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Claim No. HP-2023-000031

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

Rolls Building
Fetter Lane
London, EC4A 1NL

21 March 2024

Before :

MR JUSTICE RICHARDS

Between:

- (1) **LENOVO GROUP LIMITED**
(a company incorporated under the laws of Hong Kong, China)
- (2) **LENOVO (UNITED STATES) INC.**
(a company incorporated under the laws of Delaware, USA)
- (3) **LENOVO TECHNOLOGY (UNITED KINGDOM) LIMITED**
- (4) **MOTOROLA MOBILITY LLC**
(a company incorporated under the laws of Delaware, USA)
- (5) **MOTOROLA MOBILITY UK LIMITED**

Claimants

- and -

- (1) **INTERDIGITAL TECHNOLOGY CORPORATION**
(a company incorporated under the laws of Delaware, USA)
- (2) **INTERDIGITAL PATENT HOLDINGS, INC.**
(a company incorporated under the laws of Delaware, USA)
- (3) **INTERDIGITAL, INC.**
(a company incorporated under the laws of Pennsylvania, USA)
- (4) **INTERDIGITAL HOLDINGS, INC.**
(a company incorporated under the laws of Delaware, USA)

Defendants

James Segan KC, Ravi Mehta and Femi Adekoya (instructed by **Kirkland & Ellis International LLP** for the **Claimants**)
Mark Chacksfield KC and Joanne Box (instructed by **Bird & Bird LLP**) for the **Defendants**
Hearing dates: 26 and 27 February 2024

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 21 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Richards:

1. This is my judgment on two applications:
 - i) an application dated 28 November 2023 (the “Interim Licence Application”) made by the Claimants (together “Lenovo”) for a declaration (the “Interim Licence Declaration”) that a draft interim licence (the “Interim Licence”) of various 3G – 5G standard essential patents (“Cellular SEPs”) owned by the Defendants (together “InterDigital”) would be fair, reasonable and not discriminatory (“FRAND”); and
 - ii) an application dated 22 November 2023 (the “Stay Application”) made by InterDigital for a case management stay of part of the present proceedings that is said to overlap with proceedings in Germany concerning the Cellular SEPs.

Background to the applications

2. Lenovo and InterDigital have been litigating for some time in relation to the Cellular SEPs. In particular, there was litigation in England in which InterDigital asserted infringements of various “anchor” UK patents and Lenovo raised, as an aspect of its defence, an assertion that it was entitled to a worldwide licence on FRAND terms of InterDigital’s Cellular SEPs. In March and June 2023, after a lengthy trial, Mellor J handed down two judgments that determined a FRAND lump sum for a global licence of the Cellular SEPs based on US\$17.5 cents per device and determined the terms of a global licence (the “Cellular PLA”). Both sides have permission to appeal various aspects of Mellor J’s determination to the Court of Appeal with that appeal due to be heard over five days in June 2024.
3. The Cellular PLA expired on 31 December 2023. InterDigital and Lenovo have held negotiations on the terms of a new FRAND licence of the Cellular SEPs for the period commencing on 1 January 2024. However, to date those negotiations have not concluded successfully.
4. On 22 September 2023, InterDigital filed proceedings (the “German Proceedings”) seeking an injunction against Lenovo in the Regional Court of Munich on the basis of infringement of European Patent EP 2 127 420 B1 (“EP (DE) 420”), one of InterDigital’s Cellular SEPs. The practice of the German courts is to determine questions of infringement and whether to grant an injunction before determining the validity of the patent in suit. Accordingly, the expression “German Proceedings” refers to the injunction proceedings and does not include validity proceedings that might follow. In its defence in the German Proceedings, Lenovo argues that it is willing to take a global licence of the Cellular SEPs on FRAND terms.
5. InterDigital has made two proposals to Lenovo for settlement of the German Proceedings: (i) an “Orange Book” offer (named after a case decided in the German Supreme Court) under which InterDigital says the German court would determine a FRAND-compliant royalty rate for a worldwide licence of the Cellular SEP and (ii) an offer of arbitration. To date Lenovo has not accepted either offer.

6. On 24 September 2023, Lenovo brought proceedings (the “English Proceedings”) in England and Wales. By those proceedings, Lenovo invokes the procedure considered in *Kigen (UK) Limited v Thales Dis France SA* [2022] EWHC 2846 (Pat) and asks the English court to settle FRAND terms for a global licence, to commence on 1 January 2024, of a number of patents held by InterDigital extending beyond the Cellular SEPs. InterDigital disputes the jurisdiction of the English courts to determine such a licence in relation to some categories of patents specified in Lenovo’s claim. However, it is now common ground that the English courts have jurisdiction to settle the terms of a FRAND-compliant global licence of Cellular SEPs with effect from 1 January 2024 although InterDigital considers that matter is best determined in Germany.
7. In its Particulars of Claim in the English Proceedings, Lenovo undertakes that it will enter into any licence agreement that the English court determines to be FRAND.
8. As will be seen, InterDigital argues that the English Proceedings overlap with, and interfere with, the German Proceedings at least to an extent. Mr Segan KC said on instructions in his submissions on behalf of Lenovo that Lenovo was unaware that the German Proceedings had been brought at the time they issued the English Proceedings.
9. A hearing of the German Proceedings is listed for one day on 18 April 2024.

FRAND and infringement proceedings – the approach of the English courts

10. I assume that any reader of this judgment is familiar with the need for standardisation in the mobile telephone industry and the role of industry participants in the European Telecommunications Standard Institute (“ETSI”) in setting those standards. I also assume that readers are familiar with the undertaking that such industry participants can give under Clause 6.1 of the ETSI policy on intellectual property rights (“Clause 6.1”) to offer FRAND licences to “implementers” who seek to use Cellular SEPs.
11. Where a patent holder gives an undertaking pursuant to Clause 6.1, it takes effect under French law as a *stipulation pour autrui* or *stipulation de contrat pour autrui*. That can be analysed as a contract under which the holder of the SEPs is required by the “stipulator” (ETSI) to carry out an act of performance for the benefit of the third party implementer.
12. While a FRAND undertaking given to ETSI is global in the sense that it applies to all ETSI FRAND-encumbered SEPs, irrespective of the territory in which those patents subsist, the underlying SEPs are territorial. Without entering into an unnecessary treatise on the matter, an action to restrain infringement of a patent will generally be brought in the courts of the territory that granted the patent. It follows that, if a patentee and an implementer are unable to agree FRAND terms for the licensing of ETSI FRAND-encumbered SEPs that include UK patents, the patentee could take proceedings in the UK courts alleging that the implementer is infringing the UK SEPs. The implementer can, as a defence to those infringement proceedings, rely on the patentee’s FRAND obligations. As noted, the English Proceedings do not follow that paradigm since they are brought at the initiative of an implementer, rather than by a holder of SEPs.
13. There has been much analysis in English authorities as to the precise nature of an implementer’s FRAND defence where a patentee has given an undertaking pursuant to Clause 6.1. Fortunately, in the context of the two applications before me, there was no material disagreement between the parties. I therefore simply summarise the following aspects of the analysis applied by the English courts which I understand not to be the subject of much dispute. My intention in doing so is not to provide a comprehensive

summary of all relevant principles, just those on which the parties were agreed and which help to put in context some of the arguments dealt with later on:

- i) In England and Wales, an implementer's FRAND defence to infringement proceedings is analysed by reference to contractual principles with the courts construing, and giving effect to, the *stipulation pour autrui* governed by French law that is contained in Clause 6.1 (see [14] of *Unwired Planet International Ltd v Huawei Technologies (UK) Ltd* [2020] UKSC 37 ("*Unwired Planet SC*"). In the course of adjudicating on the FRAND defence, an English court is entitled to determine the terms of a FRAND-compliant global licence of the relevant SEPs.
- ii) Where a patentee has given an undertaking under Clause 6.1, that patentee has a contractual obligation to offer a global licence of the ETSI FRAND-encumbered SEPs on FRAND terms (see [258] of the judgment of Meade J in *Nokia Technologies Oy v Oneplus Technology (Shenzhen) Co Ltd* [2023] EWHC 1912 (Pat) ("*Nokia v Oppo 2023 HC*").
- iii) In order to take the benefit of that contractual obligation, an implementer must establish that it is within the class of beneficiaries covered by the promise. Any implementer which wants a licence to work a relevant standard by any commercial activity and which intends to work the standard under a licence from the SEP owner falls within the class of beneficiaries of the *stipulation* ([285] of *Optis v Apple (Trial F)* [2021] EWHC 2564 (Pat)).
- iv) Built into that formulation of the class of beneficiaries is a concept of "willingness". An implementer that is not willing to take a licence on FRAND terms does not fall within the class. An implementer can demonstrate "willingness" by giving an undertaking to the English court that it will take a licence on such terms as the English court determines to be FRAND.
- v) The English courts are likely to make an injunction against an "unwilling" implementer who is infringing SEPs on the basis that such an implementer is not a beneficiary of a SEP-owner's Clause 6.1 undertaking. Such an injunction is likely to be made whether or not the SEP-owner has made an offer of a FRAND global licence ([255] of *Nokia v Oppo 2023 HC*).
- vi) The English courts will not grant a patentee an unqualified injunction restraining infringement by an implementer who is within the class of beneficiaries of an undertaking under Clause 6.1 (although they may grant a "FRAND injunction" restraining infringement until the implementer enters into a FRAND licence). The reason for that is that Clause 6.1 operates as a contractual derogation from a SEP owner's right under general law to obtain an injunction to prevent infringement of its patent (see [14] of *Unwired Planet SC*).
- vii) Patent licences are complicated. It is quite possible that there can be a range of different licences of particular SEPs, none of which are identical, but all of which are FRAND. In such a case, a SEP owner could discharge its obligation under Clause 6.1 by offering whichever FRAND licence it chooses ([269] of *Nokia v Oppo 2023 HC*). Accordingly, if there are proceedings in different national courts, both of which will lead to the determination of the terms of a FRAND global licence, it is in principle up to a SEP owner to choose which court's formulation of a global FRAND licence it proposes to offer ([271] and [272] of *Nokia v Oppo 2023 HC*). (I say that it is "in principle" open to the patentee to choose because the court may choose to enquire as to whether a patentee really is seeking to choose between two competing formulations of a FRAND global licence or whether it is seeking some other unrelated advantage.)

- viii) It follows from the point made in paragraph vii) that, if there are proceedings in multiple jurisdictions that seek to determine the terms of a FRAND global licence, an implementer who is not prepared to commit to taking a licence on terms the English court determines to be FRAND, but instead will undertake only to accept a foreign court's formulation of a FRAND licence, may be labelled "unwilling" in English proceedings (*Nokia v Oppo 2023 HC* at [313]).

FRAND and infringement proceedings – the approach of the German courts

14. There was a much greater dispute between the parties as to the principles that the German courts would apply when considering FRAND issues in the German Proceedings.
15. In this regard, I had the following evidence from experts who gave reports complying with CPR 35:
- i) Lenovo relies on the expert evidence of Professor Dr Peter Michael Chrocziel. He is a professor of intellectual property law at the University Erlangen-Nurnberg.
 - ii) InterDigital relies on the expert evidence of Professor Peter Meier-Beck, a retired Presiding Judge of the Bundesgerichtshof, the German Federal Supreme Court.
16. In addition, I had evidence from the parties' German lawyers engaged in these proceedings namely Wolrad Prinz zu Waldeck und Pyrmont (to whom all parties referred as "Mr Waldeck"), a partner at Freshfields Bruckhaus Deringer, who is advising Lenovo, and from Ms Cordula Schumacher, a partner at Arnold Ruess Rechtsanwälte Partnerschaft mbB, who is advising InterDigital.
17. Neither party challenged the expertise of each other's experts and I considered both reports to be dispassionate and scholarly. Neither party suggested that Mr Waldeck or Ms Schumacher were precluded from giving evidence as to how they considered the German courts would approach FRAND matters.
18. The difficulty I have is that none of these witnesses were cross-examined. Accordingly, if there is a divergence between the opinion of one expert and that of another, I have no basis for preferring one conclusion over the other. That said, I can look carefully at what each expert has said in order to determine whether there is a divergence of opinion and if so, the nature of it.
19. More generally, none of the factual witnesses were cross-examined with the result that I will not disbelieve any of the evidence given by those witnesses on factual matters, as distinct from matters of opinion, unless that evidence is incredible.

Matters of German law and practice on FRAND that are common ground

20. Professor Chrocziel and Professor Meier-Beck agree that Lenovo is entitled in the German Proceedings to raise a "FRAND Defence". They also agree that, by contrast with the position in England and Wales, that FRAND Defence is not based on the interpretation and application of Clause 6.1. Rather, it is based on Article 102 of the Treaty of the Functioning of the European Union (the "TFEU") that restricts an undertaking's ability to abuse a dominant position. The nature of the FRAND Defence in German law is influenced by the judgment of the Court of Justice of the European Union in *Huawei v ZTE* (Case C-173/13).
21. By way of a very broad summary, normal market forces that might otherwise operate to reduce an attempt by a holder of SEPs to prevent effective competition might not apply

because the SEPs are so essential to participation in that market. Accordingly, a holder of SEPs has the ability to prevent effective competition in the relevant market by acting independently of its competitors and customers. In those circumstances if a holder of SEPs pursues infringement proceedings against an implementer, but refuses to grant a licence on FRAND terms to that implementer, it could be acting in breach of Article 102. The German courts will not grant an injunction to a holder of SEPs who is acting in breach of Article 102.

22. The experts do not disagree significantly on the following summary of certain aspects of the German Proceedings. However, they do disagree as to whether it is complete. They also disagree whether it captures what Professor Meier-Beck describes as the “negotiation model” that the German court will consider when considering the FRAND defence, with Professor Chrocziel not accepting that there is any “negotiation model” that needs capturing:
- i) The German courts will first look at whether the SEP holder has drawn the implementer’s attention to the SEPs and explained the necessity of taking a licence. If so, the court will then consider whether the implementer has shown itself willing to take a licence in response to that information (by analogy with paragraphs 60 and 63 of *Huawei v ZTE*). No particular points are taken on this stage of the analysis and so I need say little more about it.
 - ii) The next question is whether a SEP holder is “willing” to grant a FRAND licence. That question is assessed initially by looking at the offer of a licence actually made by the SEP holder. If the offer is not “devoid of all reason”, also sometimes summarised as “obviously non-FRAND”, the SEP holder is likely to overcome this initial hurdle for these purposes. Professor Meier-Beck characterises the rationale for this relatively low initial bar as being that such an offer at least forms an initial framework within which the parties can work towards agreeing a FRAND licence (as to which see further below).
 - iii) If the SEP holder’s initial offer of a licence is “devoid of all reason”, the SEP holder will be treated as acting contrary to Article 102 and will not obtain an injunction in the infringement proceedings. Professor Meier-Beck’s explanation for this approach is that an initial offer of a licence that is devoid of all reason sets no framework for further discussion.
 - iv) Assuming that the SEP holder has made an offer that is not devoid of all reason, attention shifts to whether the implementer is “willing”, which focuses on the nature of the implementer’s counter offer and with Professor Meier-Beck also stressing the parties’ negotiations resulting from it.
 - v) The dispute resolution proposals that the SEP holder and implementer have made to each other are relevant to the assessment of their “willingness”. Dispute resolution proceedings that involve non-German courts are of potential relevance (although as will be seen from the section below, Professor Chrocziel and Professor Meier-Beck disagree as to the inferences that the German court would draw from the existence of the English Proceedings or any Interim Declaration that this court makes).
 - vi) If the implementer is assessed as being “unwilling” then it is likely that the SEP holder will obtain an injunction. In that case, the injunction is likely to be granted without any consideration by the German courts of what FRAND terms actually are.

- vii) If the implementer is assessed as being “willing” then the holder of the SEPs is unlikely to obtain an injunction and again, that determination can in principle be made without considering what FRAND terms of a global licence would actually be.
- viii) The German Proceedings are listed for a one-day hearing on 18 April 2024. That is not unusual for this kind of case. The court will undertake some pre-reading before that hearing. Its focus will be on written rather than oral advocacy and so much of the advocacy is considered as part of the court’s pre-reading. A decision whether or not to grant an injunction is likely to follow within a few weeks.
- ix) The process described above has, to date, led only to decisions either to grant or (much less commonly) to refuse a SEP holder an injunction. There has, to date, been no decision of the German courts as part of infringement proceedings relating to SEPs, in which the terms of a global FRAND licence, or the royalty that should be paid for such a licence, have actually been determined.

Disputed propositions of German law on FRAND

23. There was, however, a dispute between the experts on the following questions of German law:
 - i) Whether the German courts would regard the mere fact that Lenovo has made the Interim Licence Application as good evidence of its “willingness”. Professor Chrocziel thought that they would. Professor Meier-Beck disagreed.
 - ii) The degree of attention that a German court would pay, when assessing “willingness”, to any Interim Declaration that this court makes. Professor Chrocziel thought that, if such a declaration were made, it would be good evidence of Lenovo’s “willingness”. Professor Meier-Beck disagreed.
 - iii) Whether the German court will make a determination of what FRAND terms actually are. Professor Meier-Beck considers that, if the German court finds that Lenovo and InterDigital have been negotiating in good faith to seek to agree a FRAND result, but have failed to agree, the court cannot decide who is responsible for the failure without first deciding what FRAND terms actually are (or at least which terms from which a party refused to deviate are non-FRAND). Professor Chrocziel disagrees.
24. I am simply not in a position to decide between the competing opinions of the experts on the issues described in paragraph 23.i). Both experts’ views set out in their respective expert reports made sense. Professor Chrocziel saw the Interim Licence Application as an indicator of Lenovo’s attempts to advance the debate on what terms are FRAND and, accordingly, as an indicator of “willingness”. Professor Meier-Beck saw it as an attempt to bar the German court from making an injunction that was contrary to the court’s insistence on genuine two-way negotiations with a view to agreeing a FRAND licence and so as an indicator of unwillingness. Since neither expert was cross-examined, I do not consider that I am in a position to choose between those views. The same goes for the difference of opinion summarised in paragraph 23.ii).
25. For similar reasons, I am not able to decide between the opinions of the experts summarised in paragraph 23.iii) above. I do, however, observe that Professor Meier-Beck does not say that the German courts will determine a FRAND licence in all cases, or even that it will do so in this case specifically. His point is that paragraph [74] of the judgment of the German Supreme Court in *Sisvel v Haier* makes it clear that the German court can do so if it chooses.

26. On a balance of probabilities, I am not satisfied as matters stand that the German court will determine a FRAND licence in this particular case. First, the hearing on 18 April 2024 is just for a single day. Even acknowledging the German courts' focus on written, as distinct from oral, advocacy, I do not see how a FRAND licence could be determined following such a short hearing noting that Mellor J was able to decide on the terms of the Cellular PLA only following a trial lasting three weeks at which complicated expert and factual evidence was considered.
27. Second, the parties' positions in the German Proceedings as explained during the hearing before me do not seem likely to lead to a FRAND determination. Lenovo's position is that InterDigital's first offer was "devoid of reason" as it sought a royalty at a rate considered to be far in excess of FRAND. Therefore, Lenovo seeks to establish that the principle summarised in paragraph 22.iii) means that InterDigital should be denied an injunction without any consideration of the precise terms of a global licence that would be FRAND. Similarly, InterDigital's position is that Lenovo is "unwilling" and should be made subject to an injunction also without any determination of the precise terms of a global FRAND licence. Neither party seems to accept that the other has been negotiating in good faith. Therefore, I am not satisfied that, even if Professor Meier-Beck is right on the principle summarised in paragraph 23.iii), the German court will apply it in this case.
28. Third, while Professor Maier-Beck says that the German courts can determine a FRAND licence in infringement proceedings, it is common ground that they have never actually done so. That suggests they will not do so in this case.
29. Therefore, while I will not decide which expert's position on the issue summarised in paragraph 23.iii) is to be preferred, I do conclude that on a balance of probabilities, the German Proceedings will not result in the determination of a FRAND licence of Cellular SEPs in this case. As will be seen from paragraph 30.iv) and 30.v) below, that conclusion is not altered by the presence of the Orange Book offer.

The Orange Book dimension

Agreed propositions of German law relating to InterDigital's "Orange Book" offer

30. The parties are agreed on the following propositions of German law relating to InterDigital's Orange Book offer:
 - i) Under German contract law, it is possible to enter into a contract under which one of the parties is given a discretion to specify the nature of performance required by the other. For example, one party might be given a contractual right to specify, in its discretion, a payment obligation of the other party.
 - ii) Section 315 of the German Civil Code (*Bürgerliches Gesetzbuch*) regulates the way in which discretion can be exercised under such a contract. If a party disagrees with the way its counterparty has exercised discretion then it can apply to a German court for a determination of the specification that would be "equitable". The court's determination of that equitable specification then becomes binding on the parties.
 - iii) This procedure has been offered as a dispute resolution proposal in proceedings for infringement of SEPs in the past (for example in the Orange Book case itself). However, neither Professor Chrocziel nor Professor Meier-Beck is aware of any instance in which such an offer has actually resulted in the determination of an equitable royalty rate under Section 315.

- iv) The German Proceedings, which concern infringement of EP (DE) 420, will not, as matters stand, involve any determination of an “equitable” rate for a global licence of the Cellular SEPs. That is for the simple reason that proceedings under Section 315 can take place only where a contract has been concluded. Here, Lenovo has not agreed to take the licence of Cellular SEPs that InterDigital has proposed.
 - v) Even if Lenovo accepted InterDigital’s Orange Book offer, and sought a determination under Section 315, of an “equitable” royalty rate, that would require proceedings separate from the German Proceedings to be commenced.
31. Mr Chacksfield suggested in his closing submissions that Lenovo was asserting that InterDigital’s offer of a determination under Section 315 was “defective” because (i) it proposed a worldwide licence of Cellular SEPs and (ii) it provided for InterDigital, instead of Lenovo, to fix the royalty rate. However, while Mr Waldeck referred, in his first witness statement, to “doubts” as to whether the German courts would consider they had jurisdiction to determine a global rate, I do not understand that to be the position of Professor Chrocziel. Professor Meier-Beck had stated in his expert report that there was no obstacle to a Section 315 process being used to fix a worldwide royalty rate for Cellular SEPs. Indeed, he had suggested that in order for an Orange Book offer to be credible in the German Proceedings, it would have to propose a worldwide licence. Professor Chrocziel did not express disagreement with that conclusion. Moreover, while Professor Chrocziel suggested that it would not be “typical” for an Orange Book offer to give a holder of SEPs, as distinct from an implementer, the right to fix the royalty rate, he did not say that this feature would preclude the use of a Section 315 process.
32. Mr Waldeck’s views clearly command respect as he is experienced in this area. However, he is not an independent expert for the purposes of CPR 35 and, so is offering opinion evidence from the standpoint of a witness of fact. I will be guided more by the expert opinion of Professor Chrocziel and Professor Meier-Beck. I conclude that it is common ground between the independent experts that, if Lenovo accepted InterDigital’s offer of a global licence of SEPs under which InterDigital was entitled to fix the royalty rate, Section 315 could be invoked to result in the German court deciding a rate that is “equitable” for a global licence of the Cellular SEPs.

Disputed propositions on the Orange Book application

33. The experts were not agreed on whether, if Lenovo accepted the Orange Book offer, so that the German court determined an “equitable” royalty rate, that would necessarily result in the German court determining a FRAND rate.
34. Since I have not heard cross-examination of Professor Chrocziel or Professor Meier-Beck I am unable to determine whether there is any daylight between the concept of a “equitable” royalty rate and a “FRAND” royalty rate.

The Interim Licence Application - principles

Principles applicable to interim declarations generally

35. CPR 25.1(1)(b) gives the court power to grant an interim remedy consisting of an “interim declaration”. The parties’ submissions revealed a disagreement as to the general principles that the court should apply when deciding whether or not to exercise that discretion. In my judgment, InterDigital had the better of the argument on the principles that should govern an application for an interim declaration generally. I

summarise my conclusions on the principles generally applicable and give reasons for those conclusions in the remainder of this section:

- i) An interim declaration is, of course, still a declaration. Accordingly, the court should have regard to the principles applicable to the grant of declarations generally as set out in the well-known seven principles set out by Aikens LJ in *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387.
 - ii) An interim declaration is a discretionary remedy. It is for the court to consider the proper exercise of its discretion in the case before it.
 - iii) Where an interim declaration fulfils a function similar to an interim injunction, it can be instructive for the court to apply principles in *American Cyanamid v Ethicon* [1975] AC 396 by analogy in deciding how to exercise its discretion.
 - iv) However, applying *American Cyanamid* principles will not provide a complete answer in all cases since a court should be wary of granting an interim declaration on matters of substantive law that only permit of a final rather than a temporary answer. That risk is particularly acute where an interim declaration might be conclusive as to whether a particular act amounts to criminal conduct or not. It also arises where a court is being asked to make an interim declaration in relation to the contractual rights of parties to a private law contract.
 - v) If a court overcomes its reluctance to grant an interim declaration which is determinative of a particular matter, it is likely to be appropriate to require a “high degree of assurance” that the applicant is entitled to the declaration sought.
 - vi) When considering the exercise of discretion, it is legitimate for a court to have regard to the consequences that would flow if the interim declaration is or is not made.
36. The propositions set out in paragraph 35.i) and paragraph 35.ii) were not particularly controversial. A useful shorthand distillation of the principles applicable to declarations generally that is sufficient for the purposes of the Interim Licence Application can be found in the judgment of Neuberger J in *Financial Services Authority v Rourke* [2002] CP Rep 14:

It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration.

37. The proposition set out in paragraph 35.iii) was uncontroversial as far as it goes since the judgment of Kerr J in *The Secretary of State for Education v National Union of Teachers* [2016] IRLR 512 proceeded expressly by reference to the criteria set out in *American Cyanamid*. That was a case in which the Secretary of State sought an interim declaration that proposed industrial action was unlawful. At [33] to [35], Kerr J noted the similarities between that application and an application for an interim injunction restraining the industrial action. As a consequence of those similarities, he applied a test similar to that set out in *American Cyanamid* when deciding whether to make the interim declaration. However, whereas the *American Cyanamid* principle does not require a court to assess the merits on which the application is based (beyond concluding that it gives rise to a “serious issue to be tried”), Kerr J engaged in an examination of the merits because statute requires such an examination in the context of applications for injunctions to restrain industrial action.

38. The proposition in paragraph 35.iv) was controversial. Lenovo's case is that the court should generally apply *American Cyanamid* principles to applications for interim declarations with the consequence that Lenovo need only show a "serious issue to be tried" that the Interim Licence would be FRAND.
39. However that position is at odds with the judgment of the Court of Appeal in *N v Royal Bank of Scotland plc* [2017] EWCA 253. At [85] of that judgment, Hamblen LJ noted the submission that the declaration sought in that case "operates in much the same way as an interim injunction. It is both provisional and suspensory in nature, making a temporary declaration as to the state of the law or a party's rights whilst leaving the state of uncertainty to be determined at a full trial". However, he did not accept that submission, concluding at [88] that the first instance judge should not have made the declaration because it was determining substantive law questions that only permit of a final rather than a temporary answer. Hamblen LJ's conclusion involved the application of a different test from that set out in *American Cyanamid*.
40. In a similar vein at [25] and [26] of his judgment in *British Airline Pilots' Association v British Airways Cityflyer Limited* [2018] EHC 1889 (QB), Butcher J concluded that making an interim declaration in relation to the contractual rights of parties to a private law contract would be a "very exceptional remedy" reasoning that:
- to take an interim view of the parties' private law contractual rights, with effect on the parties which depends on that interim view, may give rise to a merely and explicitly provisional view creating adverse effect on the parties with no compensation to them if it is wrong.*
41. The proposition set out in paragraph 35.v) above comes from [89] of Hamblen LJ's judgment in *N v Royal Bank of Scotland* in which he set out the threshold that should apply if, contrary to his conclusion at [88], the declaration could properly be made.
42. I did not understand the proposition set out in paragraph 35.vi) to be controversial. Kerr J performed just such a balancing exercise in *The Secretary of State for Education v National Union of Teachers*.

Additional considerations arising in connection with possible influence on the German Proceedings

43. I agree with InterDigital that, if the sole purpose of the Interim Licence Declaration would be to influence the decision of the German court in the German Proceedings, that declaration should not be made. That follows from [51] to [52] of Arnold LJ's judgment in *Teva v Novartis* [2022] EWCA Civ 1617 as follows:
- ... it is wrong for an English court to make a declaration solely for the purpose of influencing a decision by a foreign court on an issue governed by the law of the foreign court. It is not the function of the courts of England and Wales to provide advisory opinions to foreign courts seised of issues which fall to be determined in accordance with their own laws. The English courts have no special competence to determine such issues. If anything, it is likely that they have less competence than the local courts. It makes no difference that the English court and the foreign court are applying the same basic law. Furthermore, comity requires restraint on the part of the English courts, not (to adopt Floyd LJ's graphic phrase) jurisdictional imperialism.*
44. InterDigital invites me to go further and conclude that, if the Interim Licence Declaration has any effect on the German Proceedings that is a negative feature that

should incline me against making it. InterDigital seeks to draw support for this proposition from the following passage of the judgment of Marcus Smith J at [22] of *Bank of New York Mellon v Essar Steel* [2018] EWHC 3177 (Ch):

Thus, I find that as between the parties before the court, the declarations sought have no clear utility. Moreover, if and to the extent that the declarations sought will have an effect on a foreign process, it seems to me that this is an undesirable side-effect of making the declarations, and a strong indicator that they should not be made. Given the existence of these foreign insolvency proceedings, to the extent that disputes have arisen in those proceedings, they should also be resolved in those proceedings.

45. However, this submission involves a failure to put the above quote in context. Marcus Smith J's point was not that if his declaration had an effect on foreign proceedings, that was necessarily a negative feature. Rather, his concern was that a declaration by him might have an effect on a third party, described in his judgment as the "Insolvency Resolution Professional" who was not party to the proceedings and so whose views on the matter could not be heard (see [21(5)] and [22(3)(c)] which immediately precedes the quote on which InterDigital relies).
46. The key question that emerges from *Teva v Novartis* is whether making the Interim Licence Declaration would be only for the purpose of influencing the German Proceedings. If making that declaration would serve some other genuine useful purpose, then the fact that it might also be of some interest in the German Proceedings is not a negative, particularly since both Professor Chrocziel and Professor Meier-Beck are agreed that the German Proceedings will pay some regard to dispute resolution mechanisms proposed in non-German proceedings.
47. However, I consider that the court's exercise of discretion entitles it to take into account considerations of relative utility. If a party will obtain some, but little, benefit from an interim declaration in English proceedings and is in substance seeking the declaration to influence foreign proceedings, the court can treat that as a negative feature of the application.
48. I was also referred to paragraphs [16] to [18] of the judgment of Evans-Lombe J, sitting as a judge of the Court of Appeal in *Royal Bank of Canada v Cooperatieve Centrale Raiffeinsen-Boerenleenbank* [2004] EWCA Civ 07 which set out the principles applicable to anti-suit injunctions. However, since I have been able to determine the Interim Licence Application without reference to principles applicable to anti-suit injunctions, I will not quote those paragraphs.

The Interim Licence Application - analysis

49. I will approach my task first by considering arguments that the parties advanced, grouped under various headings simply for the sake of readability. In doing so, I am not suggesting that the headings I use are constituents of the overall test. Rather, at the end of this section, I will apply what I have determined to be the correct approach to the exercise of my discretion in the light of my conclusions on the parties' arguments.

The effect of the Interim Declaration if made

50. By the Interim Licence Application, Lenovo seeks only a declaration that the terms of its proposed Interim Licence are FRAND. It recognises that the concept of "FRAND" can be applied to describe behaviour of both an implementer and a holder of SEPs, both before and after proceedings are taken in relation to those SEPs. However, Lenovo seeks no declarations as to the categorisation of InterDigital's behaviour as FRAND or

otherwise. A previous version of the Interim Licence Application sought a declaration to the effect that a “willing” holder of SEPs would enter into the Interim Licence. However, Lenovo no longer seeks a declaration in those terms.

51. Nor does Lenovo seek an order of the English court that compels InterDigital actually to enter into an Interim Licence with it. A previous formulation of the application did seek such an order, but the Interim Licence Application before me does not. That said, Lenovo hopes that, if the Interim Declaration is made, InterDigital will agree to enter into an interim licence on those terms. With a view to ensuring that the Interim Licence operates, from Lenovo’s perspective, as closely as possible to an actual licence, Lenovo proposes that, if the Interim Declaration is made (i) it will enter into an Interim Licence if InterDigital is willing to do so and (ii) if not, Lenovo will act, in all material and relevant respects, as if they were bound by the terms of the Interim Licence. Accordingly, if InterDigital is prepared to enter into an Interim Licence, Lenovo will pay it the royalty stipulated in that licence of US\$17.5 cents per unit. If InterDigital is not prepared to enter into the Interim Licence, Lenovo will instead pay these sums into court.
52. No doubt with an eye on the case law analysed in paragraphs 43. to 46. above, Lenovo submits that it does not seek the Interim Declaration solely to obtain support for its case in the German Proceedings. It argues that, even if there were no German Proceedings, the Interim Declaration would be of utility in the English Proceedings in “holding the ring” until a final FRAND licence can be determined.
53. I do not, however, consider that in the English Proceedings there is much of a ring that needs to be held. Where a claimant seeks an interim injunction restraining a defendant from taking certain action prior to trial, it does so to preserve benefits or legal rights that might otherwise be lost or prejudiced. Without an interim injunction, an employer whose employee who has taken confidential customer lists and proposes to set up a rival business, might need an interim injunction as otherwise its business might have suffered irreparable damage by the time the trial comes on. That is not the situation in these proceedings. Lenovo is perfectly able to conduct its business in England and Wales even though, from 1 January 2024, it has no licence of Cellular SEPs. It is not facing any injunction proceedings in England and Wales in which InterDigital seeks to prevent it running any aspect of that business. I do not, therefore, regard the Interim Declaration as being analogous to an interim injunction.
54. Lenovo points out precedents in which a court has determined the terms of interim licences in copyright disputes pending trial. However, the fact that interim licences might be useful in copyright proceedings says little about the utility of the Interim Declaration in these proceedings which are concerned with SEPs not copyright.
55. Lenovo argues that the wider proceedings in England will ultimately result in the determination of a global FRAND licence of Cellular SEPs. Therefore, it submits that it is entirely consistent with those proceedings for there to be an interim licence which preserves the legitimate interests of both Lenovo and InterDigital: Lenovo would be licensed on an interim basis and InterDigital would be entitled to an interim royalty.
56. However, I consider that to be a slender benefit from the point of view of the English Proceedings. First, as I have noted, the Interim Licence Application will not actually achieve the “consistent” result on which Lenovo relies since the Interim Declaration is only as to terms that would be FRAND and does not compel InterDigital to enter into any licence at all. Second, as I have said, Lenovo does not need an interim licence as it is not currently under threat of an injunction in England and Wales. Third, InterDigital

does not, at least as matters stand, seem to be greatly interested in receiving an interim royalty of US\$17.5 cents per unit.

57. Next, Lenovo points out that in the previous proceedings which determined a global licence for the period from 1 January 2007 to 31 December 2023, Mellor J decided that Lenovo should have to pay InterDigital an amount computed by reference to interest on the basis that it had not been paying a recurring royalty during that period. Lenovo argues that, if the Interim Declaration is made it will either pay the interim royalty of US\$17.5 cents per unit into court or, if InterDigital is prepared to enter into an actual licence, will pay that sum direct to InterDigital. Either approach would, it argues, reduce its exposure to interest once the global FRAND licence is determined.
58. There is something in that point, but not as much as Lenovo argues. If no Interim Declaration is made, then Lenovo will retain cash that it would otherwise have paid to InterDigital or paid into court. It will have the use of that cash in its business which will itself mitigate the effect of any future interest award that is made. It can also seek to agree terms with InterDigital under which some interim payments are made. If, as Lenovo argued, InterDigital is rejecting offers of interim payments in order to bolster its case that an injunction should be made in Germany on the basis that Lenovo is “unwilling”, Lenovo will be free to draw that matter to the attention of the judge who ultimately fixes the amount of any interest that Lenovo has to pay as part of the determination of a FRAND licence.
59. By contrast to what I consider to be relatively slender benefits in the English Proceedings, the benefits of the Interim Declaration that Lenovo seeks in connection with the German Proceedings are evident. Lenovo’s skeleton argument served in advance of the hearing made absolutely clear what it considers to be InterDigital’s unprincipled position in the German Proceedings. Lenovo argues that, having actively sought a determination of a FRAND licence in the English courts in the proceedings before Mellor J, InterDigital is now seeking to subvert Lenovo’s attempts to have a FRAND licence determined by the English courts. It argues that the only conceivable benefit of the German Proceedings from InterDigital’s perspective is to put pressure on Lenovo to agree a licence at supra-FRAND rates in order to stave off the threat of an injunction in Germany. It supports that assertion by arguing that in negotiations to date on the terms of a global licence of Cellular SEPs, InterDigital has been pressing for rates considerably in excess of the US\$17.5 cents per unit that Mellor J determined to be FRAND in the previous proceedings.
60. As explained below, I do not consider that an analysis of the parties’ respective “behaviour” advances the debate on the Interim Licence Application greatly at least in the present case. However, I agree with InterDigital that it is clear from the way in which Lenovo puts its case that by far the most substantial benefit that they seek from the Interim Declaration is an effect in the German Proceedings. Shortly put, Lenovo hopes that, if the Interim Declaration is made, either (i) InterDigital will enter into an Interim Licence, in which case the German Proceedings would fall away since there could be no infringement of EP (DE) 420 since Lenovo will be licensed or (ii) the German courts would label InterDigital “unwilling” as a result of its refusal to enter into the Interim Licence, determined by the English court to be FRAND, in which case InterDigital will not obtain an injunction in Germany.
61. That is an explanation of the substantial benefit that Lenovo seeks from the Interim Declaration. I am in no position to assess whether the Interim Declaration would actually provide Lenovo with that benefit. First, as matters stand, it appears unlikely that InterDigital will enter into an Interim Licence given its position, examined below, that it is not FRAND even on an interim basis. Second, I am in no position to assess the

weight that the German court would give to an Interim Declaration if made (see paragraph 24. above).

An “interim final licence” or a “final interim licence”?

62. The debate considered in this section was directed at the points made in paragraphs 35.iv) and 35.v) above.
63. Lenovo argues that, by its Interim Licence Application it is seeking only an interim remedy and does not seek to prejudge the amount of royalty that is FRAND which is for the court to decide. If the court decides that a higher, or lower, royalty is ultimately payable than US\$17.5 cents per unit, Lenovo accepts that there will have to be a “truing up” by reference to that final royalty.
64. InterDigital disagrees. Its first proposition is that Lenovo is seeking final relief because the court will never revisit the terms of Lenovo’s proposed Interim Licence. Instead, it will determine the terms of a FRAND final licence. In his oral submissions on behalf of InterDigital, Mr Chacksfield categorised the Interim Licence as a “final interim licence” rather than an “interim final licence” to illustrate the distinction he was making.
65. I do not, however, consider that this provides much of a guide as to whether the Interim Declaration should be made. Much interim relief is not revisited in the way Mr Chacksfield highlighted. Continuing with my example in paragraph 53., the terms of any interim injunction made against the employee will typically not be revisited at trial. If the employee breaches the terms of the interim injunction before trial, it will be no answer to say that the court decided to make no final injunction at trial. If the court considers that the interim injunction was too tightly drawn, it is unlikely to vary the interim injunction, but it will instead ensure that the final injunction is appropriately framed.
66. InterDigital had a further submission on this point, namely that even if the Interim Licence truly is “interim” in nature, it may have a final effect if, for example, it results in InterDigital failing to obtain an injunction in Germany. However, in my judgment, that does not make Lenovo’s application for relief “final”. The injunction considered in paragraph 53. may also have some final effect as it may mean that the employee loses an opportunity to enter into a contract with one of the customers on the list that never becomes available again. In my judgment, the way to deal with the allegation that an Interim Declaration would have a disproportionate and irreversible effect on the German Proceedings is as part of the process of weighing up balancing considerations that I have summarised in paragraph 35.vi) above.

How confident can the court be that the Interim Licence is FRAND?

67. The argument considered under this heading follows on from those in the previous section. InterDigital argues that, even if Lenovo is seeking “interim” relief either (i) it is not possible to determine that the Interim Licence is FRAND at the present interlocutory hearing or (ii) the court cannot be satisfied to the requisite standard that the Interim Licence is FRAND.
68. Lenovo’s approach relies on the proposition that rolling over the Cellular PLA and using that as the basis for the Interim Licence (including the royalty at US\$17.5 cents per unit) will produce an outcome that the court can be satisfied, to the requisite degree of assurance, is FRAND. That argument is illustrated by Lenovo’s submission that, if US\$17.5 cents per unit was a FRAND rate on 31 December 2023, the court can be suitably satisfied that it is a FRAND rate from 1 January 2024.

69. However, while the argument that not much can change in a single day is superficially attractive, it falls down on closer inspection. The Cellular PLA which Mellor J determined to be FRAND covered the period from 2007 to 2023. Therefore, the US\$17.5 cents per unit figure was not simply a snapshot of the FRAND rate as at 31 December 2023. It was a blended rate that synthesised a FRAND royalty for the entirety of the period which Mellor J had divided into three separate sub-periods for the purpose of his analysis. As Mr Bond and Ms Mattis explain in their evidence (which has not been tested by cross-examination and which I therefore accept), between 2007 and 2023, the bulk of the relevant devices using the Cellular SEPs would have been 3G and 4G. From 1 January 2024, the devices in question will largely be 5G. Yet the US\$17.5 cents per unit figure was calculated largely by reference to the “best comparable” that Mellor J could identify (see, for example, paragraph [611] of his judgment reported at [2023] EWHC 1583(Pat)) which was a licence concluded before the 5G standard was available.
70. In addition, the Interim Licence that Lenovo has proposed is a “running royalty” licence. Since it would result in InterDigital obtaining royalty payments at periodic intervals over the term of the licence, it would, as Ms Mattis explains in her witness statement result in InterDigital taking some risk on Lenovo’s future business and strategy generating sufficient income to pay the royalty. By contrast, if the Interim Licence provided for a lump sum royalty, InterDigital would not be running that risk. There is, therefore, a question as to whether a “running royalty” is FRAND.
71. Lenovo does not answer these points by putting forward valuation evidence as to the appropriate royalty rate for a licence of the Cellular SEPs beginning on 1 January 2024. Nor does it rely on evidence to counteract Ms Mattis’s point about the incremental risk that InterDigital face under a running royalty licence. Its position is that there is at least a “good arguable case” that the Interim Licence would be FRAND and that InterDigital remains free to make its arguments to the contrary at the substantive trial.
72. In my judgment, the approach reveals a flaw in the Interim Licence Application. The question whether the Interim Licence is, or is not, FRAND like the issues that Hamblen LJ considered in *N v Royal Bank of Scotland plc* referred to in paragraph 39. above, is really susceptible only to a final rather than a temporary answer. That follows from the sheer quantity of considerations that feed into the determination of what is FRAND. The figure of US\$17.5 cents per unit might still be FRAND from 1 January 2024, but if it is, that would largely be a coincidence. On the basis of an assertion based on a presumption of continuity and without evidence, I do not have a high degree of assurance that this is a FRAND rate.

Other elements to be weighed in the balance

73. Lenovo relies heavily on what it submits to be the unattractive behaviour of InterDigital in seeking an injunction in Germany while proceedings are ongoing in England that will determine a global FRAND licence of Cellular SEPs. It argues that similar behaviour of Panasonic drew sharp criticism from Meade J in *Panasonic v Xiaomi* [2023] EWHC 2872 (Pat).
74. That prompted InterDigital to respond that the analogy with *Panasonic v Xiaomi* is imperfect. InterDigital emphasises that, unlike Panasonic, it has not brought proceedings in the English courts to determine a FRAND licence from 1 January 2024 onwards. Its position is that a FRAND licence should be determined either by arbitration or in Orange Book proceedings in Germany. It relies on the principles of the English court that I have set out in paragraph 13 above as indicating that a patentee

typically has the right to control the courts in which infringement proceedings are brought and so where a FRAND defence is determined.

75. I respectfully agree with Meade J that patentees who seek injunctions overseas as part of a strategy to exact supra-FRAND rates should not expect that behaviour will go unnoticed when the English court exercises case management or other discretions. However, in the case before me, I do not need to decide whether InterDigital is doing this since the principles governing the making of interim declarations do not require an analysis of “behaviour” in the general sense. In saying this, I should not be taken as endorsing InterDigital’s attempts to seek injunctions, whether in Germany or elsewhere. I do entertain some concern that these actions may be part of an attempt to obtain supra-FRAND rates even though I make no finding to this effect.
76. Much of the argument on the Interim Licence Application addressed differences between the approaches the German courts and the English courts take to FRAND issues. I have set out, in some detail, the parties’ respective analyses of the German and English Proceedings. InterDigital at points in its argument suggested that Lenovo’s approach is based on an assertion that the German Proceedings are somehow “unfair” in the sense that they could result in Lenovo being subject to an injunction even though they are positively seeking to drive forward a FRAND determination in England. For my part, I did not understand Lenovo to be making a case based on “unfairness”. Even if it was, it would be quite wrong for me to express any views on the way the German courts choose to deal with FRAND matters: that is a matter entirely for them.
77. I do not need to make findings as to the general differences between the German approach and the English approach. I consider the finding in paragraph 29. to be significant as it serves as a guide to what is likely to happen in this case. Beyond that, I see no need for general findings as to differences between the proceedings. Nor do I need to decide whether InterDigital has the “right to choose” where a FRAND determination takes place since, given my conclusion in paragraph 29., it cannot have exercised such a right, even if it exists, as the German Proceedings will not result in a FRAND determination in this case.
78. I also consider InterDigital’s assertions as to the commercial disadvantages that it would suffer if the Interim Declaration is made. Ms Mattis explained in her witness statement that the Interim Declaration could lead to difficult or stalled negotiations with InterDigital’s licensees. She explains that, if the English court is seen as “confirming” a rate based on US\$17.5 cents per unit as FRAND, other licensees will either insist on that rate or decline to conclude negotiations based on a higher rate until these proceedings conclude with determination of an actual FRAND rate. She says that this would result in either deferred or reduced revenue for InterDigital with a corresponding effect on its ability to fund research and development to grow its business.
79. Lenovo’s response is that InterDigital’s licensees will see any Interim Declaration for what it is, namely a purely interim determination of what a FRAND rate is. However, that does not deal with Ms Mattis’s point. She is concerned, not with whether licensees understand the Interim Declaration or not, but how they will behave in response to it. Ms Mattis’s evidence goes to commercial disadvantages that InterDigital could suffer if the Interim Declaration were made. That evidence is perfectly plausible and I accept it.

Conclusion

80. The analysis above leads me to the clear conclusion that the Interim Licence Application should be refused.

81. This is not one of those cases where the Interim Declaration can be analysed in terms similar to an interim injunction (see paragraph 53. above). I will not, therefore, proceed by analogy with *American Cyanamid*.
82. As I have explained in paragraph 72., I see real difficulties in determining on an interim basis that the Interim Licence is FRAND. I consider that question likely to be capable of determination only on a final basis. That in itself is a strong indication that the Interim Declaration should not be made.
83. Even if that objection can be overcome, I consider I should make the Interim Declaration only if I have a high degree of assurance that the Interim Licence is FRAND. I have explained why I do not have that high degree of assurance.
84. A consideration of the advantages and disadvantages of making the Interim Declaration also points against making it. Making the Interim Declaration would at most confer a slender benefit on Lenovo in the English Proceedings. The substantial benefit that Lenovo seeks from the Interim Declaration is the ability to influence the outcome of the German Proceedings. While I consider that InterDigital overstates matters in classifying the Interim Declaration as tantamount to an anti-suit injunction, I do not consider that it would be appropriate for the court to make the Interim Declaration for the substantial purpose of influencing the German Proceedings. I am reinforced in that view by my conclusions as to the commercial disbenefits that InterDigital would suffer if the Interim Declaration is made.
85. Even if I were wrong about that, and it would be appropriate for the court to make the Interim Declaration in order to give Lenovo assistance in the German Proceedings, given that the divided expert opinion that I have highlighted above, I cannot be satisfied that the effect Lenovo seeks would actually be obtained in Germany.

The Stay Application

86. By the Stay Application, InterDigital seeks a stay of some, but not all, aspects of the English Proceedings pending resolution of the German Proceedings. InterDigital does not seek to stay those aspects of the English Proceedings that do not relate to Cellular SEPs since it accepts that those aspects do not overlap with the German Proceedings. As a consequence, it agrees that a proposed hearing in the English Proceedings to determine questions of jurisdiction should go ahead. In the English Proceedings, Lenovo has applied for expedition of the trial on FRAND matters. InterDigital considers that as a matter of principle, that application should be stayed. However, it argues that the practical significance of this is limited since existing case management directions mean that Lenovo's application for expedition will be heard only after the questions of jurisdiction have been determined, by which time it is expected that the German Proceedings will have concluded and the stay expired.
87. In *Conversant Wireless Licensing SARL v Huawei Technologies Co Ltd and others* [2020] UKSC 37, the Supreme Court noted the English courts' case management power to stay English proceedings 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. However, the Supreme Court noted that this would be justified only in "rare or compelling circumstances".
88. I have concluded that there are no proceedings pending in Germany that will result in a court determining FRAND terms for Cellular SEPs before the English Proceedings conclude. Accordingly, the precondition for the exercise of the power described in

Conversant is not present. Nor are such proceedings presently anticipated since, as matters stand, Lenovo is not prepared to enter into the licence that InterDigital proposes as part of its Orange Book offer and unless it does so, the jurisdiction of the German courts to determine an “equitable” royalty rate is not engaged.

89. There are likewise no current arbitration proceedings, nor are any arbitration proceedings contemplated since Lenovo has not accepted InterDigital’s offer of arbitration.
90. InterDigital clearly considers that Lenovo is being unreasonable in refusing to enter into such a licence or to engage with its Orange Book offer or to engage in arbitration. Proceedings such as this often involve parties alleging that the other is behaving unreasonably. I can understand why Lenovo is reluctant to accept wholesale InterDigital’s proposed licence as a precondition to an Orange Book process. InterDigital’s proposed licence does not include features that Lenovo considers desirable such as provision for general “patent peace” or a restriction on InterDigital continuing to seek injunctions. That said, I am not in a position to perform a full audit of both parties’ positions on the proposed Orange Book licence. However, I consider that I do not need to do so. The simple point is that there are no arbitration proceedings or court proceedings in Germany which I consider will determine a FRAND licence.
91. Nor do I consider that InterDigital’s proposed stay would achieve much in case management terms in any event. Many aspects of the English Proceedings would continue. Those aspects which InterDigital considers would be subject to the stay (such as the expedition application) look likely to arise for determination once the German Proceedings have concluded and the stay expired. Moreover, there is a clear risk that granting the stay would involve a refusal of Lenovo’s expedition application by default since InterDigital might say that with English Proceedings having been stayed, it has had insufficient preparation time to contest that application once questions of jurisdiction are resolved.
92. Finally, if I stay the English Proceedings, InterDigital might obtain an unintended benefit in the German Proceedings since it might be able to argue that, since there are no English Proceedings presently on foot, Lenovo cannot rely on their existence as part of their arguments on “willingness”.
93. In my judgment the balance falls firmly against allowing the Stay Application which is accordingly dismissed.

Disposition

94. Both the Interim Licence Application and the Stay Application are refused.