusions.

(For continuation of proceedings: please see separate transcript)

73. I have to deal with two consequential matters. The first is permission to appeal. Mr. Akka seeks permission to appeal on the basis of the sufficient/imminent threat issue. I refuse permission to appeal because I accepted that the applicable legal principles were the very ones argued for by Mr. Akka and my assessment of how to apply those principles on the facts of this case is a multi-factorial one and/or within my discretion and not appropriate for the consideration of the Court of Appeal. I refuse permission to appeal and the defendants will need to ask the Court of Appeal for that, if they consider it appropriate.
74. The second issue is costs. I remind myself, first of all, that the overriding point under CPR part 44 is that costs should follow the event. Mr. Akka submits that it is central to my decision that I have rejected the "interfere" wording. It is quite difficult, in the circumstances of this case, to characterise whether that was the event or not or merely a sub-issue and Mr. Maclean, for the claimant, argues that the event was really the granting or withholding of relief at all.
75. Further complicating the analysis is the fact that, of course, the original application was *ex parte* and without notice, for reasons which I think it follows from my judgment were appropriate, but that did mean that the defendants did not have the opportunity to engage and try to negotiate suitable undertakings until later on, which they did in correspondence, in circumstances identified in my main judgment.
76. There were deficiencies in the undertakings offered, as explained in my judgment, and it is fair to say that the defendants did not remedy those, for example, by offering an undertaking to the court instead. It is also fair to say that the nature of the correspondence which I have characterised in my judgment as being a little bit testy on both sides, did not really facilitate the parties in getting to a final agreement.
77. I would say that I think if it had not been for the fact that this had been an *ex parte* application, albeit for reasons that were appropriate, and this had come before the court *inter partes* on the first occasion, it is quite likely that with some knocking together of heads, the result that I have reached would have resulted by agreement, but that did not

happen and I have to try to reach a fair result on costs in the messy situation which I have described.

78. Doing the best I can, I think I ought to characterise what has happened as a result of my judgment as two events. One important event is that I have granted relief in the form either of an injunction or an undertaking to the court, which was resisted right until the end by the defendants, on the basis of sticking to their contractual undertakings and on the basis of arguing the full and frank disclosure issues.
79. On the other hand, the point about "interfere" became extremely important. It was very fully flagged-up by the defendants in correspondence. As identified in my main judgment, Bristows stuck to the line that the relief sought should interfere with the initiation and/or enforcement of Chinese rate-setting and I have concluded that that was not defensible on the authorities.
80. It may be slightly unorthodox to regard there as having been two events, but I think that reflects the true reality. A great deal of effort, clearly, on the defendants' side, went into the "interfere" point, and I think their concern was legitimate and substantive.
81. I am unable to attribute, numerically, costs to these two events. I suspect that the defendants have spent much more on "interfere" than the claimant has, and I suspect that the claimant has spent much more on the question of whether there should be relief at all than the defendants. I do not have any costs budgets to guide me on this, let alone costs budgets breaking things down by issue.
82. In this unusual situation, I reach the conclusion that the two events that I have identified broadly set each other off and I am not going to make any order as to costs as a result. I am satisfied that I am doing justice to the "costs follow the event" principle, because there are two events, and my concluding that they net off against each other is somewhat rough justice in the absence of figures, but standing back I am satisfied that it is entirely just in overall terms.
