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Case No: HP-2024-000044

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

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 25 June 2025

Before :

THE HON MR JUSTICE MELLOR

Between :

(1) SAMSUNG ELECTRONICS CO., LTD
(2) SAMSUNG ELECTRONICS (UK) LIMITED

Claimants

- and -

(1) ZTE CORPORATION
(2) ZTE (UK) LIMITED
(3) NUBIA TECHNOLOGY CO., LTD
(4) LIVEWIRE TELECOM LIMITED
(5) EFONES.COM LIMITED

Defendants

Daniel Alexander KC and Henry Ward (instructed by **Kirkland & Ellis International LLP**)
for the **Claimants**

Sarah Abram KC and Ligia Osepciu (instructed by **Powell Gilbert LLP**) for the **Defendants**

Hearing dates: 4th & 5th June 2025

APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on the National Archives and other websites. The date and time for hand-down is deemed to be Wednesday 25 June 2025 at 10.30am.

THE HON MR JUSTICE MELLOR

Mr Justice Mellor:

1. This is my judgment on Samsung's application for interim licence declaratory relief. It is brought in Samsung's action seeking the determination by this Court of global FRAND terms for a cross-licence with ZTE covering their respective SEP portfolios in mobile phone technology. ZTE has brought its own action in Chongqing against Samsung seeking the determination by that Court of global FRAND terms for a cross-licence with Samsung covering the same SEP portfolios.
2. I have to add more detail below, but the nub of the issue is that both sides have made interim licence offers (although ZTE formally does not accept that the FRAND commitment requires a SEP holder to offer an interim licence). The substantial sum to be paid for the interim licence is agreed in a figure which is confidential ('**the Sum**'). The only material difference between the two offers is that acceptance of ZTE's offer requires that any adjustment of the terms of the licence, including the royalty, must take place in accordance with the final determination of FRAND terms in the Chongqing Proceedings.
3. As Arnold LJ has observed (at [153] of *Lenovo v Ericsson* [2025] EWCA Civ 182 ('*Lenovo CA*')): '*In the absence of a global dispute mechanism for determining FRAND disputes, or an ad hoc agreement to arbitration, the possibility of jurisdictional conflict is inescapable.*'
4. On this application I have to consider whether there is such conflict here and the nature of that conflict.

Introduction

5. By an application notice dated 11 March 2025, the Claimants ('Samsung') applied for the following interim declarations:
 - i) a declaration that the Defendants (ZTE) are in breach of their obligations of good faith under ETSI;
 - ii) a declaration that a willing licensor in the position of ZTE and a willing licensee in the position of Samsung would enter into an interim licence in respect of each other's standard essential patents (SEPs) with appropriate royalty terms to be determined by this Court, subject to adjustment and amendment upon final determination of global FRAND terms by this Court (or as otherwise agreed by the parties); and
 - iii) a declaration that if ZTE refuse to offer Samsung such an interim licence, ZTE are unwilling licensors (and unwilling licensees in view of the cross-licence).
6. The issues raised by such relief are now familiar:
 - i) Are ZTE in breach of their obligation to negotiate FRAND terms with Samsung in good faith?
 - ii) Would the grant of the declaration(s) serve a useful purpose?

- iii) Would the grant of the declaration(s) be contrary to comity with various courts in Brazil, Germany, the UPC, Hangzhou and Chongqing?
 - iv) What terms for an interim licence would be FRAND?
- 7. Before I can turn to consider these issues, I must set out the relevant legal principles and the considerable factual background.
- 8. In terms of the legal context, there is now a growing body of caselaw relevant to FRAND cases and also specifically to the issue of interim licence declarations: see *Panasonic v Xiaomi* [2024] EWCA Civ 1143 (*'Panasonic CA'*) and *Lenovo CA*. I should also mention *Alcatel v Amazon* [2025] EWCA Civ 43, but it is true the argument centred on *Panasonic CA* and *Lenovo CA*, the key passages in each of those cases, and the differences between the situations considered in those cases and this case.
- 9. ZTE say this case is different to *Panasonic CA* and *Lenovo CA*, and one key difference on which they rely is the fact that ZTE have offered Samsung an interim licence and on the terms which they seek, save in one respect. As I have mentioned, ZTE's latest offer includes a term that prospective and retrospective adjustment of all terms of the interim licence, including the royalty, must be in accordance with the final determination of FRAND terms in an action brought by ZTE in Chongqing (absent earlier agreement by the parties).
- 10. I acknowledge at once that in the terms of the interim licence which Samsung say are FRAND, Samsung include an equivalent term:

‘The terms (financial and non-financial) of this Agreement are subject to adjustment and amendment so as to bring those terms into line with the terms of the final global license determined to be FRAND by the High Court of Justice of England & Wales at the UK FRAND Trial, and subject to any later adjustments or amendments following any appeals in the UK FRAND Proceedings, or the license that is otherwise agreed between the Parties. Any adjustments or repayments due to either Party, if needed, would be made following the determination of the said Court-Determined License.’
- 11. ZTE make two key submissions:
 - i) First, ZTE submit that the position of each party on this application is the mirror image of the other and therefore, I infer, neither is acting in bad faith.
 - ii) Second, and in any event, ZTE submit that it is not bad faith for them to prefer Chongqing as the jurisdiction for the determination of global FRAND terms with Samsung, and suggest this follows from [153] of *Lenovo CA*.

Legal context and the applicable principles

12. The latest and most current account of the legal context was set out by Arnold LJ in *Lenovo CA* at [4]-[25]. This has the advantage of being up to date in terms of the latest tactics employed in FRAND disputes. Rather than repeat those paragraphs, they are to be treated as if set out in this judgment. I modify [26] to suit the facts here: this case is different to *Optis v Apple* in that Samsung have undertaken to enter into a cross-licence on the terms to be determined by the Patents Court as FRAND (subject to any adjustment on appeal), although ZTE have not.

Legal principles applicable to the grant of declarations

13. Again, it suffices to refer to [27]-[29] of *Lenovo CA*, which accurately summarise the principles applicable to the grant of final declarations. Neither side disagreed with those principles. The purpose of making the declaration must be not only useful but legitimate as well.
14. Further reference to *Lenovo CA* is required, but that is best done in the context of assessing the facts here.

And, specifically, to interim licence declarations in FRAND cases

15. In both *Panasonic CA* and *Lenovo CA*, the correct characterisation of the relief sought was in issue and, more specifically, whether the court is required to have a ‘high degree of assurance’ that the party seeking the relief was entitled to it.
16. As Arnold LJ explained in *Panasonic CA* at [71]:

‘71.....The expression “a high degree of assurance” comes from cases in which a party applies for interim relief which is likely to cause irremediable prejudice to the defendant if wrongly granted (see *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16, [2009] 1 WLR at [18] (Lord Hoffmann)) or whose effect will for one reason or another be determinative (see, for example, *Koza Ltd v Kaza Altin Isletmeleri AS* [2020] EWCA Civ 1018, [2021] 1 WLR 170 at [77] (Popplewell LJ) (interim injunctions) and *National Crime Agency v N* [2017] EWCA Civ 253, [2017] 1 WLR 3938 at [89] (Hamblen LJ, as he then was) (interim declarations)).

72. Panasonic argues that Xiaomi’s application is for relief which is intended to be determinative of what a willing licensor in the position of Panasonic would do in the period between now and the Patents Court’s determination. Furthermore, this is not an issue which will arise at trial. Given that the application has been made by way of an application notice during the course of proceedings under CPR Part 23, and which has not been determined by way of trial, the court is required to have a high degree of assurance that Xiaomi are entitled to the relief they

seek, albeit that Xiaomi do not have to establish their case to the summary judgment standard.

73. In my judgment Xiaomi's argument conflates two different things, which explains why their counsel's submission to the judge was equivocal. Xiaomi is correct that the standard of proof in civil proceedings such as these is the balance of probabilities. The "high degree of assurance" test is not concerned with the standard of proof, however. It is concerned with the extent to which a court dealing with an interim application should take the merits of the parties' substantive cases into account as opposed to considerations such as the balance of the risk of injustice. In the present case it is appropriate for a high degree of assurance to be required for the reasons given by Panasonic. For the reasons given below, however, this test is satisfied.'

17. Similarly in *Lenovo CA*, Arnold LJ had to clarify the nature of the relief sought by Lenovo. At [133] he said this:

'...Lenovo have not applied for an interim declaration pursuant to CPR rule 25.1(1)(b). They seek a declaration that will not be reconsidered at trial. Thus the application is for relief which is determinative of this particular issue. It is for this reason that a high degree of assurance is required: *Panasonic v Xiaomi* at [71]-[73].'

18. Although, as will appear, I find I have the necessary high degree of assurance, it strikes me that the situation presented in these FRAND cases is somewhat different to the cases referred to in [71] of *Panasonic CA*, although it depends on the level of generality at which one analyses the issues.

19. Arnold LJ also explained in *Alcatel v Amazon* at [75]:

"... Amazon's application for an interim licence will not require the court to determine most of the issues which will arise at the RAND trial. It will simply require the Court to determine (1) whether Amazon are entitled to an interim licence and (2) if so, what terms are appropriate. As can be seen from *Panasonic v Xiaomi*, the question of what terms are (F)RAND for an interim licence is quite different to the question of what terms are (F)RAND for a final licence, and determining such terms is a much more limited task. As Amazon submit, this is because the interim licence is only designed to hold the ring pending determination of the terms of the final licence, and the payments made pursuant to it will be adjusted to the extent necessary in consequence of the determination of the terms of the final licence."

20. I have the impression that those opposed to this type of declaration choose to emphasise the difference between interim and final licence terms by referring to the interim licence as a 'short-term licence'. This terminology was in play

in *Lenovo v Ericsson* and was adopted by Dr Laakkonen in his evidence on this application. However, it is important to realise that the goal of the willing licensee is a global FRAND licence to cover all use of the SEPs in issue, with a term of several years, consistent with industry practice and not merely a ‘short-term’ licence. The need for a ‘short-term’ licence arises because of the practice of SEP licensors to seek injunctive relief in other jurisdictions.

21. In this regard, it may be noted that in a FRAND action in the UK, it would be highly unusual for a SEP licensor to seek interim injunctive relief because in the vast majority of cases, damages would be an adequate (if not complete) remedy. This is why in the SEP licensors’ playbook, injunctive relief is sought elsewhere.
22. When judgment is given in a FRAND trial, the Court determines FRAND terms for the whole period in issue, which usually covers an unlicensed period in the past and a period extending into the future. Assuming the FRAND terms are accepted (and see below for when they are not), devices manufactured and sold in the future period are licensed. As for devices manufactured and sold in the past, appropriate payment is required (whether a lump sum or running royalty). The payment can be expressed as a release for past infringements or as part of a retrospective licence. Strictly, there is a difference, but the net effect is (or should be) the same: the willing licensee pays FRAND rates for both past and future, and the willing licensor receives those FRAND payments.
23. When the FRAND jurisdiction of this Court is invoked, and the claimant (whether licensor or licensee) undertakes to accept whatever terms the Court determines to be FRAND, it seems to me that it is inevitable that the Court will find what it considers to be FRAND terms – I leave out of account the most exceptional circumstances in which the Court might be persuaded that it should not determine FRAND terms at all, but in those cases the reasons would probably be apparent at the interim stage and would no doubt be taken into account when the Court decides whether to grant interim declaratory relief at all.
24. The significance of this, it seems to me, is that in the scenario under consideration, it is virtually inevitable that the SEP licensor will recover FRAND royalties (or equivalents thereof) for the past and future. Subject, therefore to the necessary adjustment when the final terms are found, both determinations involve and depend upon devices manufactured and sold in the past being effectively licensed (even if this happens retrospectively).
25. In other words, these situations involve far less uncertainty than is reflected in the [71] cases and almost no irremediable prejudice. This is why, in my view, it is not difficult to find the necessary high degree of assurance.

What if the defendant refuses to accept Court-determined FRAND terms?

26. If the Court determines FRAND terms and the defendant refuses to accept them, the consequences are different depending on whether the defendant is the SEP licensor or SEP licensee.

27. In the usual way, if a SEP licensee declines to accept FRAND terms, the Court will grant injunctive relief against it, the injunctions being limited to the jurisdiction of the Court and there have been instances where a licensee has chosen to exit the market (e.g. Oppo in Germany).
28. As far as I am aware, there has not yet been a case where a SEP licensor has declined to accept Court-determined FRAND terms but the consequences would appear to include the following:
 - i) First, the Court in question would be highly likely to declare the licensor to be unwilling.
 - ii) Second, it would be highly likely that the unwilling licensor would have to pay the costs of the FRAND trial, which experience shows can be substantial.
 - iii) Third, the effect of the declaration of unwillingness on proceedings in the Courts of other jurisdictions would be a matter for those Courts to determine.
 - iv) Fourth, there is a possibility that the reason why the licensor declined to accept FRAND terms determined by the UK Court was because it wished to hold out for FRAND terms determined by a different court. It would then be interesting to compare the FRAND ranges or rate determined by each Court and the reasoning which led to each result. There remains the possibility that each Court might be persuaded to take account of specific points in the other (e.g. a rate determined for the territory corresponding to the jurisdiction of the other Court) although sensible limits would have to be applied, to avoid going round in circles.
29. In a case involving a cross-licence, like the present, if the defendant, in its capacity as SEP licensee, refuses to accept the FRAND terms determined by the Court, the normal consequence would be the grant of injunctive relief.

Background – this litigation

30. It is necessary to summarise parts of the history of this dispute in order to assess a key plank of ZTE's submissions as to why they have not acted in bad faith: that the position of ZTE is the mirror image of that of Samsung. I set out much of the background in my earlier '**Listing Judgment**' in this action [2025] EWHC 705 (Pat), in which I explained my reasons for granting a degree of expedition for the FRAND trial in this action which will commence in January 2026. As I observed in argument, it may be necessary to put a slightly different slant on some of the background in the context of this application, due to the additional evidence filed. Hence the following paragraphs are based on but modified from paragraphs in my Listing Judgment, in which I relate the key events in chronological order and add certain observations.
31. Samsung commenced this action on 19 December 2024. As originally framed, Samsung alleged infringement of several 5G SEPs and the allegations were limited to use of 5G technology. Later, Samsung added allegations of

infringement relating to 4G technology, adding another two SEPs to the action which were said to cover both 4G and 5G technology.

32. The relief originally claimed by Samsung is in familiar form for a FRAND case. The principal claim is for the determination of global FRAND terms for a licence to the allegedly infringed SEPs pleaded, including a cross-licence. The injunctions are sought only if ZTE refuses to enter into a FRAND licence on the terms determined by this Court.
33. On 20 December 2024 (i.e. one day after the commencement of this action), Samsung filed an EU law competition claim against ZTE in Frankfurt (the '**Frankfurt Proceedings**').
34. On 23 December 2024 (i.e. two working days after the commencement of this action), ZTE commenced proceedings in the Chongqing Intermediate People's Court in China seeking a determination of the terms of a global FRAND cross-licence between the parties covering the parties' wireless communication SEPs (2G-5G) (the '**Chongqing Proceedings**').
35. Samsung challenged jurisdiction in the Chongqing Proceedings, that challenge being rejected in a Judgment dated 4 June 2025 – I was provided with a machine translation of that Judgment at 2pm on 5 June 2025. That challenge has caused some delay to the progress of the Chongqing Proceedings. At the time of the Listing Application, Samsung estimated that the trial in those proceedings is likely to take place between January and March 2026. ZTE were content to go along with that, but it remains a curiosity that ZTE have not given their estimate of when that trial might be completed. I do not believe I have a reliable estimate of when a final determination of global FRAND terms might be provided in the Chongqing Proceedings. Whether it happens extremely (and possibly unrealistically) quickly by January 2026 or whether the Chongqing court takes longer is entirely a matter for that court and its procedures, and it does not matter much, if at all, how long the Chinese courts take so far as this application (or this action) is concerned. The reason for that is simple: I am engaged in case management of this claim. Case management (and ultimate determination) of the Chongqing Proceedings are entirely a matter for the Chinese courts and there is no reason or basis for the English Court to interfere. This is basic comity.
36. On 1 January 2025, ZTE commenced the following actions for infringement of various European Patents. As is usual in Germany and in the UPC each action involves one patent:
 - i) an action for infringement of EP(DE) 2,654,356 in Munich ('**ZTE Munich 1**').
 - ii) an action for infringement of EP 3,905,730 in the UPC ('**ZTE UPC 1**').
 - iii) an action for infringement of EP 3,557,874 in the UPC ('**ZTE UPC 2**').
37. Also on 1 January 2025, ZTE wrote to Samsung (i) inviting it to agree to the determination of FRAND terms for a global cross-licence in the Chongqing Proceedings and (ii) offering to stay or terminate all other global litigation (as

to which see below) in the event of Samsung's agreement ('**ZTE's Global Litigation Standstill Offer**'). That Offer has not been accepted by Samsung. I understand it remains open.

38. In passing, I have reversed the sequence of these events on 1 January 2025 because the actions were commenced before Samsung could have even started to consider the offer. In other words, the offer necessarily had to be considered against the backdrop of infringement claims having commenced in jurisdictions known to determine infringement speedily. ZTE were holding out an olive branch in one hand but with a sword in the other.
39. On 10 January 2025, ZTE commenced a second action for infringement in Munich ('**ZTE Munich 2**').
40. On 15 January 2025, ZTE commenced an action for infringement in Brazil ('**ZTE Brazil**').
41. On 16 January 2025, ZTE commenced two actions for infringement in Hangzhou ('**ZTE Hangzhou 1 & 2**').
42. On 23 January 2025, ZTE obtained a preliminary injunction against Samsung in Brazil, apparently on an *ex parte* but on notice basis.
43. On 24 January 2025, Samsung challenged jurisdiction in the Chongqing Proceedings.
44. In this action, although jurisdiction was initially disputed by ZTE, ZTE dropped their jurisdiction challenge and served their Defence and Counterclaim on 11 February 2025. A hearing had already been appointed for the determination of ZTE's jurisdictional challenge, floating over 26-28 March 2025, but this was re-purposed as the hearing of the CMC.
45. The listing hearing took place on 13 March 2025 and I announced the result at the conclusion of submissions, providing my reasons in the Listing Judgment on 24 March 2025.
46. The Claim Form and Particulars of Claim were amended by agreement and served on 21 March 2025. The amendments to the relief claimed in the Claim Form were to add three paragraphs concerning interim declaratory relief and consequences therefrom.
47. The CMC was set to take place on 27 March 2025, but the parties agreed a draft Order which I made on 26 March 2025. For present purposes it is relevant to note that the parties agreed the sequence of trials, with the FRAND trial first, listed to commence in January 2026, with two technical trials taking place in March and May 2026.
48. On 14 February 2025, Samsung proposed that the parties commit to enter into the English Court-Determined Licence and bring an end to all other proceedings. ZTE has not accepted that offer.

49. On 25 February 2025, Samsung brought anti-trust proceedings in the US District Court for the Northern District of California (the '**NDCA Proceedings**').
50. ZTE say that the precise nature of the relief sought in the US Proceedings is currently unclear. However, ZTE contended that it appears to include anti-suit type relief preventing ZTE's pursuit of its foreign patent infringement actions (see below) and, potentially, compelling ZTE to give an undertaking to this Court to enter into the FRAND licence determined by this Court, an undertaking which could not be compelled by the English Court itself.
51. Samsung dispute this characterisation of the NDCA Proceedings. Mr Baldwin's evidence was that the NDCA Court will not determine the terms of a global FRAND cross-licence between Samsung and ZTE but will instead focus on the conduct of ZTE to ascertain whether it has breached its contractual FRAND obligations and/or US antitrust law. Perhaps more pertinently, there was no suggestion that the relief highlighted by ZTE would be likely to be granted in the period between now and the FRAND trial in this jurisdiction. Even if some of it is, ZTE would have only themselves to blame.
52. On 28 February 2025, as well as serving their Reply, Samsung sought ZTE's consent to amend the Particulars of Claim in these proceedings, *inter alia*, to (i) allege infringement of two additional Samsung 4G/5G SEPs, (ii) seek declarations of invalidity and/or non-essentiality in respect of a ZTE 4G SEP, (iii) extend the scope of FRAND licence that the Court is asked to determine to cover earlier ETSI standards (2G-4G) as well as 5G and (iv) seek a declaration that the FRAND Commitment requires ZTE to enter into an '**Interim Licence**' whereby ZTE's ETSI SEPs are licensed to Samsung pending a determination of FRAND terms. Samsung contends that the appropriate form of the Interim Licence is a cross-licence of the parties' ETSI SEPs that is adjustable so as to be brought into line with the FRAND licence determined by the English Court. ZTE helpfully consented to the proposed amendments.
53. Also on 28 February 2025, Samsung launched:
 - i) a counterclaim in the ZTE Munich 1 proceedings for infringement ('**Samsung Munich Counterclaim**').
 - ii) two claims for infringement in the UPC (**Samsung UPC 1 & 2**).
 - iii) two claims for infringement in Hangzhou (**Samsung Hangzhou 1 & 2**).
54. On 6 March 2025, Samsung launched an infringement claim against ZTE in Munich together with a request that it be heard with Samsung's counterclaim in ZTE Munich 1 ('**Samsung Munich 2**').
55. On 11 March 2025, ZTE made what was referred to as the '**ZTE March Interim Licence Offer**'. I discuss this further below, but it required a very substantial upfront payment based on the mid-point between the parties' latest offers for a licence lasting several years. It also required:

- i) Prospective and retrospective adjustment of all terms, including the royalty, in accordance with the final determination of FRAND terms in the Chongqing Proceedings; and
 - ii) Stay or dismissal without prejudice of all other proceedings between the parties pending the conclusion of the final licence.
- 56. Also on 11 March 2025, Samsung launched this Interim Licence Application, although ZTE acknowledged that it had been signalled by the draft Particulars of Claim sent on 28 February 2025. ZTE referred to the terms proposed in the Application as the ‘**Samsung March Terms**’. In comparison with the features of the ZTE offer I have just set out, this offer required:

‘Prospective and retrospective adjustment of all terms, including the royalty, in accordance with the final determination of FRAND terms in these English proceedings.’
- 57. During the listing hearing on 13 March 2025, Samsung made a further standstill proposal, whereby the parties would agree to stay or discontinue all injunctive proceedings, without prejudice to the continuation of these proceedings as well as the Chongqing, Frankfurt and US Proceedings.
- 58. In the period when I was preparing my Listing Judgment, Samsung offered a unilateral undertaking not to enforce any injunctions obtained against ZTE in other jurisdictions pending the determination of FRAND terms in these proceedings, provided that ZTE similarly refrains from enforcing injunctions during that time. Dr Laakkonen said in his evidence that Samsung sought to withdraw that offer on 24 March 2025.
- 59. I need to pick up two points from my Listing Judgment which was handed down on 24 March 2025.
- 60. First, at [36]-[37] I was critical of the ZTE March Interim Licence Offer due to the upfront payment which it required from Samsung. At [37] I concluded:

‘37. Naturally, the interim licence offers are confidential, but I will say that the sum payable in ZTE’s offer seems unnecessarily and unreasonably high and provides some further indication of hold up.’
- 61. In response, on 16 April 2025, ZTE made their ‘**ZTE April Interim Licence Offer**’, in which they sought to address my criticisms. Ms Abram KC relied on three particular revisions in this offer as evidencing ZTE’s good faith:
 - i) First, the fact that the initial upfront payment was brought down to the figure proposed by Samsung.
 - ii) However, this offer also required further rolling monthly payments. For reasons I need not go into, there were problems, so far as Samsung was concerned, with the proposed rolling payments, and ZTE waived these

on 16 May 2025, the second indication of good faith, according to Ms Abram.

- iii) Third, whereas the ZTE March Interim Licence Offer required the stay or dismissal without prejudice of *all* other proceedings between the parties pending the conclusion of the final licence (which would have included this action), the revision excepted the FRAND trial in this action.
62. ZTE emphasised that both the March and April Interim Licence Offers remained open for acceptance.
63. In May 2025, I understand that the parties commenced a mediation process, something greatly to be encouraged.
64. On 12 May 2025, Samsung served updated proposed interim licence terms (**‘the Samsung May Terms’**), modifying the Samsung March Terms in certain respects. The upshot was, as ZTE submitted and Samsung agreed:

‘The only material difference between the ZTE April Interim Licence Offer and the Samsung May Terms is, therefore, as to the forum that will determine FRAND terms.’

65. In my Listing Judgment (and this is the second point I need to pick up) I commented that it appeared that there were only two sets of proceedings in which a Court is being invited to set global FRAND terms between Samsung and ZTE: this action and the Chongqing Proceedings. On this application ZTE drew my attention to the Frankfurt and NDCA proceedings. However, Dr Laakkonen’s evidence on these two sets of proceedings did not persuade me that global FRAND terms are likely to be determined in either. The possibility is mooted in Samsung’s Frankfurt pleading in a very tentative way. So far as the NDCA proceedings are concerned, Dr Laakkonen draws attention to Samsung’s request for specific performance of ZTE’s contractual obligations. He characterises those proceedings as designed by Samsung to apply pressure to ZTE to terminate the Chongqing Proceedings. Overall, it seems extremely unlikely that a determination of global FRAND terms will take place in the NDCA proceedings prior to either a determination in this action or in the Chongqing Proceedings. I realise that, in the current environment, parties in this field are not shy of duplicative proceedings but I doubt that many courts would decide they should spend time providing a *third* determination of global FRAND terms, but that is a matter to be determined by the court or courts in question.

The respective positions in outline

66. With that overlong introduction in mind, I can turn to consider the parties’ respective positions. I start with an outline of each.
67. Samsung’s position, in essence, was that this case required a straightforward application of the principles in *Lenovo CA*. Invoking *Panasonic CA* at [79] & [80], Mr Alexander KC for Samsung emphasised that for a SEP licensor the

remedy is a financial one. So far as the SEP implementer is concerned, it is entitled to a licence from day one and entitled not to have its business interrupted. As held in *Interdigital v Lenovo*, the SEP implementer must pay from day one and is well advised to set aside funds to pay the necessary royalties since no limitation period applies to the relationship between willing licensor and willing licensee.

68. Between these two parties, day one was the day after the expiry of the previous cross-licence between them. It is agreed that a net payment will be due from Samsung to ZTE. Samsung want to pay the Sum, which is the mid-point between the respective parties' estimates of the royalty fee which is due for the period until final FRAND terms are decided.
69. In the context of the injunctive relief sought, as Mr Alexander KC observed, the bigger the implementer the greater the damage that an injunction based on a single SEP can cause.
70. Samsung acknowledged that, due the narrowing of the distance between the interim licence terms offered by each side, the principal (and perhaps the only) dispute between the parties was whether the interim licence should include the term insisted upon by ZTE.
71. ZTE contended as follows, and I quote from their Skeleton:
 - i) 'ZTE is not in breach of its obligations of good faith. Unlike the licensors in the earlier cases relied on by Samsung, ZTE has actually offered to enter into an interim licence with Samsung (i.e. precisely what Samsung claims to want).
 - ii) The critical disagreement between the parties is that, whereas Samsung wishes the interim licence to be subject to adjustment by the English Court, ZTE has offered an interim licence subject to adjustment by the Chinese Court in Chongqing, which is seised of parallel proceedings. The parties are therefore at a stalemate as to which court should set FRAND terms for a global cross-licence. There is no proper basis for the English Court to cast doubt on the legitimacy of the Chinese proceedings. If the English Court were to make the declarations sought by Samsung, it would in effect be saying that its FRAND determination must be preferred over that of the Chinese Court. By its application, Samsung is therefore inviting the English Court to engage in an act of jurisdictional imperialism.'
72. ZTE also submitted:

'There isno legal basis for the Interim Licence Declarations sought. The Declarations would not serve any useful purpose as ZTE, having already made two offers of an interim licence adjustable by its preferred forum, has no intention of granting an interim licence on the terms sought by Samsung, which would require ZTE to give up its preferred forum. In the circumstances,

the Declarations would mark this Court's disapproval of or contempt for the Chongqing Proceedings in breach of comity.'

73. Before proceeding to address the four issues I set out above, there are some issues I wish to clear out of the way.

The terms of Samsung's Interim Licence Offer

74. ZTE drew particular attention to some issues they said arose on Samsung's interim licence offer and the relief sought.
- i) Ms Abram KC's first point was that the or a purpose of the second declaration sought (see 5.ii) above) was to seize the jurisdiction of the English court. However, this Court already has jurisdiction and the second declaration does not change that.
 - ii) The second point was not mentioned in ZTE's Skeleton but was developed in oral submissions. Ms Abram KC suggested that clause 3.2 only imposed a standstill on new claims, leaving Samsung free to continue with their injunctive proceedings already on foot. If correct, this would have been a significant point against the grant of the relief sought. It would also have been a surprising stance for Samsung to take. In his reply, Mr Alexander KC was clear that this was not what was intended. Reading the clause again, the possible ambiguity would be easy to remove by inserting 'any existing and all new actions' in place of 'any and all new actions' or such other wording as the parties are able to agree.
75. I raised two further points, the first being similar to a point I raised in the listing hearing, about what Samsung proposed as regards the other proceedings they have in being against ZTE. Since there are many possible permutations, I invited Samsung's solicitors to consider them and send me a letter setting out their position after the hearing. The key paragraph reads as follows:

'On the assumption (which we consider to be implicit in the Court's question) that (i) the Court makes the interim licence declarations sought, (ii) ZTE offers and the parties enter into the interim licence on terms ordered by the Court within seven days of the Court's Order, and (iii) ZTE is itself prepared to stay all parallel/foreign actions it commenced or initiated against Samsung (other than the Chongqing proceedings) until the parties' execution of the final FRAND licence or, if this is not possible, move to dismiss them without prejudice and not re-file until such time, Samsung will apply forthwith to the relevant courts to stay (or the equivalent in local law) all parallel/foreign actions it has commenced or initiated against ZTE until the parties' execution of the final FRAND licence or, if this is not possible, move to dismiss them without prejudice and not re-file until such time, including (for the avoidance of doubt) the Frankfurt and NDCA proceedings, with the exception (naturally) of these UK proceedings.'

76. This seemed to me to reflect the *quid pro quo* I had in mind, namely: if the interim licence the subject of my declaration is taken up, Samsung will not proceed with any of the other actions they have brought against ZTE in this dispute, so that the parties can then concentrate solely on the determination(s) of global FRAND terms.
77. My second point, raised late on the first day, was exploring whether there were ways to craft an interim licence which did not specify the Court or methodology by which any adjustment to the interim licence may be made. Samsung prepared a note overnight addressing this issue, which persuaded me that (a) these ideas would only create unnecessary uncertainty and procedural complexity and (b) the nettle should be grasped now.
78. Accordingly, I leave aside any consideration of how, at the final FRAND trial, the Judge may consider whether, and if so how, to adjust the FRAND terms (including the royalty) in the light of developments elsewhere.

Samsung's submissions regarding the Chongqing Proceedings

79. Samsung's evidence contained a number of criticisms of Chinese law, the approach to FRAND cases in China, and some of the Chongqing Court itself. Submissions were also made about the significance of ZTE proceeding in its 'home' court in contradistinction to this Court which Mr Alexander KC characterised as neutral and with well-respected expertise in dealing with FRAND disputes. All these points were developed as diplomatically as possible by Mr Alexander KC in submissions. In the course of submissions, I observed that the Chinese courts were 'quick learners'. This was not intended as any sort of criticism, merely an observation that the Chinese courts have already demonstrated their ability to adapt their law and procedures to new challenges – for example, the decision of the Supreme People's Court in *Oppo v Sharp* that Chinese courts have jurisdiction in an appropriate case to determine global FRAND terms. What I had in mind was the point that whatever innovations and developments occur in FRAND cases around the world, Chinese Judges will consider them and adopt them if they consider it is appropriate.
80. The key point, however, is that all those matters are for the Chinese courts to decide.
81. I do not find it necessary to address any of these criticisms advanced on behalf of Samsung for a number of reasons:
 - i) First, because the evidence in support of these criticisms was less than compelling. There was no expert evidence filed in support. In this regard I accept Ms Abram KC's point, founded on *Altimo Holdings v Kyrgyz Mobil* [2011] UKPC 7 at [93]-[98] that any allegation of bias or procedural unfairness needs to be made in crystal clear terms and be supported by cogent evidence.

- ii) Second, if I was forced to assess these criticisms based on the inadequate evidence base, I would be likely to reject them or place no weight on them.
- iii) Third, even if appropriate expert evidence had been filed as to the current practice of the Chinese courts, I have my doubts whether accurate predictions could be made as to how the Chinese courts might develop their law and procedures in the future.
- iv) Fourth, I acknowledge the point made by Arnold LJ in *Nokia CA* at [79] regarding the significance of the Chinese Courts applying Chinese law and not French law to the interpretation of the ETSI terms, but I had no evidence to indicate the significance, if any, of that point.
- v) Fifth, what the Chinese courts do or don't do in the action brought by ZTE against Samsung in Chongqing is a matter entirely for them. In the UK, Patents Judges encourage, even require the parties to keep us informed of decisions in other European Patent jurisdictions and I have no doubt that, as this action proceeds, this Court will be kept abreast of developments in the Chongqing Proceedings as well as other proceedings in this dispute, but we have no role, let alone any jurisdiction in the proceedings in other jurisdictions.
- vi) Sixth, because although it is apparent that Samsung felt the need to argue these points, I do not find any of them necessary for a decision on Samsung's application. I suspect that, on reflection, Samsung will accept that these points should not have been raised.
- vii) The Seventh point is one I discuss next.

Forum conveniens issues

- 82. In my Listing Judgment, I commented at [79] that at times during that hearing, an observer would be forgiven for forming the view that I was being asked to decide which set of FRAND proceedings should be allowed to continue or which FRAND decision should prevail. The same was true at this hearing. Once again, I emphasise that my judgment on this application does not involve such decisions. I am simply exercising the jurisdiction of this Court which Samsung has invoked and ZTE accepted.
- 83. The points which Mr Alexander KC for Samsung was keen to emphasise were that:
 - i) ZTE withdrew their challenge to the jurisdiction of this court.
 - ii) ZTE had not sought a case management stay of this action in favour of the Chongqing Proceedings (suggesting that if ZTE had done so, they would have failed).
 - iii) ZTE should not be permitted to achieve the equivalent via their interim licence offer or their resistance to this application.

84. So far as ZTE was concerned, the revision in the ZTE April Interim Licence Offer removed the requirement for a stay or withdrawal of this action, thereby largely side-stepping any *forum conveniens* issue.
85. As I discuss below, one of the possible outcomes from this application is that both sets of FRAND proceedings continue to trial, assuming the parties can contemplate incurring two sets of costs.

Differences between this case and Panasonic CA and Lenovo CA

86. An important part of ZTE's case was that the facts and circumstances in *Panasonic CA* and *Lenovo CA* were different to the present situation. Indeed, ZTE's skeleton included their characterisation of those two cases and set out their contentions as to the similarities and differences to the current situation.
87. Although I have kept this section of their skeleton in mind at [48]-[58], it is not necessary to set out their contentions. It is axiomatic that each case turns on its own facts, even if there appear to be common features. In what follows I have taken into account the differences which ZTE chose to emphasise, notably that in both *Panasonic CA* and *Lenovo CA*, no other court was going to determine global FRAND terms, meaning that the English Court's determination was 'the only show in town'.

Two points developed in oral submissions by ZTE

88. Next I need to mention two particular points raised by Ms Abram KC in her oral submissions:
- i) First, based on *Optis v Apple (Trial F)* [2021] EWHC 2564, Meade J, that a party cannot be required to choose to elect between being enjoined and signing up to FRAND terms until a patent has been found valid and infringed. I return to this submission later.
 - ii) Second, based on the judgment of Meade J in *Nokia v Oppo* [2023] EWHC 1912 (Pat) (*'Nokia Meade J'*), that the party which was going to be the payee under a licence is entitled to choose which FRAND offer to take, when there are several FRAND offers in the FRAND range. Ms Abram KC submitted that it followed that ZTE, as the net payee, was entitled to choose whether the FRAND licence was to be settled by the English Court or by the Chongqing court.
89. Although ZTE's skeleton cited both *Nokia v Oppo* [2022] EWCA Civ 947 (*'Nokia CA'*) and the later *Nokia Meade J*, I found it curious that this second submission was nowhere mentioned. Nonetheless, I deal with it on its merits.
90. The first point to make in response is that ZTE's argument seems to suggest that ZTE will secure or expect to secure a higher net payment from the Chongqing Proceedings. The second point is that it seems to be based on a misunderstanding of the concept of the FRAND range. Depending on the evidence, the English Court may well be equipped to specify a FRAND range for the licence which Samsung needs from ZTE and for the licence which ZTE

needs from Samsung. Each licensor will be able to choose within the FRAND range and the net payment(s) can then be determined.

91. In an ideal world, the global FRAND terms determined by any court would be the same. In practice, because the evidence heard and accepted by the English Court may well be different to that heard and accepted by the Chongqing Court, the two Courts might reach differing conclusions, but one would hope their FRAND ranges would overlap to a significant extent.
92. All that said, Ms Abram KC's second submission seems to contain a non-sequitur. I do not see why the ability to choose in the FRAND range necessarily entails the right to choose jurisdiction for the determination of FRAND terms. Furthermore, if this was a valid point, it would have been made on ZTE's challenge to the jurisdiction of the English Court and/or an application for a case management stay of this action.

Are ZTE in breach of their obligation to negotiate FRAND terms with Samsung in good faith?

What terms for an interim licence would be FRAND?

93. Due to the nature of the dispute here, it is convenient to consider the first and fourth issues together.
94. I have set out the background at length above and I can now state some conclusions. From all these developments, the following points stand out, in my judgment.
95. First, Samsung commenced this action with a view to the Court determining global FRAND terms for a cross-licence with ZTE. The only injunctive relief sought was final relief, there to persuade ZTE to accept the FRAND terms determined by the Court. There was no possibility of any injunctive relief being granted by the English Court pending the FRAND trial. Furthermore, the commencement of this action was not accompanied by Samsung seeking injunctive relief in any other jurisdiction, as far as I am aware.
96. Second, having started the Chongqing Proceedings, ZTE then went on the offensive on 1 January 2025, with the start of their campaign of seeking injunctive relief in jurisdictions known to decide upon and grant injunctive relief relatively speedily (Brazil, Germany and the UPC. I do not have information about the speed of proceedings in Hangzhou, but they may well fit this description as well). I acknowledge ZTE's Global Litigation Standstill Offer communicated on 1 January 2025, but as I have said above, this was ZTE holding out an olive branch with one hand and a sword in the other.
97. Third, Samsung then retaliated, bringing (a) its own claims for injunctive relief in Germany, the UPC and Hangzhou and (b) the further claims in Frankfurt and NDCA. I am satisfied that, but for the wave of litigation brought by ZTE, Samsung would not have started their retaliation. In this regard, I am well aware that ZTE say the aim in the Frankfurt and NDCA proceedings is to apply pressure on ZTE to terminate the Chongqing Proceedings. Apart from the

waste of costs, the pressure appears to me to be either minimal or inconsequential, from ZTE's point of view.

98. Fourth, I have set out the various offers made by each side and the development of those offers. In the context of this action and this impending application, it is not at all surprising that ZTE has narrowed the gap between the respective offers. Although, as I have indicated, Ms Abram relied on this as evidencing ZTE's good faith, I have to look at ZTE's overall conduct.
99. In these circumstances, a now familiar and obvious question arises: *what is the point of ZTE pursuing the Brazilian, German, UPC and Hangzhou proceedings and attempting to exclude Samsung's products from those commercially important markets, with all the massive attendant effort and expense for both parties?* cf. the judgment of Arnold LJ in *Lenovo CA*:

'108. In those circumstances, Lenovo contend that the central question posed by this Court in *Panasonic v Xiaomi* at [82] also arises here: what is the point of Ericsson pursuing the Brazilian, Colombian and US proceedings, and attempting to exclude Lenovo's products from those commercially important markets, with all the massive attendant effort and expense for both parties? Lenovo argue that, just as in *Panasonic v Xiaomi*, there can only be one answer to that question: Ericsson wish to coerce Lenovo into accepting terms more favourable to Ericsson than the English courts will determine to be FRAND.'

100. Understandably, ZTE were alive to the relevance of this question and sought to deflect its force. In his evidence on behalf of ZTE, Dr Laakkonen explicitly acknowledged that it was ZTE's aim to try to force Samsung into accepting that global FRAND terms would be decided in Chongqing, the threat being that if Samsung did not agree, it faced possible injunctive relief excluding them from major markets. Dr Laakkonen (and ZTE) seemed to think this was all perfectly normal and reasonable conduct; indeed Ms Abram was most insistent that it was not bad faith for ZTE to prefer Chongqing as the forum for the determination of global FRAND terms.
101. I also observe that until the revision in the ZTE April Interim Licence Offer, the previous offers required Samsung effectively to abandon this action. The revised terms allow this action to proceed, yet on terms which would make it (a) largely if not wholly redundant and (b) a huge waste of time, money and effort, because of this provision (very slightly modified from the March Offer):

'Prospective and retrospective adjustment of all terms, including the royalty, in accordance with final determination of FRAND terms in the Chongqing Proceedings (absent earlier agreement by the parties);'

102. I acknowledge that a similar question can be posed to Samsung as regards the injunctive proceedings they have commenced against ZTE, but the answer is clear: Samsung is seeking to protect its position if its primary aim of an interim licence and orderly progress to the determination of global FRAND terms is

thwarted for whatever reason. If that occurs, Samsung will need the counterpoint of those injunctions to deter ZTE from enforcing theirs.

103. I revert to the justification put forward for ZTE's conduct which I outlined in [100] above. There are several answers to this.
104. One answer is to recognise that a party may have more than one aim in mind. It is perfectly possible that ZTE had several aims in mind in seeking injunctive relief in various markets: (a) to put pressure on Samsung to agree to Chongqing as the forum for determination of global FRAND terms; and (b) to put pressure on Samsung to agree to supra-FRAND rates. I acknowledge that the offers put forward by ZTE do place the emphasis on the first aim because the price for Samsung of avoiding injunctive relief was acceptance of Chongqing. For the purposes of analysis I will proceed on the basis that the aim was the first, as stated by Dr Laakkonen.
105. However, that aim gives rise to a slightly different but equally obvious question: *why are ZTE spending so much effort and cost on insisting that the global FRAND terms are determined in Chongqing?* As I have indicated, I proceed on this application without taking into account Samsung's criticisms of the Chinese approach to FRAND or of the Chinese courts. But the answer can only be that ZTE perceive an advantage, an advantage which must be a substantial one in view of the cost and effort devoted to achieving this aim.
106. In her oral submissions, Ms Abram submitted that there were so many reasons why parties want to litigate in their home court:

‘Parties want to litigate where they do business because they are familiar with the legal system, because they are familiar with court procedures, because the language of the litigation is familiar to them, because of the location of documents or witnesses, because of the desire not to lose management time through travel, because of relative legal costs in China compared to England.’
107. I did not recall these reasons being covered in the evidence for this application, so I asked where they were set out in the evidence. I was given the reference to Laakkonen 1, [26]. This witness statement was made in ZTE's opposition to Samsung's Listing Application. Although in the bundles, it did not form part of my pre-reading for this application.
108. In his first witness statement at [26], Dr Laakkonen set out 4 factors for ZTE's preference for a FRAND determination in Chongqing. In summary, these are:
 - i) China is a major manufacturing and sales market for both parties, but especially ZTE.
 - ii) Both parties have significant patent portfolios in China.
 - iii) Chinese courts (including in Chongqing) have substantial experience in rate-setting litigation.

- iv) The cost of litigation in China is substantially lower than the cost of FRAND litigation in the UK.

109. I make these observations:

- i) First, if these reasons (both sets) were the real answer to the question I posed above, I would have expected them to have been set out in the evidence on this application. After all, the parties did not skimp on the preparation of evidence.
- ii) Second, the fact that a number of the points submitted by Ms Abram were not in any evidence suggests they were a bit of an afterthought, even though in some ways they are obvious.
- iii) Third, in any event, whilst these reasons (both sets) would support a preference for Chongqing, given a free choice, I find them insubstantial in the present circumstances. They would matter if ZTE were an SME but they do not, in my view, provide a justification for the wave of litigation which ZTE set in motion, with all the attendant effort and expense, let alone for the costs which ZTE have incurred in fighting tooth and nail on this application.

Jurisdictional preference

- 110. Before proceeding further (with the final answer to my question), I must address the point which ZTE raised on [153] of *Lenovo CA*. ZTE submitted that the pursuit of injunctive relief in various jurisdictions as a means to promote its jurisdictional preference for Chongqing was a legitimate purpose, and this was established by [153]. If this submission is correct, it provides answers to the first two issues (at least) in ZTE's favour and may influence the third issue as well.
- 111. [153] of *Lenovo CA* needs to be understood in context. It is in the section of the judgment of Arnold LJ addressing comity, a ground of appeal which Ericsson had addressed first, in which they argued that the declaratory relief sought by Lenovo clearly offended the principle of comity.
- 112. In [146]-[150], Arnold LJ accepted that his reasoning in *Panasonic CA* at [96]-[97] was equally applicable and concluded that making the declaration would not be contrary to comity, as Lenovo submitted. I address this reasoning further below when addressing the comity considerations here.
- 113. Arnold LJ then went on in [152]-[155] to consider two arguments advanced by Ericsson, neither of which provided an answer to Lenovo's submission. I have added my own emphasis in underlining:

‘152. The first is that making the declaration sought by Lenovo would be contrary to comity because the courts and tribunals of the USA (specifically, the EDNC and the ITC) were first seised of the dispute between the parties. There is no doubt that, viewed from a jurisdictional perspective, this is an important

consideration. As I explained, however, Ericsson failed in their challenge to the jurisdiction of the English courts and did not appeal. In those circumstances we must proceed on the basis that the English courts are properly seised of the FRAND dispute. Furthermore, as Lenovo point out, the English courts have exclusive jurisdiction to determine the issues concerning the 2011 MM Licence, which have a significant impact on what terms for the cross-licence are FRAND. In those circumstances, the legal centre of gravity, although not the commercial centre of gravity, of the overall dispute is in England.

153. In the absence of a global dispute mechanism for determining FRAND disputes, or an ad hoc agreement to arbitration, the possibility of jurisdictional conflict is inescapable. Leaving aside Lenovo's point about the exclusive jurisdiction clause in the 2011 MM Licence, the principled answer to this might be that the court first seised should determine what terms are FRAND. In the present case, however, it is plain that Ericsson do not want the EDNC to determine FRAND terms for the cross-licence any more than they want the English courts to do so. If Ericsson wanted the EDNC to determine FRAND terms in preference to the English courts, they would have made the simple amendment to their claim in the EDNC I Proceedings which Richards J identified as being appropriate in his judgment on the Jurisdiction Application as long ago as 18 April 2024 and would have undertaken to accept the EDNC's determination as to FRAND terms. Ericsson have not done so. By contrast, Lenovo have offered to accept the EDNC's determination as to FRAND terms if Ericsson drop their campaign to obtain injunctions and equivalent relief, but Ericsson have not agreed to this. On the contrary, Ericsson have vigorously pursued such relief, in particular in the ITC. This demonstrates that Ericsson's stance is not driven by jurisdictional preference with respect to FRAND determination. It is driven by a preference for the exclusionary power of a national injunction (or equivalent relief) over FRAND determination by any court. This is hold up.

154. The second argument is that making the declaration sought by Lenovo would promote forum shopping. Since SEP owners like Ericsson forum shop every time they commence infringement proceedings against an implementer, the premise for this argument can only be that forum shopping by SEP owners is acceptable whereas forum shopping by implementers is unacceptable. When asked to justify that premise, counsel for Ericsson was unable to do so. The principled answer is that forum shopping by both SEP owners and implementers is equally to be deprecated. Regrettably, however, the potential for forum shopping is an inevitable feature of the present ETSI IPR Policy. I would also point out that Ericsson's approach may suit

large and well-resourced SEP owners, but it would not be viable for smaller, less well-resourced ones.

155. In conclusion, I entirely accept that, as counsel for Ericsson submitted, jurisdictional imperialism is to be eschewed. As I have explained, however, it is common ground in this case that a FRAND cross-licence would be global. UPSC establishes that, in such a case, the English courts have jurisdiction to determine what terms are FRAND on a global basis. A critic might argue that, to that extent, a degree of jurisdictional imperialism is already hard-wired into the English courts' approach to these issues. The declaration sought by Lenovo is less intrusive into the jurisdictions of foreign courts and tribunals than a global FRAND determination.

114. I have set out those paragraphs in full because they contain reference to many of the key concepts which were the subject of argument before me, or which underpinned them, specifically:
- i) The significance of a court being 'first-seised',
 - ii) Jurisdictional preference,
 - iii) Forum shopping, and
 - iv) So-called 'jurisdictional imperialism'.
115. On the topic of 'first seised', Ms Abram KC reminded me of what Arnold LJ said in *Nokia CA* at [16]-[17]. It suffices to cite the following:

'16 But what is to happen if the courts of more than one country are seised with proceedings concerning the SEPs in question? If more than one country's courts proceed to determine the terms of a global FRAND licence, there is an obvious risk of inconsistent decisions (not to mention a huge waste of legal costs). The only way to avoid the risk of inconsistent decisions is to ensure that only one court determines the terms of the global FRAND licence. As a matter of principle, one might expect this to be the court first seised of the dispute, with its determination being binding on the parties (by way of *res judicata*) in any other proceedings. This has three potential consequences. The first is a rush by each party to the court to establish jurisdiction in a forum which is perceived to be favourable to that party's position.'

[Arnold LJ's second and third consequences were concerned with anti-suit injunctions and anti-anti-suit injunctions, neither of which have featured in this dispute, at least to date.]

'17 The only sure way to avoid these problems is to use a supranational dispute resolution procedure, and the only

supranational procedure currently available is arbitration. If the parties do not agree to arbitration, however, the national courts must deal with the resulting jurisdictional disputes as best they can. Because there are no bespoke jurisdictional rules applicable to such disputes, still less any internationally agreed ones, national courts must apply their ordinary jurisdictional rules. In doing so national courts must have due regard to comity (that is, the need to respect the jurisdictions and judicial systems of other nations), but national courts cannot solve the problems inherent in the present system of resolving SEP/FRAND disputes.’

116. I acknowledge all of that. However, it must be remembered that *Nokia CA* was a dispute about jurisdiction. Here, as I have already said, the jurisdiction of the English Court has been accepted by ZTE and, it seems to me, subject to issues of comity which I must consider later, the Court must exercise jurisdiction and decide the case which has been brought.
117. I move to ZTE’s argument on jurisdictional preference. In my view, this argument is based on a misunderstanding of [153] of *Lenovo CA*. In that case, just because Ericsson was determined to avoid a FRAND determination by any court does not mean that it is good faith for a SEP licensor to use the exclusionary power of national injunctions to enforce its jurisdictional preference.
118. On the closely related topic of ‘first-seised’, what I think was being indicated in [153] was that there was a principled basis for Ericsson to choose the EDNC forum for the determination of global FRAND terms because it was first seised of the dispute. If Ericsson had made that choice, then Lenovo’s offer (to accept the EDNC’s determination as to FRAND terms provided Ericsson dropped their campaign to obtain injunctions and equivalent relief) would have come into sharp focus, and it is difficult to see how Ericsson could have resisted abandoning their campaign without being branded an unwilling licensor.
119. I do not consider that Arnold LJ was suggesting that ‘first-seised’ necessarily is a trump card in all situations, but it may be a tie-breaker in an appropriate case. In these paragraphs, Arnold LJ was explaining why, in the current situation in which ETSI does not mandate a global FRAND dispute mechanism, forum shopping (although to be deprecated) can be an inevitable feature of global FRAND disputes. Implicit in this is that someone has to choose a forum.
120. The other point explained by Arnold LJ in [155] in particular is that, whilst accusations of ‘jurisdictional imperialism’ are easy to make, the complaint, if there is one, is really about the decision of the UKSC in *Unwired Planet*. Now that, in this case, Samsung has invoked the jurisdiction of this Court (and that jurisdiction has been accepted by ZTE), there are two aspects to consider:
 - i) The first is the determination of global FRAND terms at the trial of this action. As already indicated, a trial date has been set and directions given to enable the parties to be ready for that trial. It is not an act of jurisdictional imperialism for a first instance court to exercise the

jurisdiction conferred by the UKSC, as we are obliged to do in an appropriate case.

- ii) The second is whether this Court should decide on what terms would be FRAND for an interim cross-licence, pending the final determination. As Arnold LJ indicates in [155] this is less intrusive into the jurisdictions of foreign courts and tribunals than a global FRAND determination.

- 121. One particular reason why the interim declaratory relief sought here is less intrusive is because it is entirely up to the courts in other jurisdictions to decide what should happen in the proceedings before them.
- 122. Notwithstanding these accusations of jurisdictional imperialism, what lies behind all the developments in the procedures of the Patents Court in FRAND proceedings is a desire to promote the resolution of these FRAND disputes as efficiently as possible. The UKSC decision and the development of the interim declaratory licence jurisdiction are designed to put an end to wasteful, essentially duplicative litigation in many countries, when there is really only one dispute: the terms of a global FRAND licence.

What would a willing licensor (in the position of ZTE) have done once Samsung had commenced this action?

- 123. I pose this question because almost all issues or problems concerning FRAND can be solved or at least illuminated by considering what the notional willing licensor and willing licensee would do, and the present application is no exception. Furthermore, the answer to this question is the last and most important answer to the question I posed at [105] above.
- 124. Despite her entreaties to me to view the whole picture, it struck me that most of the submissions made by Ms Abram KC did the opposite. I was repeatedly invited to consider whether a particular act (e.g. ZTE's preference for the jurisdiction of the Chongqing court) could possibly be in bad faith, but in circumstances where the whole of the background was ignored. I fully appreciate that Ms Abram KC may have framed her invitations in that way because she was proceeding on the basis that the positions of the parties were mirror images of each other i.e. as if everything which ZTE had done in this dispute was, in a sense, cancelled out by an equivalent act or acts done by Samsung. However, as I have attempted to explain, there are some important differences between the positions and actions of each side. Furthermore, just because ZTE can point to individual actions which may point to good faith (such as the revisions to their Interim Licence offers) does not detract from my overall assessment of their conduct.
- 125. Ms Abram KC also repeatedly urged me not to approach this case in a 'value-laden way' as if the English Court is the default for this type of FRAND determination. I have not treated the English Court as the default. As I have said already, I am simply exercising the jurisdiction of this Court which ZTE accepted.

126. Ultimately, and notwithstanding the spirited submissions made to me by each side, in my view, the answer to this application is relatively straightforward once the Court has oriented itself correctly.
127. In my judgment, a willing licensor in the position of ZTE would have engaged with this action and proceeded as speedily as possible to the FRAND trial, in the absence of earlier agreement between the parties. In my view, a willing licensor would not commence a wave of injunctive proceedings, whatever the aim of the pressure which those proceedings would exert on the SEP licensee. The wave of injunctive proceedings commenced by ZTE were completely unnecessary since Samsung were and are actively seeking fresh global FRAND cross-licence terms, to replace the previous global cross-licensing terms which the parties abided by for several years. There is no suggestion that Samsung were operating other than as a willing licensee (and as a willing licensor).
128. I acknowledge that a SEP licensor who seeks to persuade what they perceive to be an unwilling licensee to take a licence on FRAND terms will necessarily seek injunctive relief as the ultimate incentive to force the licensee into accepting the FRAND terms determined (in this instance) by the Court. In the UK, a so-called FRAND injunction presents the licensee with that choice. There is, however, a clear difference between seeking final injunctive relief in the FRAND proceedings on the one hand and seeking interim injunctive relief in many jurisdictions to try to force the other party off various markets. In FRAND proceedings, the licensor's ultimate remedy is money and the risk of irreparable damage is rare or non-existent where substantial companies are involved.
129. Of course, from ZTE's standpoint, the wave of injunctive proceedings was necessary to fulfil a principal aim of ZTE: to force Samsung into accepting a global FRAND determination in Chongqing.
130. Overall, and notwithstanding the manoeuvring by ZTE to narrow the gap between the two sides, the conclusion in my judgment is inescapable. ZTE have acted in bad faith with their wave of unnecessary injunctive proceedings, and by using the continuing threat imposed by them to seek to sideline or displace the jurisdiction of this Court and in seeking to secure their preference for a determination in Chongqing.
131. I revert to the two submissions which I mentioned at [88] above. The second one should not be viewed in isolation. ZTE's own actions indicate ZTE does not have much faith in it and/or it was an afterthought. In any event, even if it were to be correct as a matter of law, in the present circumstances it must be viewed against the backdrop of ZTE's wave of injunctive proceedings, and it would not alter my conclusion.
132. As for the first submission, in this situation of a cross-licence, the position on each licence would have to be considered. Regarding ZTE's SEPs, the Court may have to find the global FRAND terms for a licence for Samsung over that portfolio. Samsung will take that licence and offer to pay. Regarding Samsung's SEPs, even though strictly ZTE may have the right the focus of this submission, I find it unreal that ZTE really intends to hold out until one of

Samsung's SEPs is found valid and infringed. I realise that ZTE is going to be the net recipient, which is why Ms Abram KC questioned whether ZTE would be/could be injuncted to accept the money. In the present circumstances, this submission suggests hold up by ZTE. Ultimately, all these points will be dealt with if or when they arise.

133. Furthermore, since ZTE appeared to suggest that multiple actions seeking injunctive relief were now the norm for a SEP licensor against a prospective licensee, I should emphasise that the sooner this notion is dispelled the better.
134. In reaching these conclusions, I emphasise that it is entirely up to the Chongqing Court to decide what should happen in the Chongqing Proceedings, if ZTE wishes to pursue those to trial, which is a choice for ZTE to make.

Would the grant of the declaration(s) serve a useful purpose?

135. On this topic (and the next) much of what was said in *Panasonic CA* and *Lenovo CA* is equally applicable here. Effectively, the points made by Arnold LJ at [139]-[141] in *Lenovo CA* apply with equal or similar force here. As in those two cases, Samsung argue it will serve a useful purpose because it will force ZTE to reconsider its position. Again, as in those two cases, ZTE's response is stark. They say they have made their own interim licence offers and will not make any more.
136. I can also state my finding by adapting [142] of *Lenovo CA*. In my judgment, making the declaration sought by Samsung will serve a useful purpose in forcing ZTE to reconsider their position. It will not force ZTE to change their mind, but there must be a prospect that they will do so. Parties' intentions can change. I add that it is one thing for ZTE to take their implacable stance in an attempt to defeat this application, but it will be quite another thing if they maintain that stance following the grant of the declaratory relief sought. Again, adapting the rhetorical question posed by Arnold LJ: Faced with a decision by this Court that ZTE are in breach of their obligation of good faith and a formal declaration that a willing licensor would enter into the interim licence proposed by Samsung, would ZTE really persist in conduct that the Court has unequivocally and publicly condemned? I not only hope that ZTE will see the error of their ways but consider there is a prospect of them doing so.
137. It is unprofitable to try to assess the likelihood of ZTE changing their position. Mr Alexander KC submitted that, even if there is only a modest prospect that the declarations lead to agreement on forum, or even settlement of the entire dispute, that is one of the most useful purposes the Court can perform with its declaratory jurisdiction. I agree.
138. However, I must also contemplate the possibility that ZTE will not change their minds and will remain determined to have global FRAND terms decided in Chongqing.
139. In that event, a number of possibilities arise, including the following:

- i) First, both actions will proceed to trial, yielding two global FRAND determinations. From an academic and practical perspective, it would be interesting to have the opportunity to compare those outcomes even if they are unlikely to match due to the fact that each court is likely to hear different evidence.
- ii) Second, the parties agree that only one of these actions should proceed. If the parties manage to agree that, I suspect they would have moved closer to agreeing FRAND terms.
- iii) Third, the parties agree FRAND terms.

Would the grant of the declaration(s) be contrary to comity with various courts in Germany, the UPC, Hangzhou and Chongqing?

140. On this issue, it was not a massive surprise that ZTE played the ‘jurisdictional imperialism’ card. Although these are, in a real sense, two sides of the same coin, it is convenient to discuss comity first and then address the accusation of ‘jurisdictional imperialism’.

Comity

141. In terms of the applicable principles, it is convenient simply to cite Arnold LJ in *Panasonic CA* at [94], as the Judge himself did at [147] of *Lenovo CA*, in these terms:

“... Comity in this context means that the courts of this jurisdiction should respect the ability of courts [in other countries] to decide issues falling within their respective competencies, and should be cautious about granting any relief which might interfere with such courts’ exercise of their own jurisdictions or which might be perceived as an attempt to do so (unless there are proper grounds for the grant of an [anti-suit injunction]).”

142. Neither side disagreed with this.
143. ZTE argued that the grant of the declarations sought would ‘*inevitably signal a challenge by the English Courts to the legitimacy of Chinese rate-setting and/or a scepticism about the competence or probity of the Chinese Courts in this area.*’
144. This seems to me to be a complete non-sequitur. In any event, I reiterate that I have rejected Samsung’s arguments about the abilities of the Chinese Courts in this area and I have proceeded on the basis that the Chinese Courts are as well-equipped to engage in global FRAND rate-setting.
145. ZTE’s submission went on to suggest that the Interim Licence Declarations ‘*would not show due respect to the Chinese Courts and would be contrary to comity. In effect, making the Declarations would be an exercise in*

'jurisdictional imperialism' citing *TQ Delta v ZyXEL* [2019] EWCA Civ 1277 at [52] per Floyd LJ in support.

146. There are a number of reasons to reject this submission:

- i) First, because it proceeds on the wrong basis – the earlier challenge to the legitimacy of Chinese rate-setting etc. which I have not entertained.
- ii) Second, it is based on a misreading or misapplication of what Floyd LJ said in *TQ Delta*. It is important to be clear as to context in which he made his observation.

147. In *TQ Delta*, the procedural developments which led up to the hearing of the appeal were involved and complicated. They are set out in the judgment of Floyd LJ. At [38] and into [39], Floyd LJ summarised the position:

‘38 Before the change of tack which was initiated at the hearing before Henry Carr J by ZyXEL’s indication that they no longer wished to take a RAND licence, and completed by the irrevocable waiver tendered in Mr Haargaard’s witness statement, the court’s declaratory jurisdiction was entirely properly invoked as part of resolving ZyXEL’s answer to the grant of the usual relief for patent infringement. The position in the light of the waiver is, however, very different. Insofar as the declaration seeks simply to determine the scope and terms of the licence which TQD is bound to offer to the two ZyXEL parties, it would no longer serve a useful purpose, because those parties have said that they have no interest in deploying such a licence, whatever its terms would ultimately prove to be, to prevent the grant of that relief. For the same reason, they have no interest in a determination by the court as to whether TQD are obliged to grant them a licence for the purposes of resisting that relief. As a consequence, relief has been granted in respect of the 268 patent, and ZyXEL have offered to pay the full amount of the damages claimed (if the RAND trial does not go ahead).

39 The judge appears to have accepted the position as I have summarised it in the last paragraph, but to have regarded the waters as muddled by arguable concerns over the effect of the waiver.’

148. Floyd LJ addressed those concerns and concluded at [46] that there was no lack of effectiveness in the waiver and disagreed that there was a real commercial dispute involving the defendants ‘and this territory’.

149. Floyd LJ then turned to the recently added claim for a declaration that ZyXEL were not ‘willing licensees’ and not entitled to a RAND licence. The purpose of those declarations was said to be that they would have effect as *res judicata* in proceedings in foreign jurisdictions. At [48], Floyd LJ listed a number of serious problems with this argument, the first of which was that there were no other proceedings in existence involving the parties anywhere in the world.

150. Against the backdrop of this unusual set of facts one comes to [52]:

‘52 These considerations force me strongly to the conclusion that the questions on which the court’s declaratory judgment is sought are far better decided in the foreign court where those questions arise, if they ever do. It would be an exercise in jurisdictional imperialism to foist this court’s view as to whether ZyXEL were unwilling licensees, or holding-out on an unknown foreign jurisdiction. Far less can it be said that it is in the interests of justice for it to do so.’

151. That reasoning has no application in the present circumstances. Furthermore, the logic of ZTE’s argument means that any interim licence declaration is an exercise in jurisdictional imperialism but *Panasonic CA* and *Lenovo CA* demonstrate that logic is overstated at best but in any event wrong.

152. With those points out of the way, I can return to my assessment of comity. The reasoning in *Panasonic CA* at [96]-[97] and *Lenovo CA* at [149] is equally applicable here. If the declaration does induce ZTE to reconsider their position and grant Samsung an interim licence on the terms Samsung seek, that would promote comity because it would relieve the courts and tribunals of Brazil, Germany, the UPC and Hangzhou of a great deal of burdensome and wasteful litigation commenced by ZTE, but also the retaliatory litigation in those jurisdictions plus the USA commenced by Samsung.

153. In saying that, I acknowledge that the various offers made by ZTE would, if accepted, also relieve the same courts of the same amount of burdensome and wasteful litigation. The March Offer required Samsung to abandon this action and the April Offer does not. The April Offer allows this action to proceed.

154. As above, it is for the Chinese Courts to decide what they should do with the Chongqing Proceedings. I have no role in that process.

155. However, to similar effect, it is for Judges in this jurisdiction to decide what should happen to this action. The Court has jurisdiction. ZTE dropped their challenge to jurisdiction, thereby accepting the jurisdiction of this Court over the claim brought by Samsung. Not surprisingly, ZTE did not attempt to seek a case management stay of this action in favour of the Chongqing Proceedings. A trial date has been set, along with directions to that FRAND trial.

156. In these circumstances there is no basis, in my judgment, for criticising Samsung for not accepting ZTE’s terms. At best, ZTE’s approach results in unnecessary duplication of determination of global FRAND terms between these parties.

157. As for ZTE, there is a basis for criticising ZTE’s conduct in trying, through their interim licence terms, backed by their wave of litigation, to either derail or displace this action. ZTE’s terms interfere with the jurisdiction of this Court which they have accepted (cf [83] above). In practical terms, ZTE’s terms are designed to render this action pointless, so that Samsung effectively has to

abandon it, unless they can bear the prospect of the costs of two FRAND determinations.

158. Samsung's challenge to jurisdiction in Chongqing has been dismissed (subject to any appeal). Currently therefore, both the English Court and the Chongqing Court have jurisdiction over the cases brought before them. There is no jurisdictional conflict, in the sense that one court must be preferred to the other, even though there is a risk of inconsistent decisions.
159. I also bear in mind this factor. If ZTE were right in their opposition to this application and the position they have adopted, it would add a powerful weapon to the SEP licensor's armoury, in this sense. Any action for FRAND terms commenced by an implementer or net payer under a cross-licence, could be derailed in short order by the SEP licensor offering an interim licence on condition that the other party must accept the SEP licensor's choice of forum, the offer being backed with injunctive relief in other jurisdictions, most likely targeted to cause the maximum damage to the SEP licensee's business. I do not think the Court should encourage, assist or contemplate such naked forum shopping.
160. I have also kept in mind what would be likely to happen if I were to refuse the declarations sought. In my view the parties would be left in a rather depressing scenario where the trench warfare of multiple sets of unnecessary proceedings around the world continue. The interim licence declarations at least provide a route to end the other unnecessary litigation so that the parties can focus on the real dispute, which is the global FRAND terms.
161. Finally, I am well aware that one of the unintended consequences of this judgment is that it enhances the significance of the Court first seised of a claim to determine FRAND terms, with the consequences mentioned by Arnold LJ in *Nokia CA* at [16] and particularly the first. There is nothing I can do about that. It is a further reminder that ETSI and other Standard Setting Organisations need to focus attention on incorporating some dispute resolution procedure(s) into their terms.

Conclusion

162. For all these reasons, I propose to grant the interim declaratory relief sought by Samsung. I ask the parties to seek to agree an Order giving effect to this Judgment. I conclude by thanking Counsel and their solicitors for their interesting and very well argued submissions.